UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NERI JOCSON, et al., Plaintiffs, v. DIAMOND RESORTS INTERNATIONAL CLUB, INC., et al., Defendants.	Case No. 2:18-cv-10604-AB (JEMx) **ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION, GRANTING DEFENDANTS' MOTION TO STAY, AND DENYING DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS AND REQUEST FOR JURY TRIAL AS MOOT [20]**

Before the Court is Defendant Diamond Resorts International Club, Inc.'s ("Diamond") Motion to Compel Arbitration, Stay Pending Arbitration, and Strike Class Allegations and Demand for Jury Trial. (Dkt. No. 20 (hereinafter, "Mot.").) Plaintiffs Neri and Fe Jocson (collectively, "Plaintiffs") filed an opposition, and Diamond filed a reply. (Dkt. No. 24 (hereinafter, "Opp'n"); Dkt. No. 25 (hereinafter, "Reply").) For the following reasons, the Court **GRANTS** the Motion to Compel Arbitration, **GRANTS** the Motion to Stay, and **DENIES** the Motion to Strike class allegations and Plaintiffs' request for a jury trial as moot.

I. BACKGROUND

A. The Purchase Agreements

Plaintiffs entered into three separate purchase agreements with Diamond for

"memberships" in a time-share arrangement sold by Diamond that would allow the Plaintiffs to use points to obtain accommodations at various resorts. Plaintiffs entered into the first agreement on November 23, 2016, the second agreement on January 31, 2017, and the third agreement on June 29, 2017. (Dkt. No. 20-2, Declaration of Russell J. Burke ("Burke Decl.") ¶¶ 16-17, 20-21, 24-25, Exs. A ("Nov. 2016 Agreement"), B ("Jan. 2017 Agreement"), C ("June 2017 Agreement").) Plaintiff Neri Jocson also entered into a fourth purchase agreement with Diamond on August 6, 2017. (Burke Decl. ¶¶ 35-36, Ex. D ("Neri's Aug. 2017 Agreement").)

All four agreements contain arbitration provisions and provisions allowing Plaintiffs to opt-out of arbitration within thirty days.[1]

1. The November 2016 and January 2017 Agreements

The first two agreements have identical arbitration provisions that state:

> Arbitration of Claims. Unless Purchaser has exercised his or her opt-out right . . . upon the election of Purchaser or [Diamond], any Claim between Purchaser and [Diamond] shall be resolved by binding individual (and not class) arbitration. . . . . To the extent this Arbitration Provision conflicts with any other agreement binding the Bound Parties, the Arbitration Provision shall govern.

(Nov. 2016 Agreement § 18(c); Jan. 2017 Agreement § 18(c).) The term "Claim" is defined as "any legal claim, dispute or controversy between [Diamond] and Purchaser,

[1] The opt-out provision in the first two agreements state: "Opt-Out Right. **IF PURCHASER DOES NOT WANT THIS ARBITRATION PROVISION TO APPLY, WITHIN 30 DAYS PURCHASER MUST SEND A SIGNED LETTER TO SELLER STATING THAT THE ARBITRATION PROVISION DOES NOT APPLY. OPTING OUT OF ARBITRATION WILL NOT AFFECT ANY OTHER PROVISION OF THIS AGREEMENT**." (Nov. 2016 Agreement § 18(a); Jan. 2017 Agreement § 18(a).) The third and fourth agreements contain similar provisions entitled the "Right to Reject Arbitration Provision," which provides: "You may reject this [Arbitration] Provision by sending Diamond a written notice which gives your name and Agreement number with a statement that you reject the Arbitration Provision. . . . A rejection notice must be signed by you and received by Diamond within thirty (30) days after the date of this Agreement. Rejection of arbitration will not affect any other term of this Agreement." (June 2017 Agreement § 16.5; Aug. 2017 Agreement § 16.5.)

including statutory, contract and tort disputes of all kinds and disputes involving requests for declaratory relief, injunctions or other equitable relief." (Nov. 2016 Agreement § 18(b); Jan. 2017 Agreement §18(b).) These two agreements also have survival clauses that state: "[t]his Arbitration Provision shall survive repayment of all amounts owed under this Agreement or the Note, the cancellation of this Agreement, any bankruptcy and any assignment of Seller's rights under this Agreement and/or Note." (Nov. 2016 Agreement § 18(i); Jan. 2017 Agreement § 18(i).)

2. The June 2017 and August 2017 Agreements

The June 2017 Agreement—the third agreement—contains the following arbitration provision:

> Arbitration of Claims. Any Claim (defined in Section 16.2 below) between You and Diamond, whether preexisting, present or future, arising from or relating to this Agreement or the Collection, shall, at the election of either party, be arbitrated on an individual basis before JAMS. . . . The arbitrator may award all remedies that would apply in an individual court action (subject to constitutional limits that would apply in court).

(June 2017 Agreement § 16.1; Neri's Aug. 2017 Agreement § 16.1.) Section 16.2 of the arbitration provision states the term "Claim":

> shall be broadly construed and includes, without limitation, disputes concerning: purchase, financing, ownership or occupancy; breach, termination, cancellation or default; condition of all Collection Accommodation; THE Club or other exchange programs; reservations, points or rewards programs; applications and personal information; marketing or solicitations, representations, advertisements, promotions or disclosures; and consumer rights, fraud, and other intentional torts, constitution, statute, Uniform Commercial Code, regulation, ordinance, common law and equity. 'Claim' does not include: (i) disputes about the validity or enforceability of this Provision or any part thereof, which are for a court to decide, provided that disputes about the validity or enforceability of this Agreement as a whole are for the arbitrator to decide . . . .

(June 2017 Agreement § 16.2.)[2] The arbitration provision "survive[s] the breach,

[2] The definition of "claim" in Neri Jocson's August 2017 Agreement is almost

cancellation, termination or rescission of this [Arbitration] Agreement, and any bankruptcy to the extent permitted by law." (June 2017 Agreement § 16.4; Neri's Aug. 2017 Agreement § 16.4.) The miscellaneous section warns the parties that "[n]o provision is waived by failure of a party to enforce it." (June 2017 Agreement § 17; Neri's Aug. 2017 Agreement § 17.)

Here, Neri Jocson timely opted out of the August 2017 arbitration provision. Therefore, the only arbitration provisions at issue are the first three agreements on November 2016, January 2017, and June 2017.

B. The Related Action

On November 10, 2017, Plaintiffs filed a complaint in a related action entitled *Jocson, et al. v. Diamond Resorts International Club, Inc.*, et al., Case No. 2:17-cv-08214-PA-E ("the Related Action"). In the Related Action, Plaintiffs alleged that Diamond made false representations concerning membership benefits and violated various state and federal laws regarding disclosures and collection practices. The complaint included claims for violations of: (1) the Telephone Consumer Protection Act of 1991 ("TCPA"); (2) the Truth in Lending Act; (3) the Vacation Ownership and Time-Share Act of 2004; (4) the Rosenthal Fair Debt Collection Practices Act; (5) the California False Advertising Act; (6) California Business and Professions Code §§ 17200, *et seq.*; (7) the Consumers Legal Remedies Act ("CLRA"); (8) California Welfare and Institutions Code § 15610.70(a); (9) breach of contract; and (10) fraud in the inducement.

In the Related Action, Diamond filed a motion to compel arbitration seeking to enforce arbitration clauses in three of the four contracts the Plaintiffs entered with Diamond. Because Plaintiffs elected to opt out of the arbitration clause in the fourth contract, the parties eventually stipulated to waive the arbitration provisions in each of

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identical to the definition in the June 2017 Agreement. The August 2017 Agreement, however, adds "collection of delinquent amounts and the manner of collection" to the definition of "claim." (Aug. 2017 Agreement § 16.2.)

the contracts in favor of litigating all of the Plaintiffs' claims in district court before Judge Anderson. On July 20, 2018, the case was closed after the parties entered into a confidential settlement agreement.

C. This Action

Plaintiffs initiated this action against Diamond and Experian Information Solutions, Inc. on December 21, 2018. (*See* Dkt. No. 1 ("Compl.").) Plaintiffs allege that after the parties entered into the settlement agreement, Diamond continued to report to credit agencies that Plaintiffs owed monies under their purchase agreements. (Compl. ¶¶ 12-13.)

Plaintiffs seek individual and class action damages for alleged violations of the Fair Credit Reporting Act ("FCRA") and California's Consumer Credit Reporting Agency Act ("CCRAA"). (Compl. ¶ 1.) Plaintiffs also allege Diamond "breached its contract" with Plaintiffs by "failing to remove negative and false reports, publishing false and inaccurate information and/or failing to accurately verify, report[,] and update information it published to the three major credit bureaus." (Compl. ¶ 36.)

Now, Diamond moves to compel arbitration of Plaintiffs' claims relating to credit reporting for debts under the November 23, 2016, January 31, 2017, and June 29, 2017 purchase agreements, and stay claims relating to Plaintiff Neri Jocson's August 6, 2017 purchase agreement with Diamond. In the alternative, Diamond moves to strike the class allegations and request for jury trial in Plaintiffs' complaint.[3]

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[3] Diamond requests that the Court take judicial notice of four documents filed in the Related Action: the complaint, Diamond's prior motion to compel arbitration, the joint stipulation between Diamond and Plaintiffs to strike class allegations and withdraw Diamond's motion to compel arbitration, and Judge Anderson's order regarding the stipulation. (*See* Dkt. No. 21, Exs. A-D.) Courts "may take judicial notice of court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Vista USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); Fed. R. Evid. 201. The Court therefore **GRANTS** Diamond's request for judicial notice. Plaintiffs also request that the Court take judicial notice of the settlement agreement in the Related Action. (*See* Dkt. No. 27.) The copy provided to the Court is heavily redacted—the unredacted portion of the settlement agreement states only that it is a settlement and general mutual release agreement between Diamond and Plaintiffs, is dated July 24, 2018, and that "Diamond

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA provides two means of enforcing arbitration: (1) an order compelling arbitration of a dispute and (2) a stay pending litigation raising a dispute referable to arbitration. *Id.* §§ 3-4.

"By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The court's role in resolving a motion to stay or compel arbitration under the FAA is limited to determining (1) whether there is a valid agreement to arbitrate, and, if so, (2) whether the dispute falls within the scope of the agreement. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-78 (9th Cir. 1991). "If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The FAA evinces a "liberal federal policy favoring arbitration agreements" such that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

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will terminate all purchase agreements and contracts signed by the Jocsons with any Diamond entity before the date of th[e] Agreement." (Dkt. No. 27-1 at 2-3.) It is undisputed that the parties' settlement agreement terminated the purchase agreements. The Court does not rely on Plaintiffs' redacted version and therefore **DENIES** Plaintiffs' request for judicial notice as moot.

However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citation omitted).

The movant bears the burden of establishing a valid agreement and its scope, while the opponent bears the burden of establishing any defense to enforceability. "[I]ssues concerning the validity, revocability, and enforceability of contracts generally" are governed by state law. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

III. DISCUSSION

A. Obligation to Meet and Confer

The Court reminds the parties that Local Rule 7-3 requires counsel to meet and confer at least seven days prior to filing a motion in a civil matter. To satisfy Local Rule 7-3, counsel must first "contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution." If the moving party does not comply with Local Rule 7-3, the Court may refuse to hear the motion. *See, e.g.*, *Singer v. Live Nation Worldwide, Inc.*, No. SACV 11-0427 DOC (MLGx), 2012 WL 123146, *2 (C.D. Cal. Jan. 13, 2012) (denying motion due to the movant's failure to abide by Local Rule 7-3).

After reading the communications attached to the papers, the Court concludes that Diamond has not complied with Local Rule 7-3. On Friday, January 25, 2019 at 4:35 p.m.—seven days before Diamond filed the instant motion—Diamond sent Plaintiffs an email to meet and confer.[4] Plaintiffs' counsel did not respond until Monday, January 28 stating he was available the following day, Tuesday, January 29. (*See* Brum Decl. ¶¶ 2-7, Exs. 1-2.) Diamond blames Plaintiffs' counsel for the parties' failure to timely meet and confer and states "the delay was caused by [Plaintiffs'] unavailability and unwillingness to work with Diamond." (Reply at 12.)

[4] Defense counsel also called Plaintiffs' counsel at an unspecified time on Friday, January 25, 2019 to meet and confer. (*See* Dkt. No. 20-8, Declaration of Patricia Brum ("Brum Decl.") ¶ 2.)

But Plaintiffs' delay was foreseeable.[5] Diamond cannot credibly claim that Plaintiffs' "caused" the delay—the nonmoving party is not expected to drop everything on a Friday afternoon to meet and confer Friday evening or over the weekend absent sufficient notice. Although the Court, in its discretion, will nonetheless rule on the merits of the dispute, any future failure to engage in the required meet-and-confer process, including the requirement to "thoroughly" discuss the substance of the contemplated motion *at least seven days* before filing the motion, will result in appropriate sanctions.

B. A Valid Agreement to Arbitrate Exists.

Plaintiffs argue that the arbitration clauses in the first three purchase agreements are invalid for several reasons. First, Plaintiffs assert that the integration clause in Plaintiff Neri Jocson's August 2017 Agreement invalidates the three purchase agreements that precede it and therefore invalidates the arbitration provisions Diamond seeks to enforce. (Opp'n at 7-8.) Second, Plaintiffs argue the settlement agreement in the Related Action terminated the purchase agreements, including the parties' duty to arbitrate. (Opp'n at 9-10.) Third, Plaintiffs argue the purchase agreements are grounded in fraud and therefore unenforceable. (Opp'n at 11.) Finally, Plaintiffs argue Diamond waived its right to arbitrate in the Related Action. (Opp'n at 12-13.) The Court disagrees with each of Plaintiffs' arguments and finds that a valid arbitration agreement exists.

[5] The Court, however, expects Plaintiffs' counsel to *timely respond* to emails from opposing counsel. The Court reminds Plaintiffs' counsel that arguments or conflicts with opposing counsel should not be personal. Comments, like the following, are unacceptable: "I see you have been misunderstanding things consistently since entering into the case. Please direct any further requests to the Court." (Brum Decl., Ex. 3 at 9.)

1. The Integration Clause in the August 2017 Purchase Agreement Does Not Invalidate the Three Prior Purchase Agreements.

The August 2017 Agreement has the following integration clause: "This Agreement is the only agreement that governs the purchase of your Membership, and supersedes and replaces all prior negotiations, agreements, and understandings, both oral and written. No amendment to or modification of this Agreement is valid without the written approval of Diamond's legal counsel." (Aug. 2017 Agreement at 5.)

Plaintiffs argue that the plain language of the August 2017 Agreement states that "any prior agreements are no longer valid and that the most recent agreement controls." (Opp'n at 8.) Plaintiffs reason that, "because the most recent contract controls Plaintiffs' 'Membership,' it follows that all of Plaintiffs' timeshare interests are collectively governed by the terms of the most recent purchase agreement." (*Id.*) In Plaintiffs' view, because Plaintiff Neri Jocson opted out of the arbitration provision in the most recent purchase agreement—the August 2017 Agreement—Plaintiffs opted out of the arbitration provisions in all prior purchase agreements. (*Id.*)

Diamond accuses Plaintiffs of over simplifying the subject matter of the purchase agreements as "memberships." (Reply at 4.) Diamond claims Plaintiffs failed to disclose that the membership acquired under each agreement is "different" and "independent" from other purchase agreements and creates separate payment obligations and membership rights. (*Id.*) Diamond explains that Plaintiffs acquired 2,500 points under some purchase agreements and 5,000 points under others. (*Id.* at 4-5.) Diamond reasons that "Neri Jocson's 5,000 points membership did not replace or supersede the Jocsons' other 2,500 points membership, just like the August 2017 Agreement did not replace or supersede the November 23, 2016 Agreement." (*Id.* at 5.) The Court agrees.

The August 2017 Agreement's integration clause "can be understood to merely signal that the [August 2017 Agreement] was completely integrated for the purposes

of evaluating the parties' intent for that agreement." *Granite Constr. Co. v. Remote Energy Sols., LLC*, 403 P.3d 683 (Nev. 2017) (unpublished table decision) (holding provision that stated "[i]t is the intention of the parties that this Agreement supersedes any and all prior verbal or written agreements or understandings between [the parties]" did not extinguish prior bonus obligation because the "integration clause includes nothing regarding relieving any prior-incurred obligation").[6] The Court also notes that Plaintiff Fe Jocson was not a party to the August 2017 Agreement. Thus, the August 2017 Agreement (signed only by Plaintiff Neri Jocson) does not supersede or invalidate Fe Jocson's rights and obligations under the three purchase agreements that she signed.

The Court therefore concludes that the integration clause in the August 2017 Agreement does not invalidate or supersede the three prior purchase agreements.

2. Termination of the Purchase Agreements Did Not Terminate the Parties' Duty to Arbitrate.

Next, Plaintiffs argue that Diamond "cancelled" all prior purchase agreements, including provisions regarding arbitration, pursuant to the settlement agreement. (Opp'n at 9.) Diamond, however, contends Plaintiffs "remain obligated to arbitrate their claims irrespective of purported contract termination because each of the arbitration provisions Diamond seeks to enforce" have survival provisions stating the arbitration provisions "survive the breach, cancellation, termination or rescission" of the November 2016, January 2017, and June 2017 agreements. (Mot. at 2; Burke Decl., Exs. A-B § 18(h)(i); *see* Burke Decl., Ex. C § 16.4.) The Court has reviewed the purchase agreements and survival provisions and concludes the mere fact that Plaintiffs' claims are based on conduct that post-dates the termination of the

[6] Neither party cites Nevada law. But the purchase agreements, by their terms, are governed by the FAA and, to the extent state law is relevant under the FAA, Nevada law. (*See* Nov. 2016 Agreement § 18(e); Jan. 2017 Agreement § 18(e); June 2017 Agreement § 17.)

agreements does not preclude Diamond from establishing that the claims are related to the agreements.

Termination of a contract "does not necessarily extinguish a party's duty to arbitrate grievances arising under the contract." *O'Connor Co. v. Carpenters Local Union No. 1408 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO,* 702 F.2d 824, 825 (9th Cir. 1983) (citing *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243, 251 (1977)). Rather, when a postexpiration dispute arises under the contract, a presumption arises that the duty to arbitrate outlasts the date of the contract's termination. *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.,* 501 U.S. 190, 205-06 (1991) (citing *Nolde Bros.*, 430 U.S. at 253-55). "A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or *where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement*." *Id.* (emphasis added). If the dispute meets one of these three criteria, "the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Bros.,* 430 U.S. at 255. Otherwise, the dispute is arbitrable.

The purchase agreements here satisfy the third criteria by explicitly stating that the arbitration provisions survive termination of the purchase agreements. *Cf. Crooks v. Wells Fargo Bank, N.A.*, 312 F. Supp. 3d 932, 938 (S.D. Cal. 2018) ("[T]he arbitration provision explicitly provides, 'This Arbitration Provision shall survive any termination, payoff or transfer of this contract.' Thus, by its express terms, even if the Contract was terminated as a result of Plaintiff's bankruptcy discharge, the arbitration provision survives."). The Court therefore rejects Plaintiffs' argument that the settlement agreement terminated the arbitration provisions.

3. Whether the Purchase Agreements Are Grounded In Fraud Must Be Determined By the Arbitrator.

Plaintiffs argue that the arbitration provisions are void because the purchase agreements as a whole are based in fraud. (Opp'n at 11.) The Supreme Court has made it clear, however, that unless the plaintiff's challenge is directed solely at the arbitration provision, rather than the contract as a whole, the question of whether the contract is enforceable is to be determined by the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) ("In either state or federal courts, unless a challenge involving a contract with an arbitration clause is to the contract's arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010) (holding that under the FAA, if a party challenges specifically the enforceability of an arbitration clause, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120 (9th Cir. 2008).

Here, Plaintiffs challenge the purchase agreements on the grounds that Diamond "used misleading and deceptive sales tactics, false advertising[,] and made material misrepresentations to coerce the Plaintiffs into purchasing timeshare points from [Diamond]." (Opp'n at 11.) Plaintiffs claim Diamond "subject[ed] Plaintiffs to hours upon hours of high-pressure sales presentations" and that Plaintiffs "ultimately gave in and relied on [Diamond's] misrepresentations to enter into fraudulent sales contracts under duress." (*Id.*) Because this argument is directed at the entire contract, and not just the arbitration provisions, these are issues that must be determined in arbitration.

4. Diamond Did Not Waive Its Right to Enforce the Arbitration Agreement.

Plaintiffs claim Diamond waived its right to arbitrate when it stipulated that it would not compel arbitration of Plaintiffs' claims in the Related Action. (Opp'n at 12-

13.)

"The right to arbitration, like other contractual rights, can be waived." *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016) (citing *United States v. Park Place Assocs.*, 563 F.3d 907, 921 (9th Cir. 2009)). In the Ninth Circuit, arbitration rights are subject to waiver if three conditions are met: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Plaintiffs correctly note (Opp'n at 12-13) that the Ninth Circuit has also expressed the test as:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

Cox, 533 F.3d at 1124 (quoting *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1196 (2003)).

Plaintiffs fail to show waiver. Because the claims asserted in the Related Action are factually and legally distinct from Plaintiffs' claims under the FCRA, Diamond's voluntary litigation of Plaintiffs' prior claims does not mean Diamond waived the right to arbitrate the claims asserted in the instant action. And Diamond has not disavowed an intention to arbitrate the claims at issue in this action. Diamond promptly demanded that Plaintiffs submit their claims to arbitration and when they refused to do so, Diamond moved to compel arbitration. It never acted in a manner inconsistent with the right to arbitrate by, for example, refusing a proper request to arbitrate, *see Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005), or

consenting to litigate the current dispute with Diamond, *see Martin*, 829 F.3d at 1126. Nor did it unreasonably delay in seeking to compel arbitration or cause Plaintiffs to suffer prejudice; Diamond filed its motion to compel just over a month after Plaintiffs initiated this action.

The Court therefore concludes that Diamond did not waive its right to enforce the arbitration provisions in this action.

C. Plaintiffs' Claims Are Within the Scope of the Arbitration Agreement.

Having established the existence of a valid arbitration agreement, the Court must consider whether the agreement includes the dispute at issue.

Diamond contends the arbitration provisions in the November 2016, January 2017, and June 2017 agreements "clearly encompass" Plaintiffs' claims. (Mot. at 2.) Diamond points out that the term "claims" in the purchase agreements must be "broadly construed" and comprise "any legal claim, dispute and controversy between [Diamond] and [Plaintiffs]," including "disputes concerning . . . financing" or "termination" of the purchase agreements and "disputes based upon consumer rights." (Mot. at 2; Nov. 2016 Agreement §18(b); Jan. 2017 Agreement § 18(b); June 2017 Agreement § 16.2.) Diamond argues Plaintiffs' allegation that Diamond falsely reported their accounts as delinquent to credit agencies—alleged violations of the FCRA, CCRAA, and California Business and Professions Code § 17200, *et seq.*—"is clearly a dispute 'between [Diamond] and [Plaintiffs]' concerning the 'financing' and/or 'termination' of the Purchase Agreements." (Mot. at 3 (citing Compl. ¶¶ 1, 12-14, 27, 32, 42, 47, 52, 56).)

The Court agrees with Diamond and concludes that the arbitration clause extends to Plaintiffs' claims. In the complaint, Plaintiffs allege Diamond provided inaccurate information to credit agencies regarding monies owed to Diamond following the Settlement Agreement and termination of the purchase agreements. (Compl. ¶¶ 11-12.) The purchase agreements were the source of the alleged debt and

Plaintiffs' payment obligations. The Court therefore concludes that this dispute is sufficiently related to the purchase agreements to bring it within the scope of the arbitration clauses.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motion. Because Neri Jocson opted out of the arbitration provision in the August 2017 Agreement, claims regarding the August 2017 Agreement are **STAYED** pending arbitration of the remaining claims. Because the Court grants the Motion, Diamond's request to strike Plaintiffs' class allegations and request for a jury trial is denied as moot. **IT IS HEREBY ORDERED** that this action is removed from the Court's active caseload until further application by the parties or Order of this Court. The parties shall submit a joint status report within **ten days** of the conclusion of arbitration. The parties shall **submit joint status reports every 90 days** to update the Court on the status of arbitration. Each report must indicate on the face page the date on which the next report is due. Although the parties shall draft the reports jointly, Defendants shall be responsible for ensuring that the status reports are timely filed.

IT IS SO ORDERED.

Dated: 3/28/2019

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE