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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By________ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MARCUS VAUGHN, et al, Plaintiffs/Petitioners, v. TESLA, INC, et al, Defendants/Respondents.	No. RG17-882082 ORDER GRANTING IN PART MOTION OF DEFENDANT TESLA TO DENY CLASS CERTIFICATION. Date: 4/7/21 Time: 3:00 p.m. Dept.: 21

The Motion of Tesla to deny class certification came on for hearing on 4/7/21, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Counsel appeared on behalf of Plaintiff and on behalf of Defendant. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of defendant Tesla to deny class certification is GRANTED IN PART.

PROCEDURE – MOTION TO NOT CERTIFY THE CLASS

The motion to not certify the class is procedurally proper.

The motion not defendant's demurrer or a motion to strike the class allegations because the motion is supported by evidence. A motion to strike class allegation is a recognized

procedural vehicle. "[I]f the defects in the class action allegations appear on the face of the complaint or by matters subject to judicial notice, the putative class action may be defeated by a demurrer or motion to strike." (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1062; *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 210.)

The motion is not plaintiff's motion to certify the class. On a motion to certify a class, the plaintiff has the burden of proof. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 ["The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members"].)

The motion is not defendant's motion to decertify the class following an order to certify a class. "A party moving for decertification generally has the burden to show that certification is no longer warranted." (*Kight v. CashCall* (2014) 231 CalApp.4th 112, 126.)

The motion is a pre-emptive motion by defendant to not certify the class. The court finds that as a matter of procedure a defendant can file a motion to not certify a class before a class is certified. If a defendant can move to strike class allegations on the pleadings before a motion for class certification, then it stands to reason that a defendant can file a motion to not certify the class before a motion for class certification. Federal law permits a defendant to file a pre-emptive motion to deny class certification. (*Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 940-941.) The motion is proper in this regard.[1]

On a pre-emptive motion by defendant to not certify the class, the court must provide a plaintiff with an adequate opportunity for discovery to oppose the motion.

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[1] As a matter of case management, and as an alternative to a defendant filing a motion to not certify a class, a defendant can ask the court to set a deadline for plaintiff to file a motion for class certification. (CRC 3.750(a)(8), 3.763(3). 3.764(b).)

If a defendant files a motion to deny class certification relatively early in a case, then this trial court would be inclined to borrow the procedure from motions for summary judgment. The court would continue the motion as necessary to permit the plaintiff to seek discovery of "facts essential to justify opposition." (CCP 437c(h).) If the defendant unreasonably fails to allow the discovery, then by analogy then the court would be inclined to grant a further continuance or to deny the motion to decertify. (CCP 437c(i).) The Order of 11/19/20 addressed this issue.

If a defendant files a motion relatively late in a case, then this trial court might be less inclined to continue the motion as necessary to permit the plaintiff to seek discovery. If a case is older than three years and the plaintiff has not yet filed a motion for class certification, then the court might reasonably find that the plaintiff had the opportunity to discovery facts relating to class certification and that a continuance to discover facts at that late date is not warranted. (CCP 583.410 [three years]; CRC 3.1340[two years]; Std Jud Admin 2.2(g) [three years].) The Order of 11/19/20 addressed this issue.

BURDEN OF PROOF

Defendant Tesla has the burden of proof on this motion because it filed this motion. "As a general rule, the "party desiring relief" bears the burden of proof by a preponderance of the evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 861.) (See also Evid Code 500; *Stangvik v. Shiley Inc.*, 1991) 54 Cal.3d 744, 751 ["defendant, as the moving party, bears the burden of proof"].) In contrast, a defendant that waits for a plaintiff to file a motion for class certification has the lesser hurdle of arguing that the plaintiff has not met her burden of proof.

On defendant Tesla's motion to not certify any class it is immaterial that plaintiff will have the burden of proof if plaintiff files a motion to certify a class. If plaintiff files that motion, then plaintiff will have the burden of proof. The law on summary judgment is a useful analogy. If a defendant files a motion for summary judgment on the ground that plaintiff cannot prove a claim, then the defendant has the burden of presenting undisputed material facts showing that it is entitled to judgment. The defendant has that burden even though the plaintiff will have the burden of proof to prove her claim at trial.

At the hearing on 4/7/21, Tesla relied heavily on *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, for the proposition that Plaintiff has the burden of proof. In *City of San Jose*, the defendant moved for an order declaring the action inappropriate as a class action. The trial court denied defendant's motion and took the opportunity to grant class certification for plaintiff. The defendant, reasonably, argued that the court could not grant class certification because the plaintiff had not even filed a motion for class certification. (*San Jose*, 12 Cal.3d at 453-454.)[1] The Supreme Court found the procedure appropriate. Regarding the grant of class certification, the Supreme Court stated, "The burden of such a showing falls on plaintiff." (*San Jose*, 12 Cal.3d at 460.)

This trial court reads *San Jose* as meaning that if the plaintiff wants the trial court to certify a class, then the plaintiff has the burden of proving class certification. This trial court does not read *San Jose* as suggesting that if a defendant files a motion to not certify a class that the burden then shifts to the plaintiff and that the plaintiff's opposition must then present all the

[1] As a general principle, the court cannot grant a motion that has not been filed. (E.g. *Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11, 19 ["trial court may issue a mutual restraining order … only where *both* parties have filed requests for such relief, so as to give the requisite notice to the opposing party"].)

evidence and argument that the plaintiff would normally present in a motion for class certification.

At the hearing on 4/7/21, Tesla also relied on *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, where the plaintiff and the defendant filed cross-motions to certify and to not certify a class. The trial court order focused on plaintiff's motion stating, "it is settled that the class action proponent bears the burden of establishing the propriety of class certification" and "A plaintiff's burden on moving for class certification …" The trial court order concluded, "The Court denies plaintiffs' motion for class certification and grants defendants' motion to deny class certification and strike the class allegations." (*Morgan v. Wet Seal, Inc.* (Cal.Sup. Ct. 2011) 2011 WL 9527949.) The Court of Appeal similarly stated, "To obtain class certification, plaintiffs had the burden…" (*Morgan*, 210 Cal.App.4th at 1354.)

It is apparent that in *Morgan* both the trial court and the Court of Appeal focused on plaintiff's motion for class certification, where the law is clear that the plaintiff had the burden. Neither addressed defendant' s cross-motion to not certify a class or whether the defendant had the burden on that motion. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

BACKGROUND ON CASE AND MOTION

The complaint alleges race harassment and makes class action allegations. Plaintiff Vaughn was employed on the production floor at the Tesla Factory, but he was employed by a staffing agency and was not employed by Tesla. (Order of 6/1/18; *Vaughn v. Tesla, Inc.* (2019) 2019 WL 2181391.) The evidence suggests that a large number of the persons who were

employed on the production floor at the Tesla Factory were employed by staffing agencies and were not employed by Tesla.

The complaint identifies the proposed class as "all African-Americans who were employed on the production floor at the Tesla Factory at any time from November 9, 2016 to the final disposition of this action." (Cpt para 28.) Before filing this motion, Tesla suggested to Vaughn that he redefine the proposed class to exclude persons who signed Tesla arbitration agreements. (Hasan 11/4/20 Dec, para 3-4.) Vaughn did not accept that proposal. The parties apparently never discussed the creation of subclasses to assist the parties and the court in defining what arbitration related issues apply to what subclasses.

Tesla's opening brief was focused on the class as proposed in the complaint and was based on the existence of arbitration agreements. Tesla argues that the court should deny class certification because Tesla policy and practice is that Tesla employees are bound by the Tesla arbitration agreement.

Plaintiff's opposition brief argues that there is no evidence that each member of the putative class is bound by the Tesla arbitration agreement. Plaintiff argues in the alternative that plaintiff can represent subclasses of persons who did not sign the Tesla arbitration agreement. Vaughn's opposition brief raised the possibility of subclasses. (Oppo at 6-10.)

Tesla's reply brief argues that Vaugh cannot represent the proposed subclasses because the persons employed by the staffing agencies signed arbitration agreements with the staffing agencies that require those persons to arbitrate any claims that they might have against Tesla. Tesla's reply presents substantial new evidence.

Regarding the scope of the motion, Tesla's motion was based on the limited issue of the existence of arbitration agreements. Plaintiff's opposition responds to that issue. Plaintiff's

opposition is not required to address the full range of issues that plaintiff will need to prove if plaintiff files a motion for class certification.

Regarding the submission of new evidence on reply, the court may consider new evidence on reply in appropriate circumstances. "[T]he general rule of motion practice ... is that new evidence is not permitted with reply papers. ... However, a recognized exception is for points "strictly responsive" to arguments made for the first time in the opposition." (*Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 53 Cal.App.5th 733, 774.) If the court considers evidence the is not "strictly responsive," then the court must extend the briefing and give the other party the opportunity to respond to the new evidence. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 449; *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) The process of reply briefs with new evidence cannot go on forever. "[A trial] court must be allowed to halt the exchange of reply memoranda at some point." (*Acumed v. Stryker* (CAFC 2008) 551 F.3d 1323, 1332.)

On the facts of this motion, the court will not consider the substantial new evidence regarding staffing agency arbitration agreements that Tesla submitted in reply because that would lead to an additional round of briefing. Plaintiff's motion for class certification will be the additional round of briefing. Tesla may present its evidence in opposition to plaintiff's anticipated motion for class certification.

The court will consider the motion of Tesla to deny class certification in the context of both the proposed class and several potential subclasses.

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CLASS AS PROPOSED.

The motion of Tesla to deny certification of the entire class as proposed is GRANTED.

The complaint identifies the proposed class as "all African-Americans who were employed on the production floor at the Tesla Factory at any time from November 9, 2016 to the final disposition of this action." (Cpt para 28.)

Tesla reads this class definition as being limited to Tesla employees and presents evidence that Tesla had a policy and practice that every Tesla employee must accept an offer letter that contains the Tesla arbitration agreement. (White 11/4/20 Dec., para 4, Exh A.) The court finds for purposes of this motion that the majority of Tesla employees are likely bound by the Tesla arbitration agreement. Plaintiff Vaughn did not enter into a Tesla arbitration agreement. (*Vaughn v. Tesla, Inc.* (2019) 2019 WL 2181391.)

At class certification, the court will need to consider a defendant's affirmative defenses and how the defendant's assertion of those affects commonality, adequacy, typicality, and manageability concerns. (*Duran. U.S. Bank, N.A.* (2014) 59 Cal.4th 1, 33).

Tesla has presented evidence that it will assert the affirmative defense of arbitration agreements. "An agreement to arbitrate is an affirmative defense to claims asserted in a lawsuit." (*Orgel v. PacPizza, LLC* (2015)237 Cal.App.4th 342, 355) (See also *Hendershott v. Ready to Roll Transportation* (2014) 228 Cal.App.4th 1213, 1224-1225.)

Plaintiff Vaughn did not enter into a Tesla arbitration agreement. Vaughn therefore is not typical of the many members of the proposed class who have arbitration agreements with Tesla. (*Hendershott,* 228 Cal.App.4th at 1223.)

Plaintiff Vaughn is not an adequate representative of the members of the proposed class who have Tesla arbitration agreements. (*Hendershott,* 228 Cal.App.4th at 1223.) Plaintiff

Vaughn has no standing to argue that the Tesla arbitration agreements are unconscionable. (*One World Networks Integrated Technologies, Inc. v. Duitch* (2002) 103 Cal.App.4th 1038, 1042 [third party to arbitration agreement has no standing to seek order staying arbitration].) (See also Tesla opening brief pages 19-22 [federal cases].)

Regarding commonality, common issues will likely predominate regarding the interpretation of the terms of the common contract and any argument that the terms of the contract are substantively unconscionable. In contrast, individual issues would likely predominate regarding whether the presentation of the contract to any given person was procedurally unconscionable.

The case will not go forward with the current class definition. This is in part a case management issue. In *Sky Sports v. Superior Court* (2011) 201 Cal.pp.4th 1363, the Court of Appeal dealt with the related issue of defining the appropriate time for a defendant to bring a motion to compel absent class members to arbitrate their claims.

The court has not certified a class, so the absent class members are not yet parties to this case. If the court were to certify the class with the current class definition, then the notice and opt-out procedure would then give the court jurisdiction over the absent class members. At that point, the Defendant could move to compel arbitration for those persons who signed arbitration agreements. Which would raise the issue of whether plaintiff Vaughn was an adequate and typical class representative to argue that the Tesla arbitration agreement is enforceable. Which is the issue presented in this motion. The court can determine on this motion that plaintiff Vaughn cannot adequately represent a potential class of Tesla employees who signed Tesla arbitration agreements on claims arising after the commencement of their employment with Tesla.

CONSIDERATION OF A REDEFINED CLASS OR THE USE OF SUBCLASSES.

Plaintiff suggested the use of subclasses in his opposition to this motion. A plaintiff is not limited to the class definition proposed in the complaint. The court may also redefine a class or consider subclasses. (CRC 3.765(b).)

"If necessary to preserve the case as a class action, a court may redefine the class to reduce or eliminate an ascertainability or manageability problem." (*Sarun v. Dignity Health* (2019) 41 Cal.App.5th 1119, 1137-1138; *Cohen v. DIRECTV* (2009) 178 Cal.App.4th 966, 979.) The trial courts can also consider and create subclasses. (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 376-377.) Thus, just as court can at class certification grant a plaintiff's motion for class certification based on a redefined class, or based on the use of subclasses, the court can deny a defendant's motion to deny class certification with instructions that the plaintiff allege a redefined class or subclasses that reflect distinctions that are relevant to the plausibility of class certification of a class or subclass. (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99.)

At the hearing on 4/7/21, Tesla argued that the plaintiff had the burden of presenting substantial evidence that a subclass could be certified. It is Tesla's motion, so Tesla has the burden of negating the possibility and usefulness of subclasses. (Evid. Code 500, *Aguilar*, 25 Cal.4th at 861.) Plaintiff presented evidence that supports the use of subclasses. If plaintiff files a motion for class certification, then plaintiff will have the burden to demonstrate commonality and manageability.

The court can also on its own determine that subclasses are appropriate as an effective means to manage a class action. (*Sarun v. Dignity Health* (2019) 41 Cal.App.5th 1119, 1138 ["a court may redefine the class to reduce or eliminate an ascertainability or manageability

problem"].) The trial court is an active participant at class certification because "trial courts are required to "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants *and the courts*." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 [emphasis added].) "[I]f the class action is to prove a useful tool to the litigants and the court, trial courts must be accorded the flexibility "to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process." (*Linder*, 23 Cal.App.4th at 440.) The trial court is also ultimately required to manage any resulting trial so that the trial provides due process to both the absent class members and to the defendant. (*Kight v. CashCall* (2014) 231 CalApp.4th 112, 127.) That said, when a plaintiff files a motion for class certification, then "It is not sufficient ... simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question." (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432-1433.)

When the court considers the use of potential subclasses, the court focuses on ascertainable subclasses. A class is "ascertainable" when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary. (*Noel v. Thrifty Payless* (2019) 7 Cal.5th 955, 961, 967, 980-981.) For purposes of ascertainability, the parties and the court do not need to identify by name the persons in the proposed class or any potential subclass. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.)

The court can readily identify four potential subclasses. The potential subclasses are defined by the extent to which persons entered into arbitration agreements and the scope of any such arbitration agreements.

THE COURT ISSUES NO ORDER ON THE ENFORCEABILITY OF ANY ARBITRATION AGREEMENT

Motions to grant or to deny class certification are procedural in nature and the court should not reach substantive issues. ((*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.) The existence and enforceability of arbitration agreements is a substantive affirmative defense that the court should not reach on class certification. (*Hendershott v. Ready to Roll Transportation* (2014) 228 Cal.App.4th 1213.)

The court expressly does not decide whether the Tesla arbitration agreement or any Staffing Agency arbitration agreement is enforceable as to any member of the proposed class or any potential subclass. The court does not compel any absent class member to arbitrate any claim and the court does not determine whether the terms of any arbitration agreement are substantively unconscionable or whether any arbitration agreement was presented in a manner that was procedurally unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.)

The court necessarily considers the existence and scope of the Tesla arbitration agreement because Tesla placed it at issue in its motion to not certify the class. Having argued that the court should not certify a class due to the existence and scope of the Tesla arbitration agreements, Tesla is estopped from arguing that the court cannot consider the text of the agreements in deciding the motion. The court must necessarily consider the existence and scope of the Tesla arbitration agreement and any staffing agency arbitration agreements in evaluating Tesla's motion and plaintiff's opposition to that motion. The court does so solely for purposes of class certification and not for the purpose of compelling any party or absent class member to arbitrate any claim.

SUBCLASS OF PERSONS WHO SIGNED TESLA ARBITRATION AGREEMENTS BEFORE STARTING WORK AT THE TESLA FACTORY.

The motion of Tesla to deny certification of a potential subclass of Black or African American persons who signed a Tesla arbitration agreement before starting work at the Tesla factory is GRANTED.

Tesla's motion is GRANTED as to this potential subclass. Plaintiff did not sign a Tesla arbitration agreement and is not an adequate or typical class representative for persons who signed a Tesla arbitration agreement before starting work at the Tesla Factory. (*Hendershott,* 228 Cal.App.4th at 1223; *One World*, 103 Cal.App.4th at 1042; Tesla opening brief pages 19-22.)

SUBCLASS OF PERSONS WHO SIGNED TESLA ARBITRATION AGREEMENTS AFTER STARTING WORK AT THE TESLA FACTORY.

The motion of Tesla to deny certification of a potential subclass of Black or African American persons who signed a Tesla arbitration agreement after starting work at the Tesla factory is DENIED.

Plaintiff's opposition asserts that he can represent persons who signed a Tesla arbitration agreement after starting work at the Tesla factory. Plaintiff reasons that the Tesla arbitration agreements apply only after they are signed and that plaintiff can represent persons for the time period before they signed the Tesla arbitration agreements. (Oppo at 8-10.)

Plaintiff is arguably an adequate or typical class representative for these persons for the time frames they worked at the Tesla factory spent before signing the Tesla arbitration agreement.

The court will decide in this procedural motion whether the Tesla arbitration agreement covers disputes that are based on facts before the signing of the agreement. This is a merits issue regarding Tesla's arbitration affirmative defense, but it is also "enmeshed" with the issue of identifying and defining an appropriate subclass and will be "necessary" to the definition of plaintiff's proposed subclass. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1024-1025.)

First, the court considers the plain language of the Tesla agreement. The Tesla offer letter states, "If you accept our offer, your first date of employment will be [DATE]." The Tesla offer letter (arbitration agreement) states "you and Tesla agree that that any and all disputes, ... arising from or related to your employment .... (White 11/4/20 Dec., Exh 1.) The critical phrase is "arising from or related to your employment."

The court reads contracts to give effect to their text. "When language in a contract is clear and explicit, that language governs interpretation." (*Salgado v. Carrows Restaurants, Inc.* (2019) 33 Cal.App.5th 356, 359-360.) The text of the Tesla arbitration agreement states the date employment begins. The text of the Tesla arbitration agreement between a person and Tesla compels the conclusion that "your employment" means the employment relationship between the person and Tesla. The start of "employment" is the key fact, not the date of signing the agreement.

The court considers two scenarios. The court would read "your employment" as including events during a person's employment with Tesla if the person started employment with Tesla but did not complete the employment paperwork that included the start date until several weeks after the start of employment. In contrast, the court could not reasonably read "your employment" as including events during a person's employment with a staffing agency even if

the staffing agency assigned the person to Tesla. If a person were employed by a staffing agency for a time period and during that time period they were not a Tesla employee with contract rights to the benefits of contractual employment with Tesla, then they would not bound by the Tesla arbitration agreement for injuries suffered during that time period. The evidence in this case suggests that plaintiff and the persons in the potential subclass are in the second scenario. The text of the Tesla contract is that arbitration agreement does not include the time period before employment started.

Second, the court considers equitable estoppel. The claims of a putative class member in this case against Tesla for the time period before the person signed the Tesla arbitration agreement would arguably require the person (or the subclass) to prove that Tesla was an employer under the FEHA. (Oppo at 6-7.) Thus, the merit of the FEHA claims arguably depends on a finding that Tesla was an "employer" (or joint employer) under the FEHA when the alleged harassment occurred. The trial court order of 6/1/18 and the Court of Appeal decision in *Vaughn v. Tesla, Inc.* (2019) 2019 WL 2181391, held that plaintiff Vaughn's claims arose from the FEHA and not from a contract with Tesla and that equitable estoppel did not apply. Equitable estoppel does not require plaintiff and the members of a class to arbitrate claims arising in the time period before employment started.

Third, the court considers consistency. Tesla's form offer letter states, "Subject to the rules of the applicable plan documents, you will also be eligible to receive other benefits that Tesla may provide to its employees … beginning on the date of you hire." Tesla's form offer letter states it has a "competitive benefits package" and identifies the 401K Program and the Paid Time Off Program. (White Dec. Exh A.) Tesla's offer letter to Vaughn dated 10/16/17 included in the compensation package the possibility of an Equity Grant in Restricted Stock Options.

(Abad Dec filed 2/23/18, Exh C.) The court suspects that Tesla would vigorously contest any assertion that a person employed by a staffing agency was a Tesla employee entitled to the Tesla compensation package for the time period the person was employed by the staffing agency but assigned to work at Tesla. For that matter, the court suspects that it is highly unlikely any court would find that a person was a Tesla employee for purposes of the compensation package before the person's start date as a Tesla employee. (*Zhi An Wang v. Fang* (2021) 59 Cal.App.5th 907 fn 9 [referencing the axiom, "What is sauce for the goose is sauce for the gander"].)

Fourth, the court considers whether the absent class members could temporally separate claims of (1) harassment at the Tesla factory before employment with Tesla and (2) harassment at the Tesla factory after employment with Tesla. As a general proposition, a party can separate a series of recurring events into a series of separate recurring claims. For example, where wages are concerned, each day of non-payment is a separate violation that accrues independently. Another example is that a court may grant summary adjudication on some claims involving forged checks without resolving all the claims involving forged checks. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1116-1117.)

In this case, plaintiff is asserting race-based harassment. (Complaint, para 51-59.) Plaintiff or a class must prove that the alleged harassment was "sufficiently severe or pervasive to alter the conditions of the [classmembers'] employment and create an abusive working environment." (*Nazir v. United Airlines, Inc.* 178 Cal.App.4th 243, 263-264.) "Whether the … conduct complained of was sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances." (*Fisher v. San Pedro Peninsula Hospital* (1998) 214 Cal.App.3d 590, 609.)

Plaintiff is alleging a pattern or practice of race harassment at the Tesla factory. (Complaint par 11-27.) The class claim is that the harassment is "pervasive." The class claim is not based on a single "severe" incident or a few "severe" incidents. Given the nature of the claims alleged, it is superficially implausible that Vaughn or a member of the putative class could separate the claim for pervasive harassment into a series of temporally distinct incidents. Regarding liability, there is substantial evidence that plaintiff could plausibly prove ongoing pervasive harassment. (Plaintiff appendix of exhibits with witness declarations.) Regarding damages, "'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' (*Duran. U.S. Bank, N.A.* (2014) 59 Cal.4th 1, 33).

The court has considered Tesla's concern that a claim of pervasive harassment is a single claim and that it would be claim splitting for a person to assert claims for some months in the class action and claims for other months in arbitration. The court identifies three problems with that argument.

Initially, claim splitting is when the plaintiff splits the claim. "The rule against splitting a single cause of action prohibits a plaintiff from turning a single cause of action into the basis of several suits." (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 551.) "[T]he prohibition against splitting a cause of action exists for the benefit of the defendant." (*Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 910.)

It is not claim splitting when a defendant requires a plaintiff to split a claim. Or, stated otherwise, if a defendant requires a plaintiff to split a claim then the defendant is estopped from arguing that the plaintiff engaged in improper claim splitting. On the facts of this case, Tesla is asserting that any putative absent class member who worked at the Fremont factory for some

time frame subject to an arbitration agreement must arbitrate all claims that arose in that time frame. Tesla has every right to seek to enforce its arbitration agreement, but Tesla cannot then claim prejudice because Tesla's enforcement of its arbitration agreement split harassment (or other) claims into temporally distinct claims based on the temporal scope of Tesla's arbitration agreement.

Secondarily, if Tesla's argument regarding claim splitting of an indivisible claim for ongoing pervasive harassment were carried to its logical conclusion then a person could not assert the claim in either court or in arbitration because the claim could not be wholly resolved in either forum. At the hearing on 4/7/21, Tesla stated that any person could elect to bring an indivisible claim for ongoing pervasive harassment in arbitration and implied that Tesla would not object to arbitrating claims that arise outside the temporal scope of the arbitration agreement.

Tesla's suggestion is a practical solution if any person wanted to pursue their claims through arbitration. Tesla's suggestion does not, however, address the fact that the arbitration agreements have temporal scopes. The court cannot compel Tesla employees, or persons who worked at Tesla, to arbitrate claims that arose outside the temporal scope of the relevant arbitration agreements. (*Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 386 [Arbitration "is ... a matter of contract between the parties"].) (See also *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"].)

Thirdly, Tesla argues in reply that plaintiff is claim splitting because plaintiff has waived certain claims and that he is therefore not an adequate class representative. Tesla identifies an email where counsel for plaintiff states, "Plaintiff is not seeking lost wages on behalf of himself

or the class, and can provide a statement to that effect." (Hassan Reply Dec, Exh 4.) Tesla's argument is beyond the scope of the issues raised in the opening brief. Plaintiff's statement appears to be confirmation that plaintiff is asserting claims for harassment under the FEHA (Govt Code 12940) and is not asserting Labor Code claims for unpaid wages, missed meal and rest beaks, and similar matters. (Complaint.) Based on the email alone, plaintiff does not appear to affirmatively waiving any claims for lost wages. Plaintiff and Tesla can address on plaintiff's motion for class certification whether the right to be free from harassment and the right to be paid for hours worked are the same primary right and whether plaintiff is not an adequate class representative because he is not asserting Labor Code claims. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 463-464.)

Fifth, the court considers whether it would be unmanageable to temporally separate claims of (1) harassment at the Tesla factory before employment with Tesla and (2) harassment at the Tesla factory after employment with Tesla. As noted above, plaintiff could plausibly prove a pattern of ongoing pervasive harassment. Assuming liability, the trier of fact could potentially determine that damages were some fixed amount of damages per person per week. Alternatively, and assuming liability, the trier of fact could determine aggregate damages that would then be apportioned among the absent class members either based on the weeks or months worked or based on some internal administrative claims process that would not involve Tesla. (*Sav-On*, 34 Cal.4th at fn 12; *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 417-418.) Tesla has not demonstrated that it would be unmanageable to separate any given absent class member's harassment claim into temporally distinct segments.

SUBCLASS OF PERSONS WHO SIGNED STAFFING AGENCY ARBITRATION AGREEMENTS BEFORE OR AFTER STARTING WORK AT THE TESLA FACTORY.

The motion of Tesla to deny certification of a potential subclass of Black or African American persons who signed a Staffing agency arbitration agreement before or after starting work at the Tesla factory is DENIED.

Plaintiff's opposition asserts that he can represent persons placed at Tesla who did not sign Tesla arbitration agreements. (Oppo at 6-8.)

Procedurally, Tesla's opening brief focused on Tesla employees and did not present evidence of the existence or terms of the staffing agency arbitration agreements. Plaintiff's opposition presented evidence that many persons who worked on the Tesla Fremont factory floor were not Tesla employees. Tesla first presented evidence of the staffing agency agreements in its reply papers.

As stated above, on the facts of this motion, the court will not consider the substantial new evidence regarding staffing agency arbitration agreements that Tesla submitted in reply because that would lead to an additional round of briefing. Tesla may present its evidence in opposition to plaintiff's anticipated motion for class certification.

The court notes, by way of dicta, that plaintiff would likely have the same standing challenges representing persons who signed staffing agency arbitration agreements as plaintiff has representing persons who signed Tesla arbitration agreements.

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SUBCLASS OF PERSONS WHO HAVE NOT SIGNED A TESLA ARBITRATION AGREEMENT OR A STAFFING AGENCY ARBITRATION AGREEMENT AND WHO WORKED AT THE TESLA FACTORY.

The motion of Tesla to deny certification of a subclass of Black or African American persons who have not signed either a Tesla arbitration agreement or a Staffing agency arbitration agreement and who worked at the Tesla factory is DENIED.

Tesla has not demonstrated that the court should not certify this subclass.

Commonality. Tesla did not address commonality other than in the context of the arbitration agreements.

Adequacy and typicality. Tesla did not address adequacy and typicality other than in the context of the arbitration agreements.

Ascertainability. Tesla did not address ascertainability. At the hearing on 4/7/21, Tesla addressed ascertainability indirectly in the context of manageability, arguing that it would be unmanageable to identify those persons who signed arbitration agreements. This is not persuasive. A class is "ascertainable" when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary. (*Noel v. Thrifty Payless* (2019) 7 Cal.5th 955, 961, 967, 980-981.) The determination of whether an arbitration agreement exists is a simple objective inquiry. If an individual absent class member who had signed a Tesla arbitration agreement were to file an individual claim against Tesla, the court has confidence that Tesla could readily locate any such arbitration agreement for the purpose of filing a motion to compel arbitration.

Numerosity. Tesla's opening brief did not address numerosity. Plaintiff's opposition suggested subclasses and presented declarations of persons who stated they had not signed

arbitration agreements. (Oppo at 6-8; Avoni 2/26/21 Dec; Pltf compendium of Decs.) Tesla in reply produced evidence that many of those persons had signed arbitration agreements with Tesla or a staffing agency. (White 3/12/21 Dec.) This evidence is in support of a new argument that was raised for the first time on reply and the court does not consider the argument or the evidence. Tesla has not demonstrated that a subclass of persons who did not sign arbitration agreements would not be numerous.

On plaintiff's motion for class certification, and in the context of numerosity, the court ORDERS plaintiff to identity those persons who plaintiff thinks have not signed an arbitration agreement with Tesla or a staffing agency. This will permit Tesla to produce arbitration agreements for specific individuals, which will them permit the court to determine whether persons without arbitration agreements are numerous.

Manageability/ Superiority. Tesla did not demonstrate that a trial of the subclass of persons who did not sign arbitration agreements would not be manageable or superior to individual lawsuits.

On plaintiff's motion for class certification, the court ORDERS plaintiff to set out how plaintiff might present a manageable class trial on both liability and damages. The court will consider "innovative procedural tools." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 339.) "It is not sufficient .... simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question." (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432.) The discussion of manageability at class certification does not bind any party to exactly how they present their case at trial, but the court must have confidence that a class trial would be manageable.

There are two basic models for structuring a class trial that includes some individual issues. Plaintiff must, for example, state whether a trial would be manageable, efficient, and provide due process under either or both models.

The first model involves a two-phase trial. In the first phase the court typically determines whether the actions, policies, or procedures of the defendant were lawful. If the plaintiffs prevail in the first phase, the case moves to second phase hearings on individualized issues where the defendant has the burden of demonstrating that it is not liable to each member of the class. In this model, there is no common fund and the defendant is subject to open ended liability based on the results of the hearings. (See e.g. *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 360-361; *Estrada v. RPS, Inc.* (2005) 125 Cal. App. 4th 976, 984 (first phase found that the class members were employees of the defendant, a second phase determined which categories of expenses were compensable, and a third phase involved the appointment of a referee to take evidence, perform an accounting, and report back to the trial court): *Hansell v. Santos Robinson Mortuary* (1998) 64 Cal. App. 4th 608, 610 (by stipulation the court held a first phase trial on issues of duty and breach and deferred issues of causation and damages to a second phase); *Day v. NLO* (S.D. Ohio 1994) 851 F. Supp. 869, 875-876 (class trial on liability followed by individualized hearings regarding emotional distress damages).

A potential variant on the two phase trial would be a phase one trial that determined liability and some set amount of damages per person per week and then class members would have individual adversarial hearing where they would be required to demonstrate only that they were members of the defined class and that they worked at the Tesla factory floor for the claimed number of weeks. (*Sav-On*, 34 Cal.4th at fn 12.)

If plaintiff proposes a two-phase trial, then the court ORDERS plaintiff explain how the two-phase class trial would be superior to separate individual trials. A trial procedure that had individual hearings on the amount of damages would result in what amounts to a series of individual trials on damages, thus arguably destroying much of the superiority of the class procedure.

The second model involves a single trial with a single judgment followed by the distribution of a common fund to the class members in an internal nonadversarial process. In this model a class trial determines both the defendant's liability and the total damages owed to the class. After a fund is created, the fund is distributed through a claims process, a formula, or a cy pres procedure. Examples include *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 750 (*Bell III*) (summary judgment on liability followed by class trial on damages that awarded $88.8 million), and *Rich v. Schwab* (1998) 63 Cal. App. 4th 803, 809 (class trial on liability followed by class trial on damages that awarded $ 1.7 million in compensatory damages). *Bell III* holds that a trial of an aggregation of claims can be proper even if (1) some individual members of the class cannot, or do not, prove that they were damaged, 115 Cal.App.4th at 744; (2) some (or most) class members do not testify and the trier of fact is required to extrapolate the testimony of the testifying witnesses to the absent members of the class, 115 Cal.App.4th at 747-749; and (3) an award of aggregate damages results in overcompensating some class members and undercompensating others, 115 Cal.App.4th at 750-751. *Bell III* concludes that a class trial that awards damages in the aggregate can be structured so that the benefits outweigh the problems and all parties receive due process.

If plaintiff proposes a one phase trial, then the court ORDERS plaintiff to explain how the one phase class trial would address the determination of aggregate damages and the

allocation of damages, if any, among the members of the class. The plan might be to allocate damages to class members based on the weeks or months worked in the Tesla factory. The plan might be to allocate damages to class members based on a post-judgment procedure that is nonadversarial and internal to the class. (*Sav-On*, 34 Cal.4th at fn 12; *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 417.) Tesla would have no interest in any post-trial allocation of damages, but the court must consider it as part of manageability and superiority.

The court's identification of the two basic models for structuring a class trial is not a finding that either would result in a manageable trial that would provide due process to the putative absent classmembers or to Tesla. Plaintiff must demonstrate on his motion for class certification that a class trial would be manageable om the specific facts of this case.

CONCLUSION

The motion of defendant Tesla to deny class certification is GRANTED IN PART.

The court ORDERS that on or before 20 court days from the filing of this order plaintiff must file a First Amended Complaint that asserts subclasses. Plaintiff may assert subclasses on the lines identified in this order or plaintiff may assert other proposed subclass definitions. On plaintiff's motion for class certification Tesla and the court must be able to address the class issues relating to commonality, typicality, and adequacy in an orderly manner.

At the hearing on 4/7/21, plaintiff noted that the creation of subclasses will arguably require that there be a representative for each subclass and on that basis requested leave to add new plaintiffs to the case to act as representatives of any subclasses. The court does not in this order permit plaintiff to add new plaintiffs. Plaintiff may file a motion for leave to file an amended complaint that adds new plaintiffs. (*Payton v. CSI Electrical Contractors, Inc.* (2018)

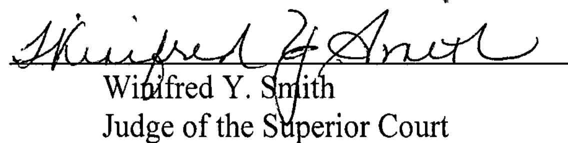
27 Cal.App.5th 832, 848-849; *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99.) Alternatively, the parties may stipulate to the filing of an amended complaint with new plaintiffs.

The court expressly does not decide whether plaintiff can certify a class or subclass. The court will decide that on plaintiff's motion for class certification, where plaintiff will bear the burden of proof.

The stay of discovery entered on 11/19/20 is LIFTED.

Regarding case management, the court notes that the case was filed 11/13/17, was stayed on appeal from 6/29/18 through 7/25/19 (13 months), and the case is now approximately three- and one-half years old, with approximately one year of that being on appeal. The court encourages plaintiff to file his motion for class certification in the near future so that, if granted, then the notice and opt out procedure can take place and the trial can be held in late 2022 or early 2023.

Dated: April 9, 2021



Winifred Y. Smith
Judge of the Superior Court