UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ELSIE METCALFE, on behalf of herself and all others similarly situated, Plaintiff, v. HYUNDAI CAPITAL AMERICA, d/b/a Hyundai Capital America, Inc., Kia Finance America, Genesis Finance, Hyundai Motor Finance, Kia Motors Finance and Hyundai Finance; HYUNDAI LEASE TITLING TRUST; and GRIECO HYUNDAI LLC, Defendants.	:	C.A. No. 1:22-cv-00378-JJM-LDA

DEFENDANT, GRIECO HYUNDAI LLC'S REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION TO STRIKE CLASS ALLEGATIONS, OR, ALTERNATIVELY, TO DISMISS THE CLASS ACTION CLAIMS

INTRODUCTION

NOW COMES, the Defendant, Grieco Hyundai LLC (hereinafter "Grieco"), and hereby submits the within Reply to the Plaintiff's Opposition to Grieco's Motion to Strike, or, alternatively, to Dismiss the Class Action Claims within the Complaint.

The following facts are not disputed:

1. The Plaintiff entered into a motor vehicle lease agreement (the "Lease Agreement")with Defendant Hyundai Capital America (hereinafter "Hyundai") in 2019.
2. The Lease Agreement stated that at the end of the lease term the vehicle would have a guaranteed "residual value". That residual value was $9,520.80. In addition the Lease Agreement granted the Plaintiff the exclusive right to purchase the vehicle from Hyundai

for the residual value, in the event the Plaintiff desired to purchase the motor vehicle at the end of her lease.[1] The Lease Agreement is attached to the Plaintiff's Complaint.

3. The Lease Agreement also contained a class action waiver provision in Section 26.R., which provided:

> "R. CLASS ACTION WAIVER: TO THE EXTENT PERMITTED BY APPLICABLE LAW, YOU HEREBY WAIVE ANY RIGHT YOU MAY HAVE TO BRING OR PARTICIPATE IN A CLASS ACTION RELATED TO THIS LEASE."

The claims subject to Grieco's instant Motion are necessarily dependent upon the Lease Agreement because the Lease Agreement provides the basis for her claims that Grieco charged her too much to purchase her vehicle. In other words, the Plaintiff seeks to enforce the purchase price contained in the Lease Agreement. The operative and key document in this matter is the Lease Agreement. Without the Lease Agreement, there is **no** basis for the Plaintiff's claims that she was charged too much when purchasing the vehicle.

In turn, the Plaintiff's Opposition to the instant Motion (ECF No. 33) asserts that the class action waiver within the Lease Agreement is "superseded" by the fact that the Parties entered into a subsequent Retail Purchase Agreement and Retail Installment Contract, both of which did not contain a class action waiver. *See* Pltf.'s Opposition to Mtn. to Dismiss, p. 1. As set forth below, such an argument lacks merit and cannot plausibly serve as the basis for, this Court's denial of Grieco's instant Motion.

LEGAL ANALYSIS

A. The Retail Purchase Agreement And Retail Installment Contract Have No Bearing On The Enforceability Of The Class Action Waiver Contained In The Lease Agreement.

[1] The aforementioned purchase price contained in the Lease Agreement is the crux of the Plaintiff's Complaint, wherein she alleges that she was entitled to purchase the vehicle for $9,520.80, rather than $11,920.00, as provided in the Retail Purchase Agreement.

The Plaintiff asserts that she subsequently entered into a Retail Purchase Agreement and Retail Installment Contract with the Defendants, both of which did not include a class action waiver provision. Thus, according to the Plaintiff, the Retail Purchase Agreement and Retail Installment Contract "supersede" the Lease Agreement and render the class waiver unenforceable. This argument fails for several reasons.

First, the Lease Agreement, Retail Purchase Agreement and Retail Installment Contract are all separate, independent contracts that do not affect validity of each other. Each of the contracts contain different terms, conditions, parties, obligations, performance and objectives. The Retail Purchase Agreement was entered into in May, 2022, for the express purpose of the Plaintiff purchasing, and Grieco selling, the vehicle. On the other hand, the Lease Agreement was entered into in May, 2019, for the express purpose of the Plaintiff leasing the vehicle from the Defendant. Thus, each of the contracts were entered into at different times and under different circumstances.

Second, the Plaintiff here seeks to enforce at least one (1) term of the Lease Agreement (*i.e.*, that the Plaintiff was entitled under the Lease Agreement to purchase the vehicle for $9,520.80), but also seeks to ignore other material terms of the Lease Agreement (*i.e.*, the class action waiver). In fact, each and every claim set forth by the Plaintiff necessarily depends upon the existence and enforcement of the Lease Agreement. Nonetheless, the Plaintiff also contends that the Lease Agreement's class waiver is superseded because such a waiver is not included in the Retail Purchase Agreement and Retail Installment Contract.[2] If this Court were to follow the logic and reasoning of the Plaintiff, then the Plaintiff could not enforce the purchase price stated

[2] The fact that the Retail Installment Contract stated, "[t]his contract contains the entire agreement between you and us relating to ***this contract***," is immaterial because such language solely applies to the Retail Installment Contract. Moreover, nowhere in the Retail Installment Contract is the Lease Agreement incorporated therein or referenced in any way. *See* Pltf.'s Opposition to Mtn. to Dismiss, p. 1 (emphasis added.)

within the Lease Agreement because the subsequent agreements both provide a different purchase price, which supersedes the purchase price in the Lease Agreement.

Therefore, the Retail Purchase Agreement and Retail Installment Contract have no bearing on the terms and conditions of the Lease Agreement. Additionally, all of the Plaintiff's claims that are subject to Grieco's instant Motion necessarily arise out of the Lease Agreement, all of which are subject to the Plaintiff's waiver of her procedural right to participate in a class action.

B. The Absence Of An Arbitration Provision Within The Lease Agreement Does Not Render The Class Action Waiver Unenforceable.

The Plaintiff cites five (5) cases in support of her contention that the class waiver without a corresponding arbitration clause is unenforceable: *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 577 (6th Cir. 2014); *Hall v. U.S. Cargo & Courier Serv., LLC*, 299 F. Supp. 3d 888, 893 (S.D. Ohio 2018); *Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 17, 144 N.M. 464, 469, 188 P.3d 1215, 1220; *Pace v. Hamilton Cove*, No. A-0674-22, 2023 N.J. Super. LEXIS 52, at *15 (Super. Ct. App. Div. May 18, 2023). *See* Pltf.'s Opposition to Mtn. to Dismiss, p. 6. However, there is no binding law that requires this Court to invalidate a class action waiver absent an arbitration provision. *See Dimery v. Convergys Corp.*, Civil Action No. 4:17-CV-00701-RBH, 2018 U.S. Dist. LEXIS 50555, at *22 (D.S.C. Mar. 26, 2018) ("While this Court notes the apparent contrary language in *Killion*, the holding in the recent *Convergys* action as it relates to the NLRA, as well as the analysis in *Feamster*, provides good support for this Court to determine that these waivers do not implicate substantive rights, do not violate the NLRA, and therefore the contractual provisions agreed upon by the parties should be enforced.").

First, *Killion* is inapposite here because the holding was premised upon the Sixth Circuit's previous determination that Fair Labor Standards Act ("FLSA") "contains a policy against allowing waivers of the right to proceed collectively." *See Mark v. Gawker Media LLC*, No. 13-

cv-4347 (AJN), 2016 U.S. Dist. LEXIS 41817, at *21 (S.D.N.Y. Mar. 29, 2016). To the contrary, because the Second Circuit in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-7 (2d Cir. 2013) determined that the FLSA contains no such policy, "the Court cannot follow *Killion*." *Id.* at *21-22. In addition, nothing in *Sutherland* relied on the collective action waiver being presented in the arbitration context. *Id.* at 22. "Accordingly, even if a jury could and did find equitable tolling appropriate for an opt-in Plaintiff based on a release, that Plaintiff would have to be dismissed from the collective action as a result of the class and collective action waiver, and would need to file suit individually." *Id.*; *see also Dimery v. Convergys Corp., Civil Action No. 4:17-CV-00701-RBH, 2018 U.S. Dist. LEXIS 50555, at *20 (D.S.C. Mar. 26, 2018),* ("This Court finds the analysis in *Feamster* persuasive, particularly in light of the fact that *Killion* has been called into doubt by *Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017)").

Second, *Hall v. U.S. Cargo & Courier Serv., LLC*, 299 F. Supp. 3d 888, 893 (S.D. Ohio 2018) is similarly a case that comes from a district court within the Sixth Circuit, and also solely relies upon *Killion*. Importantly, both *Killion* and *Hall* both rest upon the Sixth Circuit's previous holdings, which determined that an employee cannot waive substantive or procedural rights under the FLSA. In any event, both cases are not binding upon this Court and both of which arise out of the FLSA.

Third, *Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 4, 144 N.M. 464, 466, 188 P.3d 1215, does not support the Plaintiff's contention that "[w]ithout an arbitration clause, a class action waiver is unenforceable if it is contrary to a state's public policy." *See* Pltf.'s Opposition to Mtn. to Dismiss, p. 6.

> Defendant argued that, pursuant to the "terms and conditions" on its website at the time of the purchase, Plaintiff is required to individually arbitrate his claims and is precluded from proceeding on a classwide basis either in litigation or arbitration. The "terms and conditions" ***included an arbitration clause*** mandating that "any claim, dispute, or

> controversy . . . against Dell . . . [was subject to] binding arbitration administered by the National Arbitration Forum (NAF).” The terms also included a clause (hereinafter referred to as the class action ban) which directed that the arbitration was “limited solely to the dispute or controversy between [Plaintiff] and Dell.”

See Fiser, 144 N.M. at 466 (emphasis added). Additionally, in *Fiser*, the plaintiff alleged damages between $10.00 and $20.00, which is likely why the court concludes that the plaintiff would be unable to sue individually. *Id.* at 1220 (“Suffice it to say that ‘only a lunatic or a fanatic sues for [ten to twenty dollars.]’”) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004))

The facts and circumstances of *Fiser* differ substantially from this case. In the instant case, the Plaintiff seeks, at a minimum, $2,399.20 (*i.e.*, the difference between the purchase price stated in the Lease Agreement ($9,520.80) and the purchase price actually paid by the Plaintiff ($11,920.00)). The Plaintiff may also be entitled to additional relief and even attorney’s fees in the event that she is successful on the merits. *See* R.I. Gen. Laws § 6-13.1-5.2(a) (“The court may award damages equal to three (3) times the amount of actual damages and, in its discretion, provide other equitable relief that it deems necessary or proper.”); *see also* R.I. Gen. Laws § 6-13.1-5.2(d) (“In any action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney’s fees and costs.”); 15 U.S.C.S. § 1667b (“In all actions, the lessor shall pay the lessee’s reasonable attorney’s fees.”). Thus, the facts of *Fiser* are significantly more drastic than the facts presented here.

Fourth, *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 551, 567 S.E.2d 265, 267 (2002) did in fact include an arbitration provision: “At the bottom of the front of the form is a pre-printed notice that paragraph 14 of the other side of the form includes an alternate dispute resolution procedure, including a requirement for arbitration or mediation.” *Id.* at 270. *Berger* is further distinguishable from the case before this Court because it involved a contract of adhesion, which

contained the arbitration and waiver provisions. *Id.* at 273-74 ("A review of these cases shows that such exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved."). To the contrary, there is no contract of adhesion at play here, nor has the Plaintiff alleged that any contract of adhesion exists here.

Fifth, similar to *Berger supra*, *Pace v. Hamilton Cove*, No. A-0674-22, 2023 N.J. Super. LEXIS 52 (Super. Ct. App. Div. May 18, 2023) also involved a purported contract of adhesion, although the court did not rest its decision upon the same. There, the court noted that "unenforceability is not dependent upon a finding that the class action waiver is otherwise unconscionable or part of a contract of adhesion." *Id.* at *15 n.2. Notwithstanding the foregoing, the class action waiver was contained in one of many addendums to a residential lease agreement (*i.e.*, a contract of adhesion). Additionally, the *Pace* court relied upon the laws of New Jersey to find that the waiver was not enforceable. In the case before the Court there is no similar or like kind law or policy in Rhode Island. Hence the *Pace* does not apply here.

Finally, the Plaintiff contends that, because the DTPA, R.I. Gen. Laws § 6-13.1-5.2, provides that persons entitled to bring an action under subsection (a), "***may***…bring an action on behalf of themselves and other similarly injured and situated persons…," there is an absolute bar on voluntarily waivers of such a permissive right. As noted above, the right to proceed on a class basis is a procedural right that may be waived. In *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234, 133 S. Ct. 2304, 2309 (2013), the United States Supreme Court provided:

> [3] The antitrust laws do not "evinc[e] an intention to preclude a waiver" of class-action procedure. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v.*

> *Yamasaki*, 442 U. S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). [****10] The parties here agreed to arbitrate pursuant [***425] to that "usual rule," and it would be remarkable for a court to erase that expectation.
>
> [4] **Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights.** To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an "abridg[ment]" or [**2310] modif[ication]" of a "substantive right" forbidden to the Rules, see 28 U. S. C. §2072(b). But there is no evidence of such an entitlement in any event. The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the "prohibitively high cost" of compliance would "frustrate [plaintiff's] attempt to vindicate the policies underlying the antitrust" laws. *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 166-168, 175-176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). One might respond, perhaps, that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other [****11] informal class mechanism in arbitration. But we have [*235] already rejected that proposition in *AT&T Mobility*, 563 U. S., at 343-344, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

(Emphasis added). Similarly, in *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002), the court noted:

> We also reject Snowden's argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages. Snowden's argument is unfounded in light of: (1) the fact that attorney's fees are recoverable by a prevailing plaintiff in a TILA action, 15 U.S.C. § 1640(a)(3), and a civil RICO action, 18 U.S.C. § 1962(c); and (2) the fact that, although the Arbitration Agreement provides that each party shall bear the expense of their respective attorneys' fees regardless of which party prevails in the arbitration, such provision expressly does not apply if it is "inconsistent with the applicable law . . . ." (J.A. 54). *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000), cert. denied sub nom. *Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001)

see also Macklin v. Biscayne Holding Corp., No. 19-561WES, 2020 U.S. Dist. LEXIS 203890, at *28 (D.R.I. Nov. 2, 2020) ("Defendants have sustained their burden of establishing that Macklin, the lead plaintiff, and every Opt-in whose standing has not been challenged signed an enforceable agreement mandating arbitration and barring participation in a collective action."); *Deposit Guar. Nat'l Bank, Jackson v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) ("[T]he

right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Dimery v. Convergys Corp.*, Civil Action No. 4:17-CV-00701-RBH, 2018 U.S. Dist. LEXIS 50555, at *22 (D.S.C. Mar. 26, 2018) ("While this Court notes the apparent contrary language in *Killion*, the holding in the recent *Convergys* action as it relates to the NLRA, as well as the analysis in *Feamster*, provides good support for this Court to determine that these waivers do not implicate substantive rights, do not violate the NLRA, and therefore the contractual provisions agreed upon by the parties should be enforced.").

Accordingly, this Court ought to dismiss, or, in the alternative, strike the Plaintiff's class action claims because she knowingly and voluntarily waived her right to participate in a class action that relates to or arises out of the Lease Agreement. There is simply nothing mandating that this Court refuse to enforce the class action waiver due to the absence of a corresponding arbitration agreement.

C. Public Policy Does Not Render The Class Action Waiver Unenforceable.

As explained *supra*, the class action waiver ought not to be rendered invalid due to the Plaintiff's assertion that it is purportedly not worth pursuing her claims on an individual basis due to the economic value of the same. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013) (citing I*n re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012). "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Sutherland*, 726 F.3d at 298 (quoting *Am. Express Co.*, 570 U.S. at 235).

In light of the fact that the Plaintiff's potential recovery is **not** *de minimus*, given the statutory authority for the Court to order treble damages and attorney's fees, enforcing this class action waiver does not violate public policy. On the other hand, public policy favors this Court's

enforcement of voluntary agreements, regardless of whether such agreement contains a knowing waiver of a permissive, statutory right. *See* R.I. Gen. Laws § 6-13.1-5.2 (persons entitled to bring an action under subsection (a), "may…bring an action on behalf of themselves and other similarly injured and situated persons…").

In addition, if this Court were to invalidate the class action waiver simply because R.I. Gen. Laws § 6-13.1-5.2 permits the usage of class proceedings, it would effectively mean that no statutory right could be voluntarily waived. Such a result would fly in the face of the Federal Arbitration Act, which permits the waiver of one's right to litigate claims in court. Put simply, there is nothing mandating that this Court invalidate the class action waiver simply because a statute provides the Plaintiff the ability to bring a class action. This is true especially in light of the fact that the Plaintiff has not alleged any unconscionability, fraud, duress or the like as the formation of the Lease Agreement.

CONCLUSION

Accordingly, the Defendant, Grieco Hyundai LLC, respectfully requests that this Court grant its Motion to Strike the Class Allegations contained in the Plaintiff's Complaint, pursuant to Rule 12(f), or, in the alternative, grant its Motion to Dismiss the Class Action Claim, pursuant to Rule 12(b)(6), with prejudice, and award the Defendant all other appropriate relief. Put simply, the absence of an arbitration provision does not preclude the enforcement of a class action waiver, and public policy ought to tip in favor of the ability to freely and voluntarily contract, even if that involves voluntarily waiving a permissive statutory right.

Respectfully Submitted,
GRIECO HYUNDAI LLC,
By and through its attorneys,

/s/ Brendan J. Quinn

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 30th day of June, 2023, electronically filed this enclosed document with the Clerk of this Court using the CM-ECF System. All counsel of record have been served by electronic means.

/s/ *Jessica Marsh*