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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JANE DOE 1, individually and on behalf of others similarly situated; and JANE DOE 2, individually and on behalf of others similarly situated

Plaintiffs,

vs.

NIANTIC, INC., a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. 23STCV15935

DEFENDANT NIANTIC, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STRIKE CLASS AND REPRESENTATIVE ALLEGATIONS

Date: November 21, 2023
Time: 9:00 a.m.
Dept: 6
Judge: Hon. Elihu J. Berle

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I. INTRODUCTION

Defendant Niantic, Inc. moves to compel to arbitration the claims of Jane Does 1 and 2,[1] pursuant to their written agreements. The Court should also enforce Plaintiffs' binding class and representative waivers, and order that Plaintiffs cannot serve as class representatives or participate in a class or representative action given their agreement not to do so.

Plaintiffs executed valid and binding Mutual Arbitration Agreements and Class Action Waivers ("Agreement(s)") when they joined Niantic. In them, they agreed that "any and all …disputes arising out of, relating to, or resulting from my employment or the termination of my Company employment" would be subject to binding arbitration under the Federal Arbitration Act. The Agreements exclude from arbitration claims for "sexual harassment, sexual assault, or sexual bias," and thus Niantic does not seek arbitration of Plaintiffs' claims for sex discrimination or sex harassment. It asks, however, that the Court enforce Plaintiffs' Agreements to arbitrate the other claims which are not "sexual bias" claims.

The Agreements include a comprehensive class and collective action waiver which, unlike the arbitration provision, has no carveouts as to claims it covers. By executing the class and collective action waiver, Plaintiffs agreed to pursue **any** employment claims only on an individual basis, although they now seek to represent an extraordinarily broad class of all "current or former female employees who worked in California from July 7, 2019 through the date of Preliminary Approval." Pursuant to the binding, enforceable class waiver, Plaintiffs cannot pursue a class action alleging any claims against Niantic.

Niantic requests that the Court: (1) order that Plaintiffs arbitrate their claims for violation of the Equal Pay Act, retaliation under the Equal Pay Act, retaliation under the Fair Employment and Housing Act, failure to prevent discrimination, harassment and retaliation under the FEHA, and violation of California Business and Professions Code section 17200, on an individual basis

[1] Niantic will file its motion to strike Plaintiffs' improper pseudonymous filing on claims remaining after the Court rules on the arbitration motion. Given Plaintiffs' failure to cite to a statutory basis permitting a pseudonymous filing, however, their apparent desire for anonymity would best be protected in the arbitration process. Code Civ. Proc. §§ 367 ("Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."), 422.40 ("In the complaint, the title of the action shall include the names of all parties.").

only; (2) dismiss those arbitrable claims in their entirety from the court action, or in the alternative, stay the litigation pending completion of the arbitration; (3) strike the class and collective allegations, consistent with Plaintiffs' Agreements; and (4) stay Plaintiffs' sex discrimination and sex harassment individual claims pending completion of arbitration .

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs Agreed to Arbitrate Their Claims on an Individual Basis

On February 18, 2020, Niantic made Doe 1 a written offer of employment. Declaration of Jennifer Hahn ("Hahn Decl."), ¶ 5, Ex. A. To accept the offer, Doe 1 had to "sign and observe the terms of the enclosed Mutual Arbitration Agreement and Class Action Waiver." Hahn Decl. Ex. A at ¶ 10. On February 24, 2020, Doe 1 signed both the offer letter and the Agreement without modifying any provisions. *Id.* at ¶ 4. On November 28, 2018, Niantic made Doe 2 a written offer of employment. Hahn Decl., ¶ 6, Ex. B. To accept the offer, Doe 2 had to "sign and observe the terms of the enclosed Mutual Arbitration Agreement and Class Action Waiver." Hahn Decl. Ex. B at ¶ 9. Doe 2 signed both the offer letter and the Agreement without modifying any provisions. *Id.* at 3, 6.

In clear, unambiguous language beginning on the first page of the Agreements[2], Plaintiffs agreed to arbitrate any individual claims arising out of their employment relationships with Niantic, and expressly waived any right to participate in a class or representative action. Hahn Decl. Exs. A, B. The Agreements consist of three main sections. Section (a), entitled "*Arbitration,*" provides that the Company will arbitrate "any and all, past, present or future, controversies, claims, or disputes that Company may have against" Plaintiffs, and that on their part, Plaintiffs will "arbitrate disputes arising out of, relating to, or resulting from [their] employment or the termination of [their] Company employment." *Id.* at § (a). The Agreements specify that arbitration will "be administered by JAMS, pursuant to its employment arbitration rules & procedures", include a link to the rules, and provide that the arbitrator will have the power to decide motions, award "individual remedies" available under applicable law and otherwise comply with the mandates of *Armendariz*. *Id.*

[2] Doe 1 and Doe 2 signed identical Mutual Arbitration Agreements and Class Action Waivers.

Section (b) of the Agreements excludes specifically designated claims from the arbitration provision. It provides that the arbitration agreements do not prohibit the filing of administrative charges, and that claims for workers compensation or unemployment benefits, claims that cannot be subject to an arbitration as a matter of law, claims of "sexual harassment, sexual assault, or sexual bias", and claims under an employee benefit or pension plan with a different procedure "are not covered by this arbitration agreement". Hahn Decl. Ex. A at § (b); Ex. B at § (b).

After specifying the exclusions from the arbitration section of the Agreements, the following separate section (c), entitled "*Individual Dispute Resolution*", contains a clear class action waiver, in which Plaintiffs agree to waive any right to bring any claims on behalf of persons other than herself, and agree not to otherwise participate in any class or collective action, which is not modified by any exclusions. *Id*. at § (c).

B. Procedural History

On July 7, 2023, Doe 1 filed this putative class action, alleging claims for 1) violation of the Equal Pay Act; 2) retaliation in violation of the Equal Pay Act; 3) sex discrimination; 4) sex harassment; 5) FEHA retaliation; 6) failure to prevent discrimination, harassment and retaliation; and 7) violation of California Business and Professions Code section 17200. On September 11, 2023, Doe 1 amended and added an eighth cause of action, a Private Attorneys General Act claim. On September 28, 2023, Plaintiffs filed a Second Amended Complaint ("SAC"), which added Doe 2 as a plaintiff. They allege that Niantic maintains a uniform set of policies that determines employees' wages in California, and that Niantic discriminated against them regarding compensation, promotions, and opportunities – claims clearly arising out of and relating to their employment with the company. *See e.g.*, SAC ¶¶ 16, 31, 33, 53, 54. They seek to bring these claims individually and on behalf of "[a]ll current or former female employees who worked in California from July 7, 2019 through the date of Preliminary Approval."[3] *Id*. at ¶ 75.

[3] Plaintiffs' class and representative definition purports to represent all current and former female employees without limitation – including, for example, job titles, responsibilities, or levels. Plaintiffs' broad, highly individualized claims cannot possibly be typical of the putative class and subject to common evidence due to, among other differences, variances in experiences across the vague class, their differing job groups and levels, their differing experiences, and their differing

Prior to filing this action, Does 1 and 2 did not attempt to arbitrate their claims. Declaration of Annie Vadillo ("Vadillo Decl.") ¶ 2. The parties have not engaged in discovery, and the Court has not set a trial date. *Id.* at ¶ 3. Niantic has not availed itself of this forum substantively with respect to Plaintiffs' claims. *Id.*

III. ARGUMENT

A. Plaintiffs Agreed to Arbitrate Their Claims, and the Court Must Enforce the Agreements

Under the FAA and equivalent California law, a court must compel arbitration if: (1) a valid agreement to arbitrate exists, and (2) the dispute falls within the scope of the agreement. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *Ashburn v. AIG Fin. Advisors, Inc.*, 234 Cal. App. 4th 79, 96 (2015); Code Civ. Proc. § 1281.2 ("court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists").

1. The Parties' Agreements to Arbitrate Are Valid and Binding Contracts

Plaintiffs' review and signatures on the Agreements in exchange for their employment at Niantic, and Niantic's mutual obligation to arbitrate, constitute the requisite mutual assent and consideration. To determine the validity of a contract, courts generally apply ordinary state law contract principles. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt Dev.*, 55 Cal. 4th 223, 236 (2012) (general contract law principles determine whether arbitration agreement binding); *Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373, 381 (2016). Under California law, a contract is valid if there is mutual assent and valid consideration. *DLLE v. Transpacific Trans. Co.*, 69 Cal. App. 3d 268, 274-75 (1977).

The Agreements meet these validity requirements. By reviewing and signing the Employment Agreement, Plaintiffs assented to its terms. Hahn Decl. Ex. A; Ex. B. There is mutual assent between the parties both to arbitrate Plaintiffs' individual claims, and to not to

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skillsets. For example, as defined, putative class members who managed Plaintiffs would be in direct conflict with them, rendering Plaintiffs incapable of representing their interests.

bring any class claims. *Id*. The plain language of their Arbitration Agreements makes this clear:

> "In consideration of my employment with Niantic, Inc. ("Company") and our mutual promises to arbitrate all disputes, **the Company and I agree that**, except as provided in section (b) below, **any and all, past, present or future, controversies, claims, or disputes that Company may have against me, or that I may have against Company,** any of its present or future parent, subsidiary or affiliated companies, or their employee(s), officer(s), director(s), agent(s), shareholder(s) or benefit plan(s), in their capacity as such or otherwise (or the successors and assigns of any of them), including but not limited to disputes arising out of, relating to, or resulting from my employment or the termination of my Company employment (collectively "disputes"), **will be subject to binding arbitration under the Federal Arbitration Act** (9 U.S.C. §1 et seq.)" *Id*. (emphasis added).

> "TO THE MAXIMUM EXTENT PERMITTED BY LAW, I HEREBY WAIVE ANY RIGHT TO BRING ON BEHALF OF MYSELF OR PERSONS OTHER THAN MYSELF, OR TO OTHERWISE PARTICIPATE WITH OTHER PERSONS IN, **ANY CLASS OR COLLECTIVE ACTION**. IF AND WHEN APPLICABLE LAW PERMITS WAIVER OF REPRESENTATIVE CLAIMS UNDER THE CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT OF 2004 (CALIFORNIA LABOR CODE § 2698, *ET SEQ.*), (OR ANY SIMILAR LAW), I WAIVE THE RIGHT TO BRING ANY SUCH CLAIM." *Id*. (emphasis added).

By accepting employment with Niantic and signing the Agreement, Plaintiffs assented to these terms.

There is also valid consideration; Niantic agreed to arbitrate its claims against Plaintiffs and to offer them employment in exchange for their agreement to arbitrate their claims against Niantic. *Id*; *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105, 1126 (1999) (mutual promise to arbitrate constitutes consideration); *Lockhart v. Gen. Motors Corp.*, 2001 WL 1262922, at *2 (C.D. Cal. Sept. 14, 2001) ("Because [the parties] all agreed to submit to binding arbitration any claims they had against each other, there was a mutual exchange of promises sufficient to create consideration under California . . . law."). Plaintiffs cannot repudiate the Agreement now by filing their claims in court.

2. Plaintiffs' Arbitrable Disputes Are Within the Scope of the Agreements

Plaintiffs' claims – discrimination, harassment, retaliation, failure to prevent all three, violation of the California Equal Pay Act, and unfair and unlawful business practices – are categorically "disputes arising out of, relating to, or resulting from [their] employment or the termination of [their] Company employment." Hahn Decl. Exs. A, B at § (a). The Agreements are

framed broadly, encompassing "any and all" employment claims save for a few narrowly defined exceptions. This language is the most inclusive type possible and establishes intent to include all disputes. *Vianna v. Drs.' Mgmt. Co.*, 27 Cal. App. 4th 1186, 1190 (1994) (arbitration agreement "of any dispute of any kind whatsoever" broadly covers "torts rooted in the employment relationship created by their contract"); *Buckhorn v. St. Jude Heritage Med. Grp.*, 121 Cal. App. 4th 1401, 1406-08 (2004) (same); *eFund Cap. Partners v. Pless*, 150 Cal. App. 4th 1311, 1322 (2007) ("any problem or dispute" contractual language is "both clear and plain" and "very broad"); *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 554 n.1 (2004) ("An arbitration clause that covers *any claim arising out of or relating to* the contract or the breach thereof is very broad."). Thus, the Agreements require plaintiffs to arbitrate all of their claims, except those claims specifically excluded by the carveout clause (which should be stayed pending arbitration), and waive any class claims.

a. Plaintiffs' Claims Are Not "Sexual Bias" Claims

Plaintiffs' attempt to shoehorn their claims into the narrow excluded claims provision of the Agreements is meritless. "To the extent possible, an exclusionary clause in an arbitration provision should be narrowly construed." *Gravillis v. Coldwell Banker Residential Brokerage Co.*, 143 Cal. App. 4th 761, 771 (2006). The language here is clear; the carveout from the arbitration provision applies **only** to "claims of sexual harassment, sexual assault, or sexual bias," Hahn Decl. Exs. A, B at § (b), which only captures Plaintiffs' sex discrimination and harassment claims. Although Plaintiffs try to characterize their claims as involving "sexual bias" by claiming this "is a case about systemic sexual bias at Niantic," the nature of the claims at issue and the barebones allegations make clear that Plaintiffs' other claims are not "sexual bias" claims.

The elements of these claims make this clear. "Sexual bias" or sex-based intent is not an element of violation of the Equal Pay Act, which requires a plaintiff to prove that: (1) she was paid less than the rate paid to the comparator; (2) she was performing substantially similar work to the comparator; and (3) she was working under similar working conditions as the comparator. CACI No. 2740. Plaintiffs' allegation that Niantic's purported violation of the Equal Pay Act "was caused by conscious and/or unconscious sexual bias," is irrelevant because the Equal Pay

1 Act <u>does not have a causation element</u>, nor does it require a showing of "sexual bias" or intent.
2 Plaintiffs' claims for retaliation under the Equal Pay Act and FEHA also do not require
3 showing a "sexual bias" or sex-based intent. Retaliation under the Equal Pay Act and FEHA
4 requires a plaintiff to establish that: (1) she engaged in protected activity;[4] (2) she suffered an
5 adverse action; (3) the **protected activity** (not sex) was a substantial motivating reason for the
6 adverse action; (4) she was harmed; and (5) the retaliatory conduct was a substantial factor and
7 causing the harm. CACI Nos. 2743, 2505. The failure to prevent retaliation claim requires a
8 plaintiff to prove that: (1) she was an employee of defendant; (2) she was subjected to retaliation;
9 (3) defendant failed to take reasonable steps to prevent the same; (4) she was harmed; and (5)
10 defendant's failure to prevent retaliation was a substantial factor in causing harm. CACI No.
11 2527. Again, none of these claims require any showing of "sexual bias" or sex-based intent.
12 As to their Business and Professions Code section 17200 cause of action, it prohibits
13 "unfair competition", which is defined by the statute as "any unlawful, unfair, or fraudulent
14 business act or practice or false, deceptive, or misleading advertising." Given the sheer breadth of
15 the statute, it cannot be construed as a claim for "sexual bias" unless it is specifically dependent
16 solely on Plaintiffs' sex bias claim.[5]
17 These claims do not require Plaintiffs to prove that anyone at Niantic engaged in "sexual
18 bias" or sex-based intent. Even if Plaintiffs were to allege factual instances of "sexual bias," it
19 would not convert these legal claims into claims of "sexual bias." The only two claims arguably
20 within the scope of the excluded claims provision are Plaintiffs' claims for sex discrimination[6]
21 and harassment.
22 **b. <u>Courts Favor Arbitrability</u>**
23 Both California and federal courts resolve doubts on questions of arbitrability **<u>in favor of</u>**
24 **<u>arbitration</u>**. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)
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[4] Protected activity must relate to enforcing equal pay. CACI No. 2743.
[5] To be clear, to the extent the UCL and failure to prevent claims rely on the sex-based discrimination and harassment claims, Niantic does not seek to compel them to arbitration.
[6] Plaintiffs vaguely reference a potential claim of race/color discrimination but do not plead it as a cause of action. SAC ¶ 111. To the extent they allege a race/color cause of action, it must also be compelled to arbitration.

("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 like defense to arbitrability"); *Coast Plaza Drs. Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 686 (2000) ("[a]ny doubts regarding the arbitrability of a dispute are resolved in favor of arbitration"); *United Transp. Union v. So. Cal. Rapid Transit*, 7 Cal. App. 4th 804, 808 (1992) ("The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute"); *Vianna*, 27 Cal. App. 4th at 1189; *Buckhorn*, 121 Cal. App. 4th at 1406. All claims related to Plaintiffs' employment except those explicitly carved out are covered by the arbitration provision. Thus, the Court must enforce the Agreements and compel arbitration of Plaintiffs' claims for violation of the Equal Pay Act, retaliation under the Equal Pay Act and FEHA, failure to prevent, and violation of the UCL.

3. The Parties' Agreements to Arbitrate Are Enforceable

a. The Agreements Are Enforceable Under *Armendariz*

The Agreements satisfy the requirements for enforceability as outlined by *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 91 (2000).[7] The requirements for an enforceable arbitration agreement are: (i) the agreement permits a neutral arbitrator; (ii) the agreement cannot limit the damages and other remedies available to the employee; (iii) the employee must be allowed to conduct sufficient discovery; (iv) the employer cannot require the employee to bear any expense that would not be required in a court action; and, (v) the arbitrator must issue a written decision that includes the essential findings and conclusions on which the award is based. *Armendariz*, 24 Cal. 4th at 91, 103, 106, 110.

The Agreements meet these requirements. They require arbitration before JAMS, pursuant to the Employment Rules, which provide multiple safeguards for employee claimants. JAMS

[7] To the extent that *Armendariz* disfavors arbitration and is contrary to the FAA, it is no longer good law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351-52 (2011) (recognizing that state procedural requirements that disfavor arbitration and are contrary to the FAA are preempted and striking down a California rule that prohibited class-action waivers in consumer arbitration agreements); *Oguejiofor v. Nissan*, 2011 WL 3879482, at *2-3 (N.D. Cal. Sept. 2, 2011) (compelling arbitration and noting that *Armendariz* was abrogated in part by *Concepcion*). The Agreements specifically state that the FAA governs. Hahn Decl. Exs. A, B at § (f).

Employment Arbitration Rules, https://www.jamsadr.com/rules-employment-arbitration/english. The applicable JAMS rules provide for neutral arbitrators. *Id*. The Agreements authorize an arbitrator to award the full remedies that would have been available had the claims been in court. Hahn Decl. Exs. A, B at § (d). They do not limit discovery and the JAMS rules provide for sufficient discovery. They require Niantic to cover all costs above those that Plaintiffs would have incurred had they filed the claims in court. *Id*. And they require the arbitrator to issue a written award that "contain[s] findings of fact and conclusions of law." *Id*.

b. The Agreements Are Not Unconscionable

The only instance in which a court can decline to enforce an otherwise valid arbitration agreement is if it determines that the agreement is both procedurally and substantively unconscionable. *Armendariz*, 24 Cal. 4th at 113-14. The Agreements are not unconscionable.

(1) The Agreements Are Procedurally Fair and Enforceable

The Agreements are procedurally fair and thus enforceable. Procedural unconscionability requires "oppression or surprise due to unequal bargaining power." *Concepcion*, 563 U.S. at 340 (citing *Armendariz*). Oppression considers factors such as sophistication, time pressure, economic pressure, pressure from coercion or threats, bargaining power, and meaningful choices. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347-48, 1352-54 (2015). Surprise typically involves a provision hidden within the prolixity of a preprinted form contract. *Id.* at 1347 n.8. Neither are present here.

This is not a case in which an arbitration provision or class waiver has been forced on an unsuspecting employee or applicant. The arbitration provision is clearly laid out in a two-page standalone Agreement attached to the offer letters, which make clear reference to the Agreement in paragraph 10 (Doe 1) and paragraph 9 (Doe 2) (as the "**Arbitration and Class Action Waiver**") on the same page as the applicant's signature. Hahn Decl. Exs. A, B at p. 3.

The Agreements have a bold font title, making clear that they are a "**MUTUAL ARBITRATION AGREEMENT AND CLASS ACTION WAIVER**." *Id*. at 4. The language of the Agreements is clear and written in a manner easy to understand. They specify explicitly that they cover the statutes substantively at issue here, including the Equal Pay Act, FEHA, and

all claims for "retaliation, harassment, discrimination, or wrongful termination, and any other contractual, tort or statutory claims, to the fullest extent allowed by law." *Id*. at § (a). They also include, in a standalone paragraph in all caps, "I UNDERSTAND THAT, EXCEPT AS PROVIDED BELOW, COMPANY AND I WAIVE ANY RIGHT TO A JUDGE OR JURY TRIAL ON ANY DISPUTE." *Id*. Nothing in the Agreements required an immediate answer. Both the offer letter and the Agreement were sent to Doe 1 on February 18, 2020 and signed by her several days later. *Id*. at 1, 3.

Plaintiffs cannot in good faith argue that they were surprised or unaware of the requirement to arbitrate their individual claims. *Harris*, 248 Cal. App. 4th at 383 (employees may not avoid arbitration agreements by merely claiming not to have read or signed them); *Cisneros Alvarez v. Altamed Health Servs. Corp.*, 60 Cal. App. 5th 572, 591-92 (2021) (enforcing agreement to arbitrate; low level of procedural unconscionability where the plaintiff had a day to review arbitration agreement); *Zoller v. GCA Advisors, LLC*, 993 F.3d 1198, 1204 (9th Cir. 2021) (reversing denial of motion to compel arbitration where claims were clearly covered, plaintiff had opportunity to consult with counsel, and her signature was clearly in reference to the agreement).

(2) The Agreements Are Substantively Fair and Enforceable

The Agreements are also substantively fair and thus enforceable. Substantive unconscionability requires a showing that the terms of the agreement are "overly harsh or one-sided." *Concepcion*, 563 U.S. at 340.

The Agreements are not overly harsh or one-sided. To the contrary, they are mutual and require both parties to arbitrate their disputes. Hahn Decl. Exs. A, B at § (a). Further, they are governed by the well-established JAMS Employment Arbitration Rules, and Niantic pays for the cost of the arbitration. *Id*. at § (d). The mere fact that Niantic is an employer and Plaintiffs are individuals is no basis to refuse to enforce their Agreements. *Giuliano III v. Inland Empire Pers., Inc.*, 149 Cal. App. 4th 1276, 1289 (2007) ("It is well established that the right to a jury trial and judicial forum can be waived in an employment contract."); *Lagatree*, 74 Cal. App. 4th at 1122-23 ("[A] predispute arbitration agreement is not invalid merely because it is imposed as a condition of employment."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)

(“Mere inequality in bargaining power … is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”). The Agreements’ terms are not so harsh as to preclude enforcement under the FAA (or California law). The Agreements are not substantively unconscionable and must be enforced as written.

B. <u>The Class Claims and Non-Individual PAGA Claims Must Be Stricken</u>

The Agreements require **<u>any</u>** claims be arbitrated and litigated on an individual basis. Hahn Decl. Exs. A, B at § (b). Both the FAA and California law require courts to enforce agreements to arbitrate according to their terms. *Concepcion*, 563 U.S. at 344; *Vianna*, 27 Cal. App. 4th at 1189 (“arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question”). Class waivers are enforceable. *Concepcion*, 563 U.S. at 346-47; *Murphy v. DirectTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013) (“Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, is the law of California and every other state”); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014) (abrogated on other grounds); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1138 (2013) (same). In *Concepcion*, the U.S. Supreme Court directly considered the issue of enforceability of class action waivers and held that states may not use state contract law principles as a means to impose limitations or requirements that “stand as an obstacle” to the unfettered use of arbitration agreements, including those that ban class procedures. *Concepcion*, 563 U.S. at 343.

Here, Plaintiffs, **<u>without any exclusions</u>**, explicitly waived their right to participate in any class or collective actions when they agreed to the following standalone provision: “TO THE MAXIMUM EXTENT PERMITTED BY LAW, I HEREBY WAIVE ANY RIGHT TO BRING ON BEHALF OF PERSONS OTHER THAN MYSELF, OR TO OTHERWISE PARTICIPATE WITH OTHER PERSONS IN, **<u>ANY</u>** CLASS OR COLLECTIVE ACTION.” Hahn Decl. Exs. A, B at § (c) (emphasis added). These waivers must be enforced according to their terms, and because Plaintiffs explicitly agreed that any class or collective actions were impermissible, all their class claims and collective PAGA claims should be stricken from the SAC. *Cardenas-Cuevas v. Arbonne Int’l, LLC*, 2019 WL 1198964, at *4 (Mar. 14, 2019) (“The United States

Supreme Court held in [*Concepcion*] that the FAA preempts California law to the extent it prohibits class action waivers in consumer arbitration agreements…Thereafter, courts have consistently enforced arbitration agreements containing class action waivers in accordance with their terms"); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 869 (9th Cir. 2021) ("Indeed, the Supreme Court has recognized that arbitration agreements may contain waivers of the class action mechanism and require the parties to pursue their claims individually"); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1087 (E.D. Cal. 2014) ("arbitration agreements containing class action waivers are valid and enforceable.")

Moreover, to the extent Plaintiffs' individual claims are compelled to arbitration, they also cannot serve as class representatives in this action. *Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1588-89 (2009) ("A representative plaintiff still possesses only a single claim for relief – the plaintiff's own. That the plaintiff has undertaken to also sue 'for the benefit of all' does not mean that the plaintiff has somehow obtained a 'class claim' for relief that can be asserted independent of the plaintiff's own claim."); *Nixon v. AmeriHome Mortg. Co., LLC*, 67 Cal. App. 5th 934, 939-40, 52 (2021) (affirming order dismissing class claims where plaintiff's individual claims were compelled to arbitration).

C. <u>The Court Must Stay the Litigation Pending the Completion of Arbitration</u>

The litigation, including any non-arbitrable claims pending while Plaintiffs resolve their individual claims in arbitration, must be stayed, as required under federal and California law. 9 U.S.C. § 3 (court "**<u>shall</u>** on application of one of the parties stay the trial of the action until such arbitration has been had") (emphasis added); Code Civ. Proc. § 1281.4 (court "**<u>shall</u>**, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had") (emphasis added).

The California Supreme Court also confirmed that a stay is appropriate where "there is a severance of arbitrable from inarbitrable claims". *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 320 (2003). Non-arbitrable claims that overlap with arbitrable claims should be included in the stay. "Any party to a judicial proceeding is entitled to a stay of those proceedings whenever

(1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending judicial action." *Heritage Provider Network, Inc. v. Superior Ct.*, 158 Cal. App. 4th 1146, 1152 (2008). "A single overlapping issue is sufficient to require imposition of a stay." *Id.* at 1153; Code Civ. Proc. § 1281.4 (non-severable issues properly stayed).

1. <u>There Are Significant Overlapping Issues Between the Arbitrable and Nonarbitrable Claims</u>

Here, significant overlapping issues warrant the stay. Simultaneous litigation would require telling the same story in two venues, overlapping proof, and the same requests for damages. In each matter, the case would revolve around the same facts, documents, and witnesses. Each would focus on Plaintiffs' employment history with Niantic, including their hire, job duties, compensation, job performance, and interactions with HR. Proof of the excluded sex harassment and discrimination claims would necessarily overlap with proof of the other arbitrable claims relating to alleged Equal Pay violations and retaliation at Niantic because those claims are also rooted in similar factual allegations. Discovery and trial/arbitration in both proceedings will necessarily involve the same documents and witnesses testifying about the same events both.

The alleged damages would be identical, causing overlapping and duplicative awards of damages should Plaintiffs prevail. *See, e.g.*, SAC ¶¶ 97-99 (violation of Equal Pay Act: alleging lost wages, liquidated damages, reasonable attorneys' fees, punitive and exemplary damages); 104-106 (retaliation under Equal Pay Act: same); 116-119 (sex discrimination: same and emotional distress damages); 124-127 (sex harassment: same); 133-136 (FEHA retaliation: same); 142-145 (failure to prevent: same); *see also Tavaglione v. Billings*, 4 Cal. 4th 1150, 1158-59 (1993) ("Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited.").

2. <u>Trial of the Excluded Claims Should Be Stayed Pending Arbitration</u>

The Court should order arbitration of Plaintiffs' arbitrable disputes before trying any excluded claims in this Court – all further proceedings should be stayed. *Laswell v. Ag Seal*

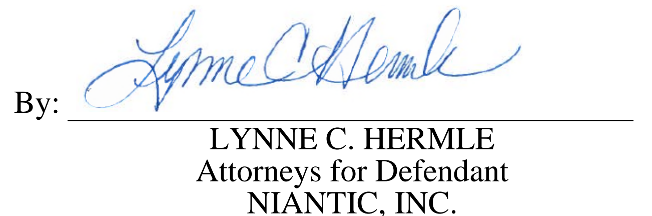
Beach, LLC, 189 Cal. App. 4th 1399, 1409 (2010) ("the presence of a nonarbitrable cause of action is not sufficient by itself to invoke the trial court's discretion to deny arbitration" and the plaintiff's nonarbitrable claims seeking relief "based on the same alleged improper care addressed in her arbitrable causes of action" could "be litigated in court after completion of the arbitration"); *Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 966 (2015) ("Because the issues subject to litigation . . . might overlap those that are subject to arbitration . . . the trial court must order an appropriate stay of trial court proceedings."); *Marchand v. Northrop Grumman Corp.*, 2017 WL 2633132, at *13 (N.D. Cal. June 19, 2017) (applying CA law to stay non-arbitrable employment claims pending arbitration of other employment claims); *Morello v. Amco Ins. Co.*, 2012 WL 1949387, at *1-3 (N.D. Cal. May 29, 2012) (proper under CA law to stay action pending resolution of arbitration where outcome of arbitration would affect court claims).

IV. CONCLUSION

Niantic requests that the Court grant this Motion and enter an order to: (1) compel arbitration of Plaintiffs' claims for violation of the Equal Pay Act, retaliation under the Equal Pay Act, FEHA retaliation, failure to prevent, and violation of the UCL, on an individual basis only; (2) dismiss those arbitrable claims in their entirety from the court action, or in the alternative, stay the litigation pending completion of the arbitration; (3) strike the class and collective claims and allegations on all claims; and (4) stay Plaintiffs' sex discrimination and sex harassment individual claims pending completion of arbitration.

Dated: October 12, 2023

ORRICK, HERRINGTON & SUTCLIFFE LLP



By: ______________________________

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