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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 REPLY IN SUPPORT OF ITS 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

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	1
	A. Plaintiffs Agreed to Arbitrate Their Claims	1
	1. Plaintiffs' Arbitrable Disputes Are Within the Agreements' Scope	2
	2. The Agreements to Arbitrate Are Enforceable and Not Preempted	5
	a. The Arbitration Agreements Are Enforceable	5
	b. The EFAA Does Not Apply to Plaintiffs' SAC	5
	B. Niantic's Motion to Strike Is Proper and Should Be Granted	8
	C. The Court Must Stay the Litigation Pending the Completion of Arbitration	10
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

Cases

Adolph v. Uber Techs., Inc.,
14 Cal. 5th 1104 (2023) 10

Allen v. Staples, Inc.,
84 Cal. App. 5th 188 (2022) 2

Armendariz v. Foundation Health Psychcare Services, Inc.,
24 Cal. 4th 83 (2000) 5

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 8

Cardenas-Cuevas v. Arbonne Int'l, LLC,
No. G055921, 2019 WL 1198964 (Mar. 14, 2019) 9

Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
207 F.3d 1126 (9th Cir. 2000) 1

Coast Plaza Drs. Hosp. v. Blue Cross of Cal.,
83 Cal. App. 4th 677 (2000) 5

Cruz v. PacifiCare Health Sys., Inc.,
30 Cal. 4th 303 (2003) 10

Gravillis v. Coldwell Banker Residential Brokerage Co.,
143 Cal. App. 4th 761 (2006) 2

Heritage Provider Network, Inc. v. Superior Ct.,
158 Cal. App. 4th 1146 (2008) 10

Iskanian v. CLS Transp. Los Angeles, LLC,
59 Cal. 4th 348 (2014) 8, 10

Jones v. Tracy School District,
27 Cal. 3d 99 (1980) 3

Kelly-Zurian v. Wohl Shoe Co.,
22 Cal. App. 4th 397 (1994) 7

Lyle v. Warner Bros. Television Prods.,
38 Cal. 4th 264 (2006) 6

Mera v. SA Hosp. Grp., LLC,
-- F. Supp. 3d --, 2023 WL 3791712 (S.D.N.Y. June 3, 2023) 7

Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.,
186 Cal. App. 4th 696 (2010) 2

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 5

Murphy v. DirectTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 8

Nixon v. AmeriHome Mortg. Co., LLC,
67 Cal. App. 5th 934 (2021) 9

Ortiz v. Hobby Lobby Stores, Inc.,
52 F. Supp. 3d 1070 (E.D. Cal. 2014) 9

Pepe v. New York Life Ins.,
No. CV 22-4005, 2023 WL 184879 (E.D. La. Feb. 7, 2023) 6

Reno v. Baird,
18 Cal. 4th 640 (1998) 6, 7

Tovar v. City of San Jose,
No. 5:21-CV-02497-EJD, 2021 WL 6126931 (N.D. Cal. Dec. 28, 2021) 5

Tyler v. Travelers Com. Ins. Co.,
499 F. Supp. 3d 693 (N.D. Cal. 2020) 5

United Transp. Union v. So. Cal. Rapid Transit,
7 Cal. App. 4th 804 (1992) 5

Vianna v. Drs.' Mgmt.,
27 Cal. App. 4th 1186 (1994) 8

Viking River Cruises, Inc. v. Moriana,
596 U.S. ----, 142 S. Ct. 1906 (2022) 10

Yanowitz v. L'Oreal USA, Inc.,
36 Cal. 4th 1028 (2005) 3, 4

Yost v. Everyrealm, Inc.,
No. 22 CIV. 6549 (PAE), 2023 WL 2224450 (S.D.N.Y. Feb. 24, 2023) 6

Statutes

9 U.S.C. § 3 10

9 U.S.C. § 401 6

9 U.S.C. § 402 ..... 1, 6

Cal. Bus. and Prof. Code § 17200 4

Cal. Code Civ. Proc. § 1281.2 1
Cal. Code Civ. Proc. § 1281.4 10
Cal. Lab. Code § 1197.5 ..... 2, 3

I. INTRODUCTION

The Court should require Plaintiffs to comply with their valid, enforceable contracts in which they agreed to arbitrate employment claims in exchange for their continued employment at Niantic. The Court should decline to entertain Plaintiffs' refusal to comply with the terms of their Arbitration Agreements.

Plaintiffs' Arbitration Agreements cover all claims arising out of Plaintiffs' employment, with very limited exceptions, including a carve out for claims of sexual harassment, sexual assault, and sexual bias. Plaintiffs seek to force their broadly pled class and representative claims into this narrow exception, even though exceptions are to be construed narrowly and most of their claims are simply not claims of sexual bias. The Court should not permit Plaintiffs to manipulate enforcement of the Arbitration Agreements by insisting that their theory, and not the nature and elements of the claims themselves, control the determination of arbitrability. To do otherwise would frustrate the very purpose of arbitration agreements and run afoul of the FAA.

The Ending Forced Arbitration Act ("EFAA"), which prohibits mandatory arbitration of sexual harassment claims, has no bearing on Niantic's Motion. The Arbitration Agreements themselves already carve out arbitration of sexual harassment claims. And Plaintiffs cannot make use of the EFAA before they state a plausible claim for sexual harassment (which they have not done, and likely cannot do). Even if the EFAA did apply, Plaintiffs' equal pay, retaliation, failure to prevent retaliation, UCL, and PAGA claims, are not subject to it because they are not related to Plaintiffs' sexual harassment claim.

The Court should grant Niantic's motion—including the class action waiver which *is* part of the enforceable Arbitration Agreements—and stay any remaining claims pending arbitration.

II. ARGUMENT

A. Plaintiffs Agreed to Arbitrate Their Claims

Arbitration is required, consistent with both state and federal law, where a valid agreement to arbitrate exists, the dispute falls within the scope of the arbitration agreement, and no statutory exception to the arbitrability of the claims applies. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); Code Civ. Proc. § 1281.2; 9 U.S.C. § 402(a). The Court

should grant Niantic's motion to compel certain of Plaintiffs' claims to arbitration because the claims are subject to the Arbitration Agreements (the "Agreements") and not subject to EFAA.

1. Plaintiffs' Arbitrable Disputes Are Within the Agreements' Scope

Plaintiffs do not dispute that all of their claims arise out of their employment, the prerequisite for application of the Agreements, but argue that *all* claims are encompassed within the "sexual bias" carve-out. This is contrary both to the requirement that the exceptions be narrowly construed, and to the nature of the claims pled in the Second Amended Complaint ("SAC").[1]

Contrary to Plaintiffs' assertion that there is ambiguity that should be interpreted in their favor, the Agreements' language is clear, and they apply to all claims arising out of Plaintiffs' employment except "claims of sexual harassment, sexual assault, or sexual bias." Decl. of Jennifer Hahn In Supp. of Mot. to Compel Arbitration ("Hahn Decl."), Exs. A, B at § (b) (Oct. 12, 2023). Importantly, "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); *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 186 Cal. App. 4th 696, 705 (2010) ("doubts as to the scope of an agreement to arbitrate are to be resolved in favor of arbitration") (citation omitted). The Court must therefore reject Plaintiffs' attempts to broaden this narrow exception to cover their entire SAC. The exception would swallow the rule if Plaintiffs' characterization, and not the elements of the claims, determined arbitrability.

The Equal Pay Act. While the EPA was enacted to address the wage gap, it is not itself a discrimination statute.[2] Indeed, unlike discrimination claims arising out of the FEHA, an EPA

[1] Niantic does not move to compel Plaintiffs' actual sexual bias claims, including Plaintiffs' sex-based discrimination and hostile work environment claims. To the extent Plaintiffs concede their failure to prevent discrimination and harassment claims and their Unfair Competition Law claim are derivative only of the foregoing, Niantic would similarly not object to Plaintiffs' ability to pursue those derivative claims in court. Niantic does not understand Plaintiffs to have made such a concession.

[2] While some courts have referred to EPA claims as "wage discrimination" claims, those references are colloquial, primarily made in the context of the federal EPA, and quite dated. In other instances, the reference is simply incorrect. For example, in *Allen v. Staples, Inc.*, the court states that to "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." 84 Cal. App. 5th 188, 194 (2022) (emphasis added) (internal citation omitted). Yet the EPA has no causation requirement, and a plaintiff need not prove that disparities are "based on" gender but instead need show a gender disparity across employees performing substantially similar work. Lab. Code § 1197.5.

claim arises out of the Labor Code and need not be administratively exhausted through the Civil Rights Division prior to filing a claim. Consistent with that background, an EPA plaintiff need not prove (or even allege) discriminatory intent. In other words, an EPA plaintiff need not demonstrate that she is paid less because of her gender. An EPA plaintiff must show she (1) was paid less than her comparator; (2) for substantially similar work; (3) performed under similar working conditions. CACI No. 2740. Plaintiffs are wrong that the "key difference" between an EPA claim and a FEHA wage discrimination claim is that the employer must "justify the disparate pay by proving that a factor *other than sexual bias* accounts for" the disparity. Opp. at 13, n.7. First, the EPA does not include the language "sexual bias" or anything similar. Lab. Code § 1197.5. Rather, it requires employers to be mindful when relying on the catchall "bona fide factor other than sex," that said factor is not simply a proxy for sex. It does not impose an intent requirement (and indeed, an employer may not even make use of this defense). Second, the *primary* difference between the two statutes is that under the EPA, a plaintiff need not—at any point—prove the employer's discriminatory intent. In other words, an EPA plaintiff can succeed even where no evidence of intent to discriminate is ever presented. And the statute's reference to a "willful violation" does not change the claim's substance.[3] That Plaintiffs take on a greater burden—to prove "*discriminatory* wage disparities *based on sex* and *caused by conscious and/or unconscious sexual bias*" (Opp. at 14)—does not permit them to change the fundamental nature of an EPA claim for purposes of pleading themselves out of their Agreements.

Retaliation Claims. Plaintiffs' claims for retaliation under the EPA and FEHA also do not require any proof of sexual bias or discrimination. Indeed, a retaliation claim is viable even where the employee's complaints were baseless. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1043 (2005) ("a retaliation claim may be brought by an employee who has complained of or opposed conduct . . . even when a court later determines the conduct was not actually prohibited by the FEHA.") (citing cases). Thus, a retaliation claim does not depend on the viability of the underlying claim about which employees complain. A retaliation claim requires

[3] Plaintiffs cite to *Jones v. Tracy School District*, 27 Cal. 3d 99, 105-106 (1980) where the court considered whether the statute of limitations limited recovery of damages and fees. The case is silent on the concept of "willful violation" and does not suggest that a claim for unequal pay amounts to a claim of sexual bias.

proof that plaintiff (1) engaged in protected activity; (2) suffered an adverse action, (3) that was substantially motivated by the protected activity, (4) which caused harm. CACI Nos. 2743, 2505. There is no requirement that a plaintiff demonstrate sexual bias. Rather, to prove their claims, Plaintiffs must show they made complaints and were retaliated against because of them—the subject matter of the complaint is irrelevant. Once again, Plaintiffs cannot plead their way out of their Agreements with superfluous facts that have no bearing on the legal merit of the claims.

Failure to Prevent Discrimination, Harassment, and Retaliation. Although pled as a single cause of action, Plaintiffs' failure to prevent claim is actually three claims in one. Niantic does not contest that to the extent Plaintiffs' failure to prevent discrimination and harassment claims are based on Plaintiffs' sex-based discrimination and harassment claims, those claims are reasonably outside the scope of the Agreements. However, Plaintiffs also allege a failure to prevent retaliation theory. Like the retaliation claim itself, a failure to prevent retaliation claim does not depend on Plaintiffs' allegations of sex-based discrimination. *Yanowitz*, 36 Cal. 4th at 1043. Plaintiffs need only demonstrate that they were retaliated against and that Niantic failed to take reasonable steps to prevent such retaliation. CACI No. 2527. The evidence relevant to the claim, then, is not evidence of sexual bias, but instead what steps the employer could or should have taken to prevent retaliation against employees who raised HR complaints.

Unfair Competition. Bus. and Prof. Code section 17200 broadly prohibits unlawful, unfair, or fraudulent business practices. To the extent Plaintiffs' claim is derivative solely of their FEHA discrimination and harassment claims, Niantic does not seek to compel it to arbitration. However, as pled, Plaintiffs base their UCL claim on their EPA and failure to prevent claims *(see* SAC ¶ 155) which are not derivative of sex bias claims and must be compelled to arbitration.

Race-based Claims. Plaintiffs do not expressly plead race-based causes of action for discrimination or equal pay. However, in addition to vague references to such a claim in their SAC (*see e.g.*, SAC ¶¶ 2-3, 111), their Opposition similarly alludes to race-based claims. *See, e.g.*, Opp. at 9. Plaintiffs do not expressly respond to Niantic's position that race-based claims must be compelled to arbitration (Mot. at 7, n.6), nor do they clarify whether they in fact seek to advance a race-based discrimination or equal pay theory. Any such claims must be arbitrated.

2. The Agreements to Arbitrate Are Enforceable and Not Preempted

California and federal courts resolve doubts on questions of arbitrability in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Coast Plaza Drs. Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 686 (2000) (same); *United Transp. Union v. So. Cal. Rapid Transit*, 7 Cal. App. 4th 804, 808 (1992) (arbitration required "unless it is clear that the arbitration clause cannot be interpreted to cover the dispute"). There is no dispute here that all of Plaintiffs' claims arise from their employment at Niantic. The Court should compel arbitration of Plaintiffs' EPA, EPA and FEHA retaliation, failure to prevent retaliation, and UCL claims (as well as any race-based claims, if Plaintiffs intend to pursue them) because the Agreements are enforceable, and the EFAA does not apply.

a. The Arbitration Agreements Are Enforceable

Plaintiffs do not dispute that the Agreements satisfy *Armendariz* and are not unconscionable. *See generally* Opp. to Def.'s Mot. to Compel Arbitration. Accordingly, the Court should deem these points conceded. *See Tovar v. City of San Jose*, No. 5:21-CV-02497-EJD, 2021 WL 6126931, at *2 (N.D. Cal. Dec. 28, 2021) (court permitted to treat as conceded arguments plaintiff fails to address in opposing motion to dismiss); *Tyler v. Travelers Com. Ins. Co.*, 499 F. Supp. 3d 693, 701 (N.D. Cal. 2020) ("As an initial matter, Plaintiff concedes these arguments by failing to address them in her opposition."). Plaintiffs instead argue that their "case" is excluded from mandatory arbitration by the EFAA. It is not.

As stated in Niantic's Motion, the Agreements are mutual, contain provisions to ensure Plaintiffs are not disadvantaged in agreeing to resolve their disputes in arbitration, and satisfy the *Armendariz v. Foundation Health Psychcare Services, Inc.* requirements for enforceability. 24 Cal. 4th 83, 91 (2000); *see also* Mot. at 8-9. The Agreements are also not unconscionable. *See* Mot. at 9-11. Plaintiffs do not argue otherwise. The Agreements must be enforced.

b. The EFAA Does Not Apply to Plaintiffs' SAC

Plaintiffs argue that the EFAA exempts their case from arbitration, but the EFAA does not apply to Plaintiffs' claims and even if it did, the Court should not find that it applies to the

entirety of Plaintiffs' SAC. As Plaintiffs acknowledge, the EFAA defines "sexual harassment" 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); *see also* Opp. at 10, n.4. The EFAA does not operate to invalidate an otherwise enforceable arbitration agreement where a plaintiff fails to plead a plausible sexual harassment claim. *Yost v. Everyrealm, Inc.*, No. 22 CIV. 6549 (PAE), 2023 WL 2224450, at *16 (S.D.N.Y. Feb. 24, 2023); *see also Pepe v. New York Life Ins.*, No. CV 22-4005, 2023 WL 184879, at *4 (E.D. La. Feb. 7, 2023) ("use of the word 'harassment' alone, without supporting legal or factual allegations, does not bring his case within the ambit of 9 U.S.C. § 402"). Such a restraint is necessary to prohibit a plaintiff from alleging a baseless harassment claim for the purposes of frustrating the terms of a valid, applicable arbitration agreement—an outcome plainly inconsistent with the FAA.

Plaintiffs' harassment claim here could not survive a demurrer, and accordingly they cannot avail themselves of the protections of the EFAA. To successfully invoke the application of the EFAA, Plaintiffs were required to demonstrate that their sexual harassment claim, as pled, is plausible under FEHA. Plaintiffs fail to do so, arguing instead that because they broadly assert "sexual bias" exists at Niantic, they must be permitted to litigate their entire case—regardless of the specific claims they assert—contrary to the express terms of their Agreements.

To state a claim for sex-based harassment under FEHA, Plaintiffs must allege: (1) they are members of a protected class; (2) they were subjected to unwelcome harassment; (3) the harassment was based on their protected class; and (4) the harassment unreasonably interfered with their work performance by creating an intimidating, hostile, or offensive work environment. *See Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 277-79 (2006). "Personnel management actions such as hiring and firing, job or project assignments, office or work-station assignments, promotion or demotion, performance evaluations, . . . deciding who will be laid off, and the like" are not harassment. *Reno v. Baird*, 18 Cal. 4th 640, 647 (1998) (citation omitted).

Plaintiffs' harassment claim fails because they allege only personnel management actions as the factual basis for their claim. Plaintiffs allege failure to promote, unequal pay, and termination—each firmly considered personnel management conduct outside the scope of a

harassment claim. *Compare* SAC, ¶¶ 34, 51 (plaintiffs not promoted nor given raises despite receiving positive feedback and reviews), *with Reno v. Baird*, 18 Cal. 4th 640, 646-47 (1998) ("… firing. . . promotion or demotion, performance evaluations…deciding who will be laid off" not harassment). This is true even where Plaintiffs' theory is that "sexual bias" impacted those personnel decisions. Moreover, none of the assertions allege conduct sufficiently severe or pervasive to support this claim. *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 409 (1994). In fact, Plaintiffs' factual allegations do not even use the word "harassing" to describe the conduct they experienced, which all amounts to routine personnel management decisions. *See* SAC at 9-19. Plaintiffs have not stated a plausible claim for harassment and accordingly, cannot avail themselves of the EFAA.

Even if the EFAA did apply to Plaintiffs' claims, it would have no effect here; it would only apply to claims that are already not arbitrable as a result of the Agreements' carve-out. Plaintiffs argue that if the EFAA is applicable, it mandates that their entire case remain in litigation, regardless of whether the case includes non-harassment claims. While some courts have agreed with Plaintiffs in that regard, others have severed claims that were unrelated to the harassment claims themselves. *Mera v. SA Hosp. Grp., LLC*, --- F. Supp. 3d ----, 2023 WL 3791712, at *4 (S.D.N.Y. June 3, 2023). In *Mera*, the court compelled the plaintiff's wage and hour claims to arbitration despite the EFAA, because it determined that the EFAA makes the otherwise applicable arbitration agreement unenforceable "only with respect to the claims in the case that relate to the sexual harassment dispute." *Id.* at *3. The court found the wage and hour claims were not "related to" the sexual harassment claims. *Id.* at *4. In addition to the support in the plain text of the EFAA, the court offered a policy argument in support of its decision: "To hold [that the EFAA applies to claims not related to sexual harassment] would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone." *Id.* at *3. The same holds true here. Plaintiffs should not be permitted to allege a bare bones harassment claim for the purpose of voiding the otherwise binding Agreements. That is particularly true given that the harassment claim is not the primary theory of liability

Plaintiffs advance. *See e.g.,* SAC ¶ 3 (focusing on pay equity and promotions).

Plaintiffs' claims are not subject to the EFAA. And even to the extent they were, the EFAA would have no additive value to Plaintiffs, whose sexual bias claims (*i.e.*, those claims related to sexual harassment) are already exempted from the Agreement.

B. Niantic's Motion to Strike Is Proper and Should Be Granted

Niantic filed its Motion consistent with the Court's order to file its motion to compel arbitration by October 12, 2023. The motion does exactly that. Far from the gamesmanship Plaintiffs suggest, Niantic properly filed a single motion to address the applicability of a single contract—the Mutual Arbitration Agreement And Class Action Waiver. Plaintiffs point to no prejudice that they have or will suffer as a result of opposing Niantic's Motion to Strike.

The Agreements separately require any claims asserted by Plaintiffs be arbitrated or litigated (for those claims exempted from arbitration) 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 v. Drs.' Mgmt.*, 27 Cal. App. 4th 1186, 1189 (1994) ("arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question"). In particular, class waivers are enforceable. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011); *Murphy v. DirectTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013) (Section 2 of the FAA "requires the enforcement of arbitration agreements that ban class procedures"); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014) (abrogated on other grounds).

Plaintiffs misconstrue Niantic's argument concerning the class waiver. Niantic does not contend that the class waiver is a separate agreement, but instead argues basic contract interpretation—that the structure of the Agreement is instructive in interpreting plain contract language.[4] Here, the Agreements include several subparts, each with a different purpose. Section (a) states the agreement to arbitrate. Section (b) indicates the carve outs to section (a). And Section (c) is a class waiver that does not distinguish between sections (a) and (b). It does not

[4] And because the class waiver is part of the Agreement, the FAA—not California law—governs. *See Concepcion*, 563 U.S. at 346-47.

follow that claims of sexual bias are exempted from Section (c) of the Agreement solely because they are exempted from Section (a). Indeed, while section (c) does include the language "this arbitration agreement," the agreement itself does not use that term consistently when addressing the entire document and does not state the phrase as a proper, defined term. Most relevant, however, is that section (b) carves claims out only from "arbitration" and does not reference the class action waiver—concepts that are distinct as indicated by the title of the document.

Importantly, as discussed in Niantic's Motion, the class waiver is broad. Far from limiting itself to a certain type of claim, the class waiver states that the signee waives the right to participate in a class or collective action "to the maximum extent permitted by law." Hahn Decl. Exs. A, B at § (c). It does not say to the maximum extent permitted by this agreement. It does not say that it waives the right to participate in a class or collective arbitration. Plaintiffs point to no law that would restrict Niantic's ability to obtain a class waiver for claims of sexual bias. The plain terms of the clause broadly waive the right to act as a class or collective representative and to participate in a class or collective action. *Id.* This is expressly permitted by law. *Cardenas-Cuevas v. Arbonne Int'l, LLC*, No. G055921, 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"); *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.").

Plaintiffs expressly agreed to the terms of the Agreements. The Agreements are conspicuous—a standalone document titled "Mutual Arbitration Agreement And Class Action Waiver." Within the two-page Agreement, Niantic emphasized the language of the class waiver. Plaintiffs were given adequate time to review the Agreements. Consequently, the Court should enforce the terms of the Agreements and strike the class and representative claims from the SAC. *See Nixon v. AmeriHome Mortg. Co., LLC*, 67 Cal. App. 5th 934, 939-40, 952 (2021) (affirming dismissal of class claims where individual claims were compelled to arbitration).

The class action and representative waiver similarly applies to Plaintiffs' PAGA claims as

made clear in the U.S. Supreme Court decision, *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ---, 142 S.Ct. 1906, 1924-25 (2022). The Supreme Court found that the FAA preempted *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014) to the extent *Iskanian* precluded division of PAGA claims into individual and non-individual claims. *Viking River*, 142 S.Ct. at 1924-25. But Plaintiffs do not plead an individual and a representative claim separately. Accordingly, Plaintiffs' PAGA claims as pled violate the Agreements and are not saved by *Iskanian*. The claims as pled must be stricken.[5]

C. The Court Must Stay the Litigation Pending the Completion of Arbitration

Once the Court compels the relevant claims to arbitration, it must stay the litigation of any non-arbitrable claims while the arbitration is pending. 9 U.S.C. § 3 (court "shall on application of one of the parties stay the trial of the action until such arbitration has been had"); Code Civ. Proc. § 1281.4 (same). Plaintiffs argue only that the Court should deny a stay as moot because none of their claims are arbitrable. Opp. at 19. As argued herein, however, certain of Plaintiffs' claims are subject to mandatory arbitration consistent with their Agreements. Accordingly, in the interests of fairness and efficiency, and because there is at least one overlapping issue across the arbitrable and non-arbitrable claims, the Court must stay the litigation. *See, e.g.*, *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 320 (2003); *Heritage Provider Network, Inc. v. Superior Ct.*, 158 Cal. App. 4th 1146, 1152-53 (2008); Code Civ. Proc. § 1281.4.

III. CONCLUSION

For the foregoing reasons, Niantic respectfully requests the Court grant its Motion in its entirety.

Dated: November 9, 2023

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[5] To the extent Plaintiffs agree their individual PAGA claims are subject to arbitration, and seek to preserve their representative claims pending resolution of arbitration, Niantic does not object to a stay of the PAGA representative claim. *See Iskanian* and *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).