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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CIVIL COMPLEX

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

PLAINTIFF JANE DOE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT NIANTIC, INC.'S MOTION TO COMPEL ARBITRATION

Served and Filed Concurrently with:
- **Plaintiffs' Request for Judicial Notice;**
- **Declaration of Jane Doe 1; and**
- **Declaration of Jane Doe 2**

Hearing:
Date: November 21, 2023
Time: 9:00 a.m.
Place: Department 6
Judge: Hon. Elihu M. Berle

Action Filed: July 7, 2023
Trial Date: Not yet set

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Niantic, Inc. ("Niantic" or "Defendant") has been engaged in the systemic and blatant devaluation of its female employees for years. The problem is exacerbated by Niantic's directive to silence women who speak out about sexual bias. Plaintiffs allege that Niantic's blatant devaluation of and silencing of women in the workplace has resulted in systemic gender discrimination, retaliation, and a hostile work environment for women. Through this action, Plaintiffs seek systemic change on behalf of female employees to remedy these violations.

Predictably, Niantic's response to this lawsuit is to try to silence Plaintiffs and their female colleagues once again. Niantic does so by trying to force Plaintiffs into separate and unfair private arbitrations. But Niantic's attempted procedural maneuvers to silence Plaintiffs are fatally defective because the Federal Arbitration Act ("FAA") expressly entitles Plaintiffs to litigate matters like this that involve a sexual harassment dispute as a collective and class action.

In 2021, Congress amended the FAA to add section 402, which provides that "at the election of the person alleging conduct constituting a sexual harassment dispute . . ., or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under . . . State law and relates to . . . the sexual harassment dispute." (9 U.S.C. § 402(a).) As many courts have already held, section 402 invalidates predispute arbitration agreements and predispute joint action waivers for the entire "case" that relates to the sexual harassment dispute, and not just the *claim* for sexual harassment. (*Id.*)

First and foremost, this case falls squarely into the protections of section 402 of the FAA. As Niantic acknowledges in its motion, Plaintiffs have made a hostile work environment sexual harassment claim under the California Fair Employment and Housing Act ("FEHA"). The FAA therefore entitles Plaintiffs to elect to proceed in court as a class action with respect to this entire case which relates to the sexual harassment dispute regardless of the existence of an arbitration agreement. For that reason alone, the Court must deny Niantic's motion in its entirety.

Second, although section 402 of the FAA is dispositive as to the entirety of Niantic's motion, even without that controlling statute the motion still must fail because Plaintiffs' claims

fall outside of the scope of claims covered by Niantic's Arbitration Agreements. The Arbitration Agreements expressly exclude "claims of sexual harassment . . . or sexual bias…" from their provisions. Niantic concedes that Plaintiffs' hostile work environment claim and FEHA sex discrimination claim are excluded from the Arbitration Agreements, while asserting that Plaintiffs' other claims for violation of the Equal Pay Act, retaliation under the FEHA, and derivative claims are not claims of "sexual bias" and therefore not excluded from the agreement. Just because the term "sexual bias" does not appear in California's equal pay and retaliation statutes does not mean that Plaintiffs' equal pay and retaliation claims are not claims of "sexual bias" within the meaning of the agreement. Indeed, as explained further below, all of Plaintiffs' claims are centered and based on alleged sexual bias against women. For that reason, the claims are carved out from Niantic's Arbitration Agreement and Niantic's motion should be denied.

Third, because Plaintiffs' claims are not covered by the Arbitration Agreements as explained above, those claims are also not covered by the class waivers contained in the Arbitration Agreements. Nevertheless, in order to try to strike *all* of Plaintiffs' class allegations notwithstanding the carve-outs contained in its Arbitration Agreements, Niantic claims that its class action waivers are *not part of* its Arbitration Agreements. Niantic then ironically cites FAA case law regarding *arbitration agreements containing class waivers* to claim that class waivers are enforceable. But the FAA would not apply to class waivers that exist separately from arbitration agreements. Therefore, even were the Court to agree with Niantic's claimed interpretation of the agreements (that the class waivers are not part of the Arbitration Agreements), the Court must then deny Niantic's request to strike the class allegations on a separate ground – if the class waivers are not part of the Arbitration Agreements, they are not governed by the FAA, and California substantive law invalidating the waivers is not preempted.

Fourth, Niantic's request to strike the PAGA representative claim must be denied based on the California Supreme Court's clear holding in *Adolph v. Uber Technologies, Inc.* that representative PAGA claims cannot be waived in predispute arbitration agreements.

For those reasons and as discussed in further detail herein, the Court must deny Niantic's motion and all relief sought by way of that motion, and must allow Plaintiffs' individual, class, and representative claims to proceed in court.

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II. SUMMARY OF RELEVANT FACTS

A. The Legal Claims and Factual Allegations in Plaintiffs' SAC

Plaintiffs' Second Amended Complaint ("SAC") alleges the following causes of action: (1) Violation of California Equal Pay Act; (2) Retaliation in Violation of California Equal Pay Act; (3) Discrimination in Violation of the FEHA; (4) Hostile Work Environment in Violation of the FEHA; (5) Retaliation in Violation of the FEHA; (6) Failure to Prevent Discrimination, Harassment, & Retaliation in Violation of the FEHA; (7) Violation of Unfair Competition Law; and (8) Representative Action Pursuant to Labor Code §§ 2698, *et seq.*

Plaintiffs allege systemic sexual bias at Niantic, blatant favoritism toward men, and sexism and toxicity that permeates the company. Plaintiffs allege that female employees see Niantic as a Boys Club where men mentor and boost the careers of other men while leaving women behind, and that Niantic has made clear to its female employees that it does not tolerate discussion or dissent about sexism or the Boys Club culture at Niantic. Plaintiffs allege that women who speak out at Niantic on these issues are labeled as a problem by upper management and pushed out, and that Niantic's HR department operates on an apparent directive from its CEO and men in leadership to silence female employees who speak out. (SAC at ¶ 1.)[1]

Plaintiffs allege that Niantic's systemic poor treatment of female employees has created an offensive and oppressive work environment for female employees, has driven many female employees to tears, has undermined their personal sense of wellbeing, has made it more difficult for them to do their jobs, and has disrupted the emotional tranquility of female employees, therefore constituting a hostile work environment. (SAC at ¶¶ 27, 71.)[2]

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[1] The SAC is attached as Exhibit 1 to Plaintiffs' Request for Judicial Notice, which is filed concurrently herewith.

[2] The California Legislature has declared that harassment is conduct that "sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." (Cal. Govt. Code § 12923(a).) The Legislature affirmed that, "'It suffices to prove that . . . the harassment so altered working conditions as to make it more difficult to do the job.'" (*Id.* (internal citations omitted).) California courts also recognize that there is "no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) "[A]busive conduct that is not facially sex specific can be grounds for a hostile environment sexual harassment claim *if it is inflicted because of gender*, i.e., if men and women are treated differently and the conduct is motivated by gender bias." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 130.)

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By way of their class action lawsuit, Plaintiffs "seek to ensure the sexual bias complaints of all female employees and women of color at Niantic are taken seriously and acted upon." Plaintiffs seek to stop "Niantic's custom and practice of fostering sexual bias in employment decisions," including: (a) paying women less than similarly-situated men; (b) paying women of color less than similarly-situated white persons; (c) promoting similarly-situated men more frequently than women who are equally or more qualified for promotions; (d) assigning women to lower paid positions than similarly-situated men, even when these women's qualifications were equal to or greater than the men's qualifications; (e) retaliating against female employees who express concerns about the workplace, including concerns regarding discrimination and equal pay issues; and (f) creating, encouraging, and maintaining a work environment that exposes its female employees to discrimination, harassment, and retaliation. (SAC at ¶¶ 2, 3.)

B. Relevant Procedural History

On September 14, 2023, the Court permitted Niantic to file a Motion to Compel Arbitration and set a hearing and briefing schedule for that sole motion. (See September 14, 2023 Minute Order.)[3] On October 12, 2023, Niantic filed three motions in one pleading – (1) a motion to compel arbitration, (2) a motion to strike all class and representative allegations (based on a class waiver that Niantic claims is separate from its Arbitration Agreement), and (3) a request to stay all of Plaintiffs' claims in litigation pending resolution of binding arbitration on select individual claims. Plaintiffs now oppose Niantic's motion, through which Plaintiffs reiterate that because they have alleged a sexual harassment dispute under the FEHA, they are electing to proceed in court with their case, pursuant to 9 U.S.C. § 402, which invalidates the predispute arbitration agreements and predispute joint-action waivers with respect to the entirety of Plaintiffs' case.

III. LEGAL ARGUMENTS

A. The FAA Empowers Employees To Bring Individual, Representative, And Class Action Cases In Court When The Case "Relates To" A "Sexual Harassment Dispute."

As Niantic points out, the Arbitration Agreements at issue in this matter "specifically state that the FAA governs." (See Deft's Mot., at fn. 7, p. 8, ln. 28.) Despite acknowledging that the

[3] The Court's September 14, 2023 Minute Order is attached as Exhibit 2 to Plaintiffs' Request for Judicial Notice, filed concurrently herewith.

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FAA applies, Niantic fails to apply or even discuss the part of the FAA that is determinative to the resolution of the instant motion – section 402. Section 402 empowers Plaintiffs to bring individual, representative, and class action cases like this one in court. Because Plaintiffs invoke section 402, the Court must deny Niantic's motion in its entirety.

Effective March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") amended the FAA to allow employees to bring individual, joint, class, and collective action cases relating to a sexual harassment dispute *in court*, notwithstanding a mandatory predispute arbitration agreement. (9 U.S.C. §§ 401-402 (136 Stat. 26, Pub.L. 117-90; eff. 3/3/22).) Specifically, the statute provides that:

> [A]t the election of the person alleging conduct constituting a sexual harassment dispute …, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable *with respect to a case* which is filed under Federal, Tribal, or State law and relates to … the sexual harassment dispute.

(9 U.S.C. § 402(a) (eff. 3/3/2022) (emphasis added).)[4]

As such, "the text of § 402(a) makes clear that its invalidation of an arbitration agreement extends to the *entirety of the case* relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute." (*Turner v. Tesla, Inc.* (N.D. Cal., Aug. 11, 2023) --- F.Supp.3d ----, 2023 WL 6150805, at *5 (emphasis added), quoting *Johnson v. Everyrealm, Inc.* (S.D.N.Y., Feb. 24, 2023) --- F.Supp.3d ----, 2023 WL 2216173, at *18 (observing that the text of the statute is "clear, unambiguous, and decisive as to [this] issue," because the statute "makes a pre-dispute arbitration agreement invalid and unenforceable 'with respect to a *case* which is filed under Federal, Tribal, or State law and relates to the … sexual harassment dispute.' ")[5]; see also, *Delo*

[4] The EFAA defines "sexual harassment dispute" to mean "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." (9 U.S.C. § 401(4).)

[5] The *Johnson* court also elaborated as follows: "If further confirmation of that understanding were needed, a surrounding EFAA provision--the one that sets EFAA's effective date--uses the narrower term 'claim.' As enacted in the Statutes at Large, the EFAA provides that 'the amendments made by [it], shall apply with respect to any dispute *or claim* that arises or accrues on or after Mar. 3, 2022.' *See* Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022) (emphasis added).[footnote omitted] Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms 'case' and 'claim.' 'When Congress includes particular language in one section of a statute but omits it in another, th[e] Court presumes that Congress intended a difference in meaning.' *Digital*

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v. Paul Taylor Dance Foundation, Inc. (S.D.N.Y., Aug. 1, 2023) 2023 WL 4883337, at *5 (court emphasized that the EFAA focuses on a "case" in its entirety and that it therefore applied to block enforcement of the parties' arbitration agreement as to all claims brought in the action, including the plaintiff's claims for familial status discrimination and retaliation under the FLSA); *Watson v. Blaze Media LLC* (N.D. Tex., Aug. 3, 2023) 2023 WL 5004144, at *5 (plaintiff's causes of action included religious discrimination claims in addition to sexual harassment claims; the court relied on the same rationale as in *Johnson* to deny the defendant's motion to compel arbitration as to all of the plaintiff's claims, not just the sexual harassment claims, stating that the employer "cannot enforce the parties' arbitration agreement against Watson").) [6]

It is undisputed that in this matter Plaintiffs have made a sexual harassment claim under the FEHA as their fourth cause of action. (See Plaintiffs' SAC.) Because Plaintiffs allege conduct that constitutes a sexual harassment dispute under state law and have elected to proceed with such action in court, under the EFAA the predispute arbitration agreement and predispute joint-action waiver are invalidated as to the entire "case" relating to the sexual harassment dispute. (See, e.g., *Johnson*, *supra*, 2023 WL 2216173, at *17.)

Further, Niantic concedes and even argues that Plaintiffs' other claims are intertwined with their sexual harassment claim. In fact, Niantic asserts in its motion that there are "significant overlapping issues" and that "[s]imultaneous litigation would require telling the same story in two venues, overlapping proof, and the same requests for damages" and that "[i]n each matter, the case would revolve around the same facts, documents, and witnesses." (See Deft's Mot., 13:7-10.) Niantic further insists that "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." (See Deft's Mot., 13:11-14.) This provides further reason for the Court to apply the invalidation of the arbitration agreement to the entire case, although as

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Realty Tr., Inc. v. Somers [2018] --- U.S. ----, 138 S. Ct. 767, 777 [] (internal alterations omitted)." (*Johnson*, *supra*, --- F.Supp. ----, 2023 WL 2216173, at *18.)

[6] The ordinary meaning of the word "case" refers to a "civil or criminal proceeding, action, suit, or controversy at law or in equity," which reflects an "undivided whole" and "does not differentiate among causes of action within it." (*Delo*, *supra*, --- F.Supp.3d ----, 2023 WL 4883337, at *5, citing *Johnson*, *supra,* --- F.Supp.3d ----, 2023 WL 2216173, at *17, quoting Black's Law Dictionary (11th ed. 2019).)

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noted above, the language of the EFAA statute is clear and unambiguous that the invalidation of the arbitration agreement applies to the entire case and not merely to claims for sexual harassment or claims which are closely related to or overlapping with sexual harassment. (See, *Johnson*, *supra*, --- F.Supp. ----, 2023 WL 2216173, at *16-19; *Turner*, *supra*, --- F.Supp.3d ----, 2023 WL 6150805, at *5; *Delo*, 2023 WL 4883337, at *5.)

Because Plaintiffs have alleged a sexual harassment dispute and their entire case relates to the sexual harassment dispute, the EFAA empowers them to litigate their entire case as a class and representative action in court, and the Court must deny Niantic's motion in its entirety.

B. <u>The Arbitration Agreement Expressly Carves Out All Claims in This Matter.</u>

Separate and independent from the EFAA, which is dispositive as to Niantic's entire motion, the Court must also deny the motion because Plaintiffs' claims are expressly carved out of Niantic's Arbitration Agreement. The Arbitration Agreement states that, "[t]he following claims are not covered by this arbitration agreement: … claims that as a matter of law cannot be subject to arbitration; claims of sexual harassment, sexual assault, or sexual bias…" (See Arb. Agmt., at p. 4 ("(b) *Disputes Not Covered*").)

Niantic asserts that only Plaintiffs' individual sexual harassment and sex discrimination claims, and the claims that are directly derivative of those claims (i.e., the failure to prevent discrimination and harassment claim and the unfair competition claim) are carved out from the covered claims under the Arbitration Agreement. Contrary to Niantic's position, however, *all* of Plaintiffs' claims in this action are claims of sexual bias, and thus all of Plaintiffs' claims fall within the "disputes not covered" by the Arbitration Agreement. For that additional reason, Niantic's motion should be denied.

1. The Arbitration Agreement must be construed in favor of the non-drafting party – in this case, the Plaintiffs.

The Arbitration Agreement at issue was solely drafted by Niantic. (See Declaration of Jane Doe 1, at ¶ 2; Declaration of Jane Doe 2, at ¶ 2.) Therefore, any ambiguities in the contract terms must be resolved in Plaintiffs' favor. (See Cal. Civ. Code § 1654 ("In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.").)

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2. Plaintiffs' first and second causes of action under California's Equal Pay Act are "claims … of sexual bias."

California's Equal Pay Act ("EPA") prohibits an employer from paying any of its employees wage rates that are less than what it pays employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. (Cal. Lab. Code § 1197.5(a).) After an employee proves that he or she is being paid less than an employee or employees of the opposite sex who perform substantially similar work, then the employer must prove that it has a legitimate non-discriminatory reason for the pay difference, *i.e.*, that the wage differential is based upon one or more of the following factors: a seniority system; a merit system; a system that measures earnings by quantity or quality of production; and/or a *"*bona fide factor other than sex," such as education, training, or experience. (*Id.*) Further, this factor only applies if the employer demonstrates that the factor "is not based on or derived from a sex-based differential" in compensation, is job-related with respect to the position in question, and is consistent with a business necessity. (*Id.*)

"The [EPA] does not prohibit variations in wages; it prohibits *discriminatory* variations in wages…" (*Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194.) Thus, under EPA, "[t]o prove a prima facie case of wage discrimination, 'a plaintiff must establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions.' " (*Id.*) The burden then shifts to the defendant employer to show that disparities in pay between substantially similar work can be explained by "any factor other than sex." (*Id*.) If the defendant establishes one of EPA's statutory exceptions (*e.g.*, that the disparity is based on a factor other than sex), then the burden shifts back to the plaintiff to prove pretext. (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324.)[7]

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[7] The key difference between an EPA wage discrimination claim and a traditional sex discrimination claim under the FEHA is that a EPA wage discrimination claim places the burden on the *employer* to justify the disparate pay by proving that a factor *other than sexual bias* accounts for the entire wage discrepancy, whereas a traditional disparate treatment sex discrimination FEHA claim places the burden on the *employee* to prove intentional discrimination. (See, *Hall*, *supra*, 148 Cal.App.4th 318, 323-324; Cal. Lab. Code § 1197.5(a)(3); see also, *Maxwell v. City of Tucson* (9th Cir. 1986) 803 F.2d 444, 446 ("Although discriminatory intent is not part of the employee's prima facie burden under the [EPA], an employee may rebut the employer's affirmative defenses with evidence that the employer intended to discriminate, and that the affirmative defense claimed is merely a pretext for discrimination.").)

Additionally, the statute of limitations for an EPA wage discrimination claim is two years, but that period is extended to three years where the claim alleges a "willful violation" of the statute. (Cal. Lab. Code § 1197.5(i); see, *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 105-106.) As such, an EPA wage discrimination claim is very much a claim of "sexual bias."

Additionally, the SAC alleges that Plaintiffs and the class and/or subclasses were paid and are continuing to be paid at a rate less than Niantic's male employees performing substantially similar work, that Niantic "willfully" disregarded the fact that its conduct was in violation of the EPA, and that Niantic's unequal treatment of Plaintiffs and the class and/or subclasses and their willful or reckless disregard for their violation of the Equal Pay Act is and was caused by "conscious and/or unconscious sexual bias." (See SAC, ¶¶ 91-96.)

With respect to their EPA retaliation claim, the SAC further alleges that Niantic targeted Plaintiffs *and their female colleagues* for discrimination and retaliation because of their protected conduct, including with respect to their disclosures, discussions, and/or inquiries regarding wages of employees in order to prevent or remedy equal pay violations "caused by sexual bias." (SAC, at ¶ 101.) As alleged in the SAC, Plaintiffs' claims under the EPA are undoubtably claims of "sexual bias" given that the claims are for *discriminatory* wage disparities *based on sex* and *caused by conscious and/or unconscious sexual bias*, and when Plaintiffs and other female employees complained about the unequal pay and sought to remedy the discriminatory wage practices and be paid equally to their male counterparts, they were not only denied such relief, but were retaliated against for raising these protected complaints of sexual bias pay practices.[8]

Thus, Plaintiffs' first and second causes of action for violation of the Equal Pay Act cannot be compelled to arbitration as they are not subject to Niantic's Arbitration Agreement.

[8] The legislative findings and declarations of amendments to the EPA also make clear that the EPA claims are claims of "sexual bias." When the EPA was amended effective in 2017, the preamble of the bill explained that "[o]ver the past decade, the wage gap has barely budged and wage disparities continue to persist. . . . ." (2016 Cal. Legis. Serv. Ch. 856 (A.B. 1676), § 1, subd. (a).) The Legislature further declared that "[w]hen employers make salary decisions during the hiring process based on prospective employees' prior salaries or require women to disclose their prior salaries during salary negotiations, women often end up at a sharp disadvantage and *historical patterns of gender bias and discrimination repeat themselves*, causing women to continue earning less than their male counterparts." (2016 Cal. Legis. Serv. Ch. 856 (A.B. 1676), § 1, subd. (b) and (c) (emphasis added).) Thus, it is clear that the purpose of EPA and its amendments has been to stop perpetuation of sex/gender bias that women, women of color, and several other groups have historically experienced in the workplace and continue to face.

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3. Plaintiffs' fifth cause of action for retaliation in violation of the FEHA is also a "sexual bias" claim.

Plaintiffs' claim for retaliation under the FEHA is also a "sexual bias" claim. The SAC alleges that *women were targeted* for retaliation, and the retaliation was *for opposition to sexual bias* in the workplace. (SAC, at ¶¶ 25, 130, 131.) Plaintiffs specifically allege that:

> Niantic's solution to receiving reports of sexual bias is to silence or hide such reports, and to make clear *to women* making such reports *that their reporting of sexual bias will subject them to retaliation*. Niantic's practice of silencing and retaliating against women who speak out about sexual bias is apparently at the directive of upper male management at Niantic but is fostered and maintained by Niantic's human resources office headquartered in San Francisco. Indeed, Niantic's human resources officers have expressly warned employees that speaking out or collectively about Niantic's mistreatment of female employees could jeopardize their careers at Niantic.

(SAC, at ¶ 25 (emphasis added).)

Because Plaintiffs' FEHA retaliation claim is based on opposition to sexual bias, and because the claim alleges that women are targeted for retaliation, it is a claim of "sexual bias" and not covered by the Arbitration Agreements. The claim cannot be compelled to arbitration.[9]

4. Plaintiffs' sixth cause of action for failure to prevent discrimination, harassment, and retaliation under the FEHA is also a "claim of sexual bias."

Plaintiffs' claim for failure to prevent discrimination, harassment, and retaliation under the FEHA is also a "claim of sexual harassment… or sexual bias", as it is dependent on and inextricably intertwined with the underlying claims of sexual harassment, sex discrimination, and retaliation. Niantic even acknowledges that "to the extent the . . . failure to prevent claims rely on the sex-based discrimination and harassment claims, Niantic does not seek to compel them to arbitration." (Deft's Mot., at p. 7, lns. 26-27, fn. 5.) Here, the failure to prevent claim does rely on the sex-based discrimination and harassment claims. This claim therefore cannot be compelled to arbitration, as acknowledged by Niantic.

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[9] Additionally, the FEHA claims brought by Plaintiffs seeking public injunctive relief cannot be compelled into arbitration. (See SAC, Prayer at 15; *Vaughn v. Tesla* (2023) 87 Cal.App.5th 208, 232, *reh'g denied* (Jan. 20, 2023), *review denied* (Apr. 12, 2023) (affirming trial court's denial of motion to compel arbitration as to FEHA claims for public injunctive relief and holding that such claims cannot be compelled to arbitration).)

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5. Plaintiffs' seventh cause of action for violation of the Unfair Competition Law is likewise a "claim of sexual bias."

As alleged in the SAC, the Unfair Competition Law ("UCL") claim is based on Niantic's unlawful and unfair business acts or practices, specifically, the denial of equal pay and an environment free of discrimination, harassment, and retaliation. This conduct by Niantic, as alleged, stems from Niantic's sexual bias against Plaintiffs and other female employees working for Niantic. Niantic even acknowledges that "to the extent the UCL . . . claims rely on the sex-based discrimination and harassment claims, Niantic does not seek to compel them to arbitration." (Deft's Mot., at p. 7, lns. 26-27, fn. 5.) Here, the UCL claim does rely on the sex-based discrimination and harassment claims and it is a "claim of sexual bias." This claim therefore cannot be compelled to arbitration.

C. <u>The Arbitration Agreement's Carve-Out for Sexual Harassment and Sexual Bias Claims Applies to the Representative and Class Waiver.</u>

The "*Disputes Not Covered*" section of Niantic's Arbitration Agreement states that, "[t]he following claims are not covered by *this arbitration agreement*: … claims that as a matter of law cannot be subject to arbitration; claims of sexual harassment, sexual assault, or sexual bias…" (See Deft's Exhs. A and B, at § (b) (emphasis added).) The reference to "this arbitration agreement" clearly means the entire agreement, including the class action waiver provision found in section (c) of the Arbitration Agreement. But even if the agreement were ambiguous as to whether the carve-out in "this arbitration agreement" applies to the class action waiver that is part of the same agreement, such ambiguities must be resolved in favor of Plaintiffs who did not draft the agreement. (See Cal. Civ. Code § 1654.) Because claims of sexual harassment or sexual bias—*i.e.*, all of Plaintiffs' causes of action in the SAC—are carved out of the Arbitration Agreement, they likewise are not subject to the class waiver provision of the Arbitration Agreement. Therefore, the Court should deny Niantic's motion to strike the class allegations.

D. <u>To The Extent the Class Waiver Is Separate from The Arbitration Agreement, the FAA Has No Application To It And State Law Invalidates It.</u>

In an effort to prevent Plaintiffs from obtaining relief for the class of women, Niantic has manufactured the position that its class action waiver is distinct and separate from the Arbitration Agreement contained in the same document. (See Deft's Mot., at p. 3, lns. 7-8.) Highlighting the

disingenuity of Niantic's assertions, Niantic then cites cases holding that class waivers *found in arbitration agreements* are valid under the FAA. (See, e.g., *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 ("The arbitration agreement also contained a class and representative action waiver…").) But to the extent that the class waiver is separate from the Arbitration Agreement as Niantic argues, the FAA does not apply and would not stand in the way of the conclusion that the class waiver is unconscionable and unenforceable as against public policy under the California Supreme Court's *Discover Bank v. Superior Court* holding. (See *Discover Bank v. Superior Court* (2005) *36 Cal.4th 148*, 173, abrogated as preempted by the FAA by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

Therefore, to the extent that the class waiver is not part of the arbitration agreement, it is void as unconscionable under California law. (See *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1399 (holding that a contract is procedurally unconscionable where it is a contract of adhesion); Declaration of Jane Doe 1, at ¶ 2 (the Arbitration Agreement was a contract of adhesion); Declaration of Jane Doe 2, at ¶ 2 (same); *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 340 (holding that substantive unconscionability can be found where the terms of an agreement are "one sided."); *Discover Bank, supra*, 36 Cal.4th at 161 ("Moreover, such class action or arbitration waivers are indisputably one-sided . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable."); *Vaughn v. Tesla* (2023) 87 Cal.App.5th 208, 232, *reh'g denied* (Jan. 20, 2023), *review denied* (Apr. 12, 2023) (holding that arbitration agreement's prohibition on relief to a "group or class of employees" is unenforceable as unconscionable and affirming denial of motion to compel as to FEHA claims for public injunction).

For these reasons, to the extent that the class waiver is not part of the Arbitration Agreement, it is unconscionable and void under California law, and not preempted by the FAA.

E. The Purported Waiver of Representative Claims Under PAGA Is Against California Public Policy, And Thus Unlawful And Unenforceable.

An employee's right to bring a representative Private Attorney General Act ("PAGA") action is unwaivable. (*Westmoreland v. Kindercare Education LLC* (2023) 90 Cal.App.5th 967,

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981, citing *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.) In *Iskanian*, the California Supreme Court held that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." (*Id.* at 360.) The *Iskanian* court explained that such waivers violate California public policy and violate California Civil Code sections 1668 and 3518. (*Id.* at 383-384, quoting Cal. Civ. Code § 1668 (prohibiting contractual waivers, whether "direct[] or indirect[]," that "exempt any one from responsibility for his own … violation of law") and Cal. Civ. Code § 3513 ("a law established for a public reason cannot be contravened by a private agreement").)

Last year, the United States Supreme Court considered whether the FAA preempts certain holdings in *Iskanian*. (See *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ----, 142 S.Ct. 1906, 1913, 1917.) As to *Iskanian*'s principal rule prohibiting waivers of representative PAGA claims in a judicial or arbitral forum, the *Viking River* court held the FAA does *not* preempt *Iskanian*'s principal rule. (*Id.,* at 1922-1923, 1924-1925.) "Thus, even after *Viking River*, a contractual waiver of the right to prosecute PAGA claims is unenforceable as against California public policy." (*Barrera v. Apple American Group LLC* (2023) 95 Cal.App.5th 63, 313 Cal.Rptr.3d 176, 191; see also, *Viking River*, 142 S.Ct. at 1916 ("[W]here … an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."); see also, *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1117-1118 (reiterating that *Viking River* left intact the rule from *Iskanian* that an arbitration agreement purporting to waive an employee's representative claims frustrates the PAGA's objectives and is unenforceable as a matter of state law).) Therefore, the purported waiver of representative claims in the Arbitration Agreement at issue here is unlawful and unenforceable.

Even if Plaintiffs' individual PAGA claims were compelled to arbitration (which they should not be for all the reasons already stated), Plaintiffs would not lose standing to maintain their representative PAGA claims in this court action, and therefore, there are no grounds for striking Plaintiffs' PAGA allegations. (*Adolph*, *supra*, 14 Cal.5th at 1123 ("where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling

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arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court").) The Court therefore must deny Niantic's request to strike the PAGA representative claim or allegations from the complaint.

F. Niantic's Motion to Strike Class and Collective Allegations Must Be Denied Because It was Improperly Filed.

Niantic has improperly combined its Motion to Compel Arbitration with a Motion to Strike Class and Representative Allegations from the SAC. These motions seek different relief and should have been made separately. Niantic has not cited any citable legal authority that supports bringing a Motion to Strike as part of a Motion to Compel arbitration.[10] Nor has the Court authorized Niantic to file a Motion to Strike; instead, the Court has only authorized Niantic to file a Motion to Compel Arbitration. (See September 14, 2023 Minute Order.)

Moreover, Niantic's decision to file a Motion to Strike together with a Motion to Compel Arbitration is particularly inappropriate here where Niantic claims the Arbitration Agreement at issue is separate and distinct from the class and representative waiver. If the agreements are different, then Niantic has no legitimate reason for filing the motions together in one pleading. Niantic's request to strike the class and representative allegations therefore should be denied.

However, to the extent that the Court is inclined to rule on Niantic's motion to strike, Plaintiffs respectfully request that the Court issue a separate order for that. Niantic should not be able to argue that the class waiver is separate from the Arbitration Agreement and simultaneously benefit from having an automatically appealable order on the motion to strike because it filed its motion together with a motion to compel arbitration.

G. Because None of Plaintiffs' Claims Can Be Compelled to Arbitration, Niantic's Motion for A Stay Must Be Denied As Moot.

As discussed above, because none of Plaintiffs' claims can be compelled to arbitration, Niantic's motion seeking to have Plaintiffs' sex discrimination and sex harassment individual claims stayed pending completion of arbitration must be denied as moot. (See *Turner v. Tesla, Inc.*, --- F.Supp.3d ----, 2023 WL 6150805, at *8.).

[10] Defendant cites *Cardenas-Cuevas v. Arbonne International, LLC* (2019) 2019 WL 1198964—an *unpublished* noncitable opinion, in violation of Rule of Court 8.1115. (Deft's Mot., p. 11, lns. 26-28; CRC 8.1115.).

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H. Delegation Of Arbitrability to The Arbitrator Has Been Waived by Niantic's Submission to This Court On The Merits Of Arbitrability Of Plaintiffs' Claims.

A party requesting enforcement of an arbitration agreement who submits an issue on the merits to the court *waives* the right to have the arbitrator decide the issue. (See, *Pulli v. Pony International, LLC* (2012) 206 Cal.App.4th 1507, 1511; see also *Bodine v. Cook's Pest Control Inc.* (11th Cir. 2016) 830 F.3d 1320, 1324-1325 (failure to raise delegation clause in contract waived right to have arbitrator determine whether arbitration agreement was enforceable).) Further, under the EFAA, the court has *exclusive* jurisdiction to decide whether a dispute—and thus the case—is covered by the EFAA statute. (See 9 U.S.C. § 402(b).)[11]

Here, Niantic has failed to raise the issue of the delegation clause in the Arbitration Agreement, has submitted the issue of the arbitrability of the Arbitration Agreement to Plaintiffs' various claims on the merits, and has therefore waived any right to have the arbitrator determine whether this Arbitration Agreement is enforceable. Additionally, Plaintiffs have invoked the protections of the EFAA and therefore the Court has exclusive jurisdiction over this issue.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Niantic's motion in its entirety.

DATED: October 26, 2023

JML LAW, A Professional Law Corporation

By: _____
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DATED: October 26, 2023

GENIE HARRISON LAW FIRM, APC

By: _____
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[11] "The *applicability* of this chapter to an agreement to arbitrate *and the validity and enforceability* of an agreement to which this chapter applies *shall be determined by a court*, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, *and irrespective of whether the agreement purports to delegate such determinations to an arbitrator*." (9 U.S.C. § 402(b) (eff. 3/3/2022) (italics added).)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 W. 6th Street, Suite 707, Los Angeles, California 90014.

On October 26, 2023, I served the foregoing document described as **PLAINTIFF JANE DOE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT NIANTIC, INC.'S MOTION TO COMPEL ARBITRATION** on the interested parties in this action as follows:

LYNNE C. HERMLE lchermle@orrick.com ANJALI PRASAD VADILLO avadillo@orrick.com ZOE BROWN RUSSELL zrussell@orrick.com ORRICK, HERRINGTON & SUTCLIFFE LLP 1000 Marsh Road Menlo Park, CA 94025-1015 Telephone: +1 650 614 7400 Facsimile: +1 650 614 7401	

☒ **[By Electronic Service]** Pursuant to the Court's Electronic Case Management Order, I institute service of the foregoing document by submitting an electronic version of the document via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com. Service will be deemed effective as provided for in the Electronic Case Management Order.

Executed on October 26, 2023 at Los Angeles, California.

☒ STATE I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ FEDERAL I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Zenia Anderson