SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

RG17882082: Vaughn VS Tesla, Inc.
03/01/2024 Hearing on Motion - Other PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; filed by Evie Hall (Plaintiff) + in Department 21

Tentative Ruling - 02/27/2024 Noël Wise

PARTIES TO APPEAR at the hearing. A class action must be "superior to alternate means for a fair and efficient adjudication of the litigation." (Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 332.) The court therefore considers the "alternate means" and sets out the case management options.

The court ORDERS that the parties may submit supplemental briefs of up to 12 pages before close of business Thursday February 29, 2024, addressing the issues and options set out by the court in the tentative decision.

The court ORDERS that at or before the hearing on March 1, 2024, Tesla must file a document or make a statement on the record whether it agrees that the filing of this putative class action tolled the time for the members of the putative class to file administrative charges with the DFEH and to file complaints with the court. Clarity on that issue will affect the evaluation of the options.

OPTION A (single trial on aggregate liability and aggregate damages). The motion is DENIED. Plaintiffs do not propose this trial structure. As a matter of law, a single trial on aggregate liability and aggregate damages is not appropriate where the members of the class seek aggregate emotional distress damages. (Bennett v. Regents (2005) 133 Cal.App.4th 347.)

OPTION B (Teamsters). The motion is GRANTED IN PART. The court certifies a class defined as the specific approximately 5,977 persons self-identified as Black/African-American who worked at Tesla during the class period from November 9, 2016, through the date of the entry of this order to prosecute the claims in the complaint. The trial will be the two-phase trial described in Teamsters. In Phase I the jury will not decide the issue of whether Tesla's Fremont facility was a hostile work environment. In Phase I the jury will decide the issues of whether Tesla had a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and whether when Tesla "[knew] or should have known of this conduct [it failed] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). After Phase I, the court will enter any appropriate injunctive relief. In Phase II the individual members of the class will pursue their individual claims for damages in jury trials that are part of this class action. (CCP 1048.) In Phase II Tesla may assert that any member of the class must pursue their claims in arbitration. The findings in the Phase I trial will be evidence in the Phase II trials, but the findings in the Phase I trial will not alter the burden of proof in the Phase II trials.

OPTION C (single issue). The motion is GRANTED IN PART. The court certifies a class defined as the specific approximately 5,977 persons self-identified as Black/African-American

who worked at Tesla during the class period from November 9, 2016, through the date of the entry of this order. The trial will not decide the issue of whether Tesla's Fremont facility was a hostile work environment. The trial will decide whether Tesla had a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and whether when Tesla "[knew] or should have known of this conduct [it failed] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). The trial would concern Tesla's practices during the class period and avoid the need to litigate the common issues repeatedly in any individual cases. Following the trial the court could enter judgment in the nature of a declaratory statement. The court will set the trial in this case for the same date as the trial in the CRD parallel law enforcement case, which is October 14, 2024. The members of the putative class must file individual cases if they want to seek damages.

OPTION D (injunctive relief only). The motion is GRANTED IN PART. The court certifies a class defined as all persons who worked at Tesla during the class period from November 9, 2016, through the date of the entry of this order to prosecute the issues of whether Tesla currently has a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and whether when Tesla currently "[knows] or should have known of this conduct [it fails] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). The trial will concern Tesla's practices in the relevant time frame and the need for prospective injunctive relief. After trial on these issues, the court will enter any appropriate injunctive relief. The court will set the trial in this case for the same date as the trial in the CRD parallel law enforcement case, which is October 14, 2024. The members of the putative class must file individual cases if they want to seek damages.

OPTION E (members of putative class must file individual actions). The motion is DENIED. The court will deny the motion in its entirety because common issues do not predominate. The members of the putative class will need to file individual actions, which the court would then manage as related cases. (CRC 3.300.)

OVERVIEW OF PURPOSE OF CLASS ACTION PROCEDURE

Class certification is a procedural device for managing the claims of numerous allegedly injured persons. A motion for class certification does not concern the merits. (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 437-444.)

Class actions are creatures of equity. (Estrada v. Royalty Carpet Mills, Inc. (2024) 15 Cal.5th 582, ___, 317 Cal.Rptr.3d 219, 238; Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1084.) "'The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, fn 14 [quoting Hansberry v. Lee (1940) 311 U.S. 32, 41-42].)

The class mechanism should be used when "substantial benefits accrue both to the litigants and the courts." (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.) A class action is a procedural mechanism for the resolution of numerous claims in a single lawsuit with all the attendant savings of time and energy for the parties and the court. "[T]he class suit both eliminates the

possibility of repetitious litigation and provides small claimants with a method of obtaining redress." (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435-436.) "If a class suit is not permitted …, a multiplicity of legal actions dealing with identical basic issues will be required in order to permit recovery by each of several thousand [plaintiffs]. The result would be multiple burdens upon the plaintiffs, the defendant and the court." (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 714-715.)

A class action must be "superior to alternate means for a fair and efficient adjudication of the litigation." (Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 332.) In determining whether a class is appropriate, "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions—not between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever." (Sav-on, 34 Cal.4th at 339 fn 10.)

Therefore, the court must consider all the other tools available for the effective and efficient judicial management of the claims that would be asserted and resolve in a class action. This complex department has the court's authority to manage cases generally (CCP 128(a)(3)), to manage complex cases specifically (CRC 3.400; Std. Jud. Admin. Standard 3.10), to manage related cases (CRC 3.300), to join multiple plaintiffs in a single case (CCP 378), to consolidate cases for pretrial or trial purposes (CCP 1048, CRC 3.350), to manage the claims of numerous persons using the class action mechanism (CCP 384), and to manage the claims of numerous persons as a coordinated proceeding (CCP 404; CRC 3.501. (See generally Volkswagen of America, Inc. v. Superior Court (2001) 94 Cal.App.4th 695, 704-705 [complex]; McGhan Medical Corp. v. Superior Court (1992) 11 Cal.App.4th 804, 805 [coordination].)

OVERVIEW OF RELATED CASES

As noted above, a class action must be "superior to alternate means for a fair and efficient adjudication of the litigation." (Sav-on, 34 Cal.4th at 332.) This is a situation where the "alternate means" are actual and current alternatives.

This trial court is managing three related categories of cases that concern allegations of race or sex harassment or discrimination against Tesla. The court's goal is to manage the claims effectively, efficiently, and to avoid inconsistent orders. (CRC 3.400; Std Jud Admin 3.10; Volkswagen of America, Inc. v. Superior Court (2001) 94 Cal.App.4th 695, 704-705.)

Category 1 is this putative class action. Vaughn v. Tesla, RG17882082, is a putative class action that alleges claims for race harassment at the Tesla Fremont manufacturing facility. The case was filed on November 13, 2017. The temporal scope of the putative class action is from November 9, 2016, through the present. The case has taken two trips to the court of appeal. (Vaughn v. Tesla, Inc. (2019) 2019 WL 2181391 [arbitration re plaintiff Vaughn]; Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208 [arbitration re plaintiffs Chatman and Hall/public injunction].)

Category 2 is a law enforcement action. Civil Rights Department v. Tesla, 22CV006830, is brought by the Civil Rights Department, which is part of the Business, Consumer Services and Housing Agency of the State of California. (Govt Code 12804.) The law enforcement action alleges claims for race harassment and discrimination at the Tesla Fremont manufacturing facility and throughout California. The case was filed on February 9, 2022. The claims appear to

be limited to those that arise from June 18, 2018, through the present. (Dept. of Fair Employment and Housing v. Tesla, Inc. (Superior Court 2022) 2022 WL 17549760 at *5.) Trial is set for October 14, 2024.

Category 3 is approximately 15 active actions brought by individual plaintiffs. The individual actions allege claims for race or sex harassment and discrimination at the Tesla Fremont facility and potentially elsewhere in California. The court recently reassigned all the identified individual plaintiff cases to Judge Wise in Dept 21 to obtain the efficiencies of consistent case management and avoid inconsistent orders. (CRC 3.300 [related cases].)

The court identifies the three categories of cases because the court must consider whether a class action would be "superior to alternate means for a fair and efficient adjudication of the litigation." (Sav-on, 34 Cal.4th at 332.) The court does not consider the motion for class certification in a vacuum.

The three categories of cases are interrelated. The management of one category affects the management of the others. The putative class action, the law enforcement action, and the individual cases would each concern in part whether Tesla had a pattern or practice of failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring" and whether Tesla failed to take immediate and appropriate corrective action when Tesla "[knew] or should have known of this conduct." (Govt Code 12940(j)(1) and (k)). Similarly, the putative class action, the law enforcement action, and the individual cases each assert that individual persons were subject to discrimination or harassment and that they should recover damages. As proposed by counsel for Vaughn, the putative class action would address both in a single action using the two-phase approach described in Teamsters v. United States (1977) 431 U.S. 324, and Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, 35-37. The law enforcement action would likewise address both in a single action using the same two-phase approach. The individual cases focus on the actions that affected each individual plaintiff, but in each case a potential finding that Tesla had a pattern or practice of failing to prevent or address race discrimination and harassment would arguably be relevant evidence. Thus, the issue for the court is not the abstract issue of whether a class action is a mechanism that would be superior to hypothetical alternatives but the immediate real-life issue of whether a class action would be superior to the alternative cases that are currently being pursued in this court by the CRD and by individual persons.

BACKGROUND

The Second Amended Complaint filed July 7, 2021, alleges race discrimination and harassment at Tesla's production facility in Fremont, California. Plaintiff asserts that because of Tesla's failure to comply with the FEHA, that the members of the class were exposed to discrimination and harassment as a result of their race and suffered emotional distress damages. The Second Amended Complaint asserts claims for Race-Based Discrimination in Violation of FEHA (Govt Code 12940(a), Race-Based Harassment in Violation of FEHA (Govt Code 12940(j)(1)) and Failure to Prevent Discrimination and Harassment in Violation of FEHA (Govt Code 12940(k)). The court will discuss the evidence in the context of the discussion on commonality.

COURT DISCRETION IN CLASS CERTIFICATION

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The California Supreme Court "has urged trial courts to be procedurally innovative" in managing class actions. (Sav-on, 34 Cal.4th at 339.) "[T]he trial court has an obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class." (Sav-on, 34 Cal.4th at 339.)

Plaintiffs seek to certify a class to pursue FEHA claims, to prove a pattern and practice, to prove injury to individual members of the class, and to obtain damages and injunctive relief. The court has the option of the Teamsters two-phase trial. (Moving at 17-18.) Plaintiffs also suggest the court could certify a class for a single issue. (Moving at 18-19.) The court has this option. (CRC 3.765(b).) Plaintiffs also suggest that the court could certify a class for the limited remedy of injunctive and declaratory relief. (Moving at 18-19.) The court also has this option. (Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 689-696 [directing use of injunction only class].)

Before turning to the traditional class certification analysis, the court will consider all of its class certification and trial structure options from a high level of generality. The court will then determine whether class certification is appropriate under the model or models that are most suitable for this case.

OPTION A. SINGLE TRIAL TO RESOLVE LIABILITY, DAMAGES, AND INJUNCTIVE RELIEF.

The first model involves a class that is certified to pursue defined claims where liability and damages are resolved in a single trial and result in a single judgment. This is the most common model. The court certifies a class to pursue certain claims on a class basis. At the class trial the court determines both the defendant's liability and the aggregate damages owed to the class. The defendant does not assert individual defenses and affirmative defenses against each individual member of the class, but it can demonstrate that it would prevail against a percentage of the class and that would be taken into account in determining the amount of damages. "The allocation of the total sum of damages among the individual class members is an internal accounting question that does not directly concern the defendant." (In re Cipro Cases I & II (2004) 121 Cal. App. 4th 402, 417.) The court discussed this model in the order on Tesla's motion that a class could not be certified. (Vaughn v. Tesla, Inc (Cal. Superior 2021) 2021 WL 2182408 at 12.) The court referred the parties to Bennett v. Regents (2005) 133 Cal.App.4th 347 and its holding that this model was not appropriate where the members of the class seek aggregate emotional distress damages. Plaintiffs do not propose this trial structure and the court does not address this option further.

OPTION B. TWO-PHASE TRIAL (TEAMSTERS).

The second model involves a two-phase trial. The United States Supreme Court set out this model in Int'l Bhd. of Teamsters v. United States (1977) 431 U.S. 324, 360-361, and more recently referred to this model with approval in Wal-Mart v. Dukes (2011) 564 U.S. 338, 367. (See also Serrano v. Cintas Corp. (6th Cir., 2012) 699 F.3d 884, 893; Thiessen v. GE Capital Corp. (10th Cir. 2001) 267 F.3d 1095; Allison v. Citgo Petroleum Corp. (5th Cir. 1998) 151 F.3d 402, 409.)

The California Supreme Court has also recognized this model as appropriate. (Duran v. U.S.

Bank National Assn. (2014) 59 Cal.4th 1, 35-37.) A decade earlier, the court of appeal suggested that the model would be appropriate. (Alch v. Super. Ct. (2004) 122 Cal.App.4th 339, 378-80.) It appears that the Teamsters model is not used regularly in the California courts. The court has not located any California trial court orders implementing this option.

The Teamsters model is bifurcated into phases. In the first phase a jury typically determines whether the workplace was a hostile workplace environment. If the plaintiffs prevail in Phase I, the case moves to Phase II hearings (or trials) on individualized issues where the burden of proof is flipped and the defendant has the burden of demonstrating that it is not liable to each member of the class, and the defendant can assert its individual affirmative defenses against each individual member of the class. If the defendant prevails in Phase I, then judgment is entered in favor of the defendant against all member of the class because the defendant has demonstrated on a class wide basis that there was no hostile work environment.

Plaintiffs argue that if the defendant prevails in Phase I, then the class is decertified. (Trial plan at 5:6-13.) This is not the law. That would create a "heads I win, tails you lose" situation where if the class prevailed at Phase I then the case would continue with the burden of proof flipped but that if defendant prevailed at Phase I then the class would be decertified and the members of the class could then bring individual cases. If the court certifies a class to proceed on the issue of whether the workplace was a hostile workplace environment and the defendant prevails, then then the defendant has prevailed on that issue against every member of the class.

This court would order a variation of the Teamsters approach in which Phase I is a trial on the issues of whether Tesla had a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and whether when Tesla "[knew] or should have known of this conduct [it failed] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). Phase I would not decide whether the Tesla Fremont facility was a hostile workplace in all locations in the factory for the entire proposed eight-year class period. Phase I would not concern whether any given person was discriminated against or harassed while at the Fremont facility. This approach puts the focus on Tesla's common actions. (Pltf Reply at 9:10-18.) This asks the jury to decide a central question that can be answered with a "simple "yes" or "no" answer for the entire class" for any given time frame. (Duran, 59 Cal.4th at 32.)

The court anticipates that the verdict form would permit the jury to find that Tesla had a pattern or practice of complying with the FEHA during some portions of the class period and has a pattern or practice of noncompliance during other time periods. The class period spans eight years. Tesla's practices might have been compliant during some time frames and not compliant during other time frames. The evidence suggests that Tesla might have changed its FEHA compliance efforts at some point during the proposed class period. By analogy, when a class trial concerns the amount of damages, "any procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence … to reduce overall damages" and also "a defendant … must be given a chance to … show that its liability is reduced." (Duran, 59 Cal.4th at 37-38.)

Regardless of who prevails at Phase I, the case would move to Phase II where there would be hearings (or trials) on individualized issues. If plaintiffs prevail at Phase I, the court would not flip the burden of proof because the Phase I jury would not have decided whether the Tesla

Fremont facility was a hostile workplace. Regardless of who prevails at Phase I, the court would order that parties can use the result of the Phase I trial as evidence in any Phase II proceedings. (Michail v. Fluor Mining & Metals, Inc. (1986) 180 Cal.App.3d 284 [trial court has the discretion to admit or exclude EEOC determinations under Evid Code 352].) The use of the result of the Phase I trial as evidence in any Phase II proceedings is a discretionary decision, but the purpose of the Phase I trial is to have the issue resolved so that it does not have to be revisited in each and every Phase II proceeding. Consistent with that purpose the court would order, as part of class certification, that the result of the Phase I trial is admissible in any Phase II proceedings. This is also consistent with Teamsters in that the result of the Phase I trial has consequences in the Phase II proceedings and explicitly or implicitly shifts the burden to the defendant or raises a barrier for the plaintiff.

In the Teamsters model, there is no common fund and the defendant is subject to open ended liability based on the results of the Phase II hearings (or trials). Plaintiffs generally propose this structure, with the Phase II hearings being jury trials. (Pltf Trial Plan at 6:24, 7:5, 7:24. 15:6.) Jury trials in Phase II are appropriate. As a general matter, under the California Constitution, "Trial by jury is an inviolate right." (Cal Const art 1, sec 16.) (See also LaFace v. Ralphs Grocery Co. (2022) 75 Cal.App.5th 388, 394-395; Ramirez v. Superior Court (1980) 103 Cal.App.3d 746, 755.) Although "inviolate," a person is not entitled to a trial by jury in all disputes. In cases brought in the Superior Court the right to jury depends in part on the amount at issue. (CCP 630.20 [limited civil cases have trial by jury]; Dorsey v. Superior Court (2015) 241 Cal.App.4th 583, 591 [no right to jury trial in small claims court].) This suggests that although the United States Supreme Court referred to "evidentiary hearings" (Teamsters, 431 US at 376), the court should be cautious about developing or planning for a process that relies on some form of summary procedure, such as having special masters conduct non-jury hearings on individual liability and damages.

The court has independently considered whether the Phase II hearings should or must be jury trials. Teamsters states that individual liability can be determined in "evidentiary hearings" (Teamsters, 431 US at 376), which suggests some form of hearing that is not a jury trial.

On the facts of this case, the use of non-jury "evidentiary hearings" to resolve individual claims for discrimination or harassment seems inappropriate. The assertions of plaintiffs' counsel indicate that the claims of each member of the putative class would be unlimited jurisdiction claims if filed in the superior court because each case might result in significant damages. For example, plaintiffs' counsel pointed to a recent case in which a federal trial court awarded approximately $130,000,000 million to a single Black staffing agency worker who spent nine months at the Tesla factory. (Diaz v. Tesla, Inc. (N.D. Cal., 2022) 598 F.Supp.3d 809 [appeal filed].) (See also Organ Dec Exh 10 [Berry arbitration award for over $1,000,000].) If the court were to create a non-jury process, then the court would need to be mindful that in administrative proceedings "the precise dictates of due process are flexible and vary according to context." (Today's Fresh Start, Inc. v. Los Angeles County Office of Education (2013) 57 Cal.4th 197, 212.) Given the possibility of significant damages, the court would be inclined to design an "evidentiary hearing" process that approximated a civil action with a jury trial.

In other cases, courts have decided that non-jury proceedings are appropriate for Phase II proceedings on individual claims. Those cases are generally, if not entirely, in the context of

when there is an "existing administrative forum" to resolve individual issues. In Employment Development Dept. v. Superior Court (1981) 30 Cal.3d 256, the Supreme Court held that "a court can devise remedial procedures which channel the individual determinations that need to be made through existing administrative forums." (30 Cal.3d at 266.) In Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases (2018) 25 Cal.App.5th 369, the court held that predominant common issues existed on the central legal issue and the trial court should have certified a class on that common issue (25 Cal.App.5th at 395) and stated that individual members of the class could seek refunds under the existing Rev & Tax 19322 administrative procedure . (25 Cal.App.5th at 396-397.) In Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, the court held that the trial court should have granted class certification to address the allegedly unlawful systemwide policies and practices (155 Cal.App.4th at 693) and that after that issue was resolved, then the members of the class could use the existing statutory fair hearing procedure that adjudicates individual claims and grievances (155 Cal.App.4th at 701-702). In Reyes v. San Diego Cnty. Bd. of Sups. (1987) 196 Cal. App. 3d 1263, 1268-1280, the court of appeal found it was appropriate to certify a class on common issues regarding a county policy and then to permit the members of the class to seek individual relied in the county's established administrative procedure.

In this case, the CRD has a procedure that requires an employee to file an administrative complaint before filing a civil action (Govt Code 12960), the CRD procedure starts an investigation (Govt Code 1293), the CRD tries to eliminate the unlawful practice through conciliation (Govt Code 12963.7), and if the issue cannot be resolved, then then CRD files a civil action (Govt Code 12965(a).) The CRD has no "existing administrative forum" to adjudicate individual disputes in a non-jury proceeding. Therefore, the plaintiffs appropriately suggest that the Phase II "evidentiary hearings" be jury trials.

The use of juries in Phase II the raises the issue of superiority. The court order of April 9, 2021 ordered plaintiff to "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." (Vaughn v. Tesla, Inc (Cal. Superior 2021) 2021 WL 2182408 at 11.) In McCleery v. Allstate Ins. Co. (2019) 37 Cal.App.5th 434, 456, the court of appeal raised the same issue of whether a procedure where "class members could submit claims by answering a questionnaire, and any dispute could be resolved in "streamlined trials" … would be materially superior to individual trials."

If the court granted certification under the Teamsters model and 3,000 members of the defined class submitted claims, then the case would effectively become a case with 3,000 plaintiffs asserting individual claims. (CCP 378.) The joinder of 3,000 plaintiffs in a single case would normally be totally inappropriate and the court would order that the plaintiffs must file individual cases. (In re Ranitidine Cases (Superior Court 2021) 2021 WL 9749384 [ordering use of single plaintiff complaints].) On the facts of this case, however, the benefits of having all the members of the class in a single case managed by a single judge appear to outweigh the benefits of having each member of the class file a separate civil action. The court can set deadlines for the members of the class to file claim forms and there will be no delay in the filing of new cases. The court can also order the use of standardized discovery, issue orders that apply to all the plaintiffs, and

ensure the discretionary decisions have consistent analysis. This case is different from a typical JCCP in that all the members of the class will proceed to trial in Alameda County and the court will likely not need to send the cases to other jurisdictions for trial. (Compare CCP 1048(b) with CRC 3.543 and Pesses v. Superior Court (1980) 107 Cal.App.3d 117.) When it is time for trial, the court can order that members of the class have individual trials or can group the plaintiffs as might be appropriate for trial. (CCP 1048(b).) When the trial of any given member of the class is complete, then there will be a judgment as to the claims by that plaintiff against Tesla and the parties can appeal that judgment. (CCP 904.1.)

If the court does not order class certification under the Teamsters model, then the court would consider Option C – single issue certification.

OPTION C. TRIAL ON A SINGLE COMMON ISSUE, WITH SEPARATE CASES FOR DAMAGES.

The third model is certification of a single issue for adjudication and then separate individual cases by persons who want to pursue individual cases. Plaintiffs suggested this possibility. (Moving at 17-18.) Tesla argued that the proposed approach is contrary to law and was not adequately raised. (Oppo at 29.) Class certification must have benefits to the court as well as the parties, so the court must consider the case management options. The court issued a tentative decision before the hearing and invited the parties to file briefs that addressed the case management options as set out by the court. The court considers the option.

Certification of a single issue is permissible under California law. (CRC 3.765 [“When appropriate, an action may be maintained as a class action limited to particular issues”].) The only published California addressing single issue certification directly is Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 545, where the court affirmed the trial court’s denial of single-issue class certification on the facts of that case. Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 339-340, implicitly suggests that single issue certification is permissible when it states that trial courts have substantial discretion in evaluating whether to certify a class and in devising innovative procedures to manage class actions to obtain the benefits of the class action mechanism while protecting the rights of the parties.

Certification of a single issue is also permissible under Federal law. (FRCP 23(c)(4) [“When appropriate, an action may be brought or maintained as a class action with respect to particular issues”].) Addressing single issue certification, Mejdrech v. Met-Coil Sys. Corp. (7th Cir. 2003) 319 F.3d 910, 911, states, “If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.” Single issue certification has been used in various circumstances. In Hernandez v. Motor Vessel Skyward (S.D. Fla. 1973) 61 F.R.D. 558, 561, over 600 passengers fell sick on an ocean cruise and the court granted class certification on the single issue of “Whether the defendants were negligent in preparing either the drinking water or food that was available for consumption by the passengers.” In In re Honda Am. Motor Co. Dealership Rels. Litig. (D. Md. 1997) 979 F. Supp. 365, plaintiffs alleged a conspiracy in violation of RICO and

the Court certified a class for the limited purpose of determining whether the conspiracy existed, with damages to be decided in subsequent individual actions. In In re Chiang (3rd Cir. 2004) 385 F.3d 256, 267, the court approved class certification on two issues related to whether a business practice discriminated unlawfully but left other issues for individual determination. In Dawson v. Great Lakes Educational Loan Services, Inc. (W.D. Wis. 2018) 327 F.R.D. 637, 648-649, the court approved class certification on the common issue of liability where it was alleged that defendants fraudulently and negligently inflated the amount owed on student loans while leaving issues of causation and damages for later proceedings.

Single issue certification must be tailored to the facts of each case to ensure there are significant benefits to the parties and the court. The court should only certify single issues if they can be cleanly separated from other issues so that a jury deciding individual issues will not need to revisit the issues that were decided on a class basis. "[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." (In re Rhone-Poulenc Rorer Inc. (7th Cir. 1995) 51 F.3d 1293, 1303.) (See also Mejdrech, 319 F.3d at 911.) In the colorful language of In re Rhone-Poulenc Rorer Inc. (7th Cir. 1995) 51 F.3d 1293, 1302, the court "must carve at the joint." (See also Rink v. Cheminova, Inc. (M.D. Fla 2001) 203 F.R.D. 648, 652 [rejecting single issue certification because "even if a jury answered this question in the Plaintiffs' favor, any subsequent mini-trial involving the issue of whether the delivery of the defective product caused injury and damage to a particular Plaintiff would necessarily have to involve all of the facts and circumstances surrounding the delivery of the product"].)

When there is single issue certification of a common issue in a mass tort, there is the legitimate concern that there might be undue risk of error when there are enormous consequences [that] turn on the correct resolution of a complex factual question" and it might be preferable to have the issue decided repeatedly in multiple trials and "letting a consensus emerge from several trials." (Mejdrech, 319 F.3d at 912.) (See also In re Rhone-Poulenc Rorer Inc. (7th Cir. 1995) 51 F.3d 1293, 1299, 1304 [noting risk of entrusting significant issue to a single jury].) That risk is mitigated because "The individual class members will still have to prove the fact and extent of their individual injuries. The need for such proof will act as a backstop to the class-wide determinations." (Mejdrech, 319 F.3d at 912.)

On the facts of this case, certification of a class to determine the issue of the alleged unlawful pattern or practice (and perhaps to order injunctive relief) seems appropriate. In this model, there would be a judgment on the common issues and the members of the class would then pursue their individual civil cases for damages. Tesla has argued that the claims should.be asserted in individual civil cases. (Oppo at 35-36.)

This model is similar to, but different from, the Teamsters two-phase trial. It would be similar because the court and the parties would have the benefit of a single resolution of the common issue of whether Tesla had the alleged pattern or practice before the individual claims would be resolved in jury trials. It would be different because instead of the claims being resolved in a single case the claims of the individuals would be presented in separately filed cases that would then be resolved in jury trials. The court would order that the equitable tolling effect of this putative class action ends ten days after notice is given to the class of the limited issues class certification. (In re Honda Am. Motor Co. Dealership Rels. Litig. (D. Md. 1997) 979 F. Supp. 365, 367, 371 and fn5.) The parties could anticipate that any case alleging race discrimination or

harassment at the Tesla Fremont facility would be related and assigned to a single judge for management as related cases. (CRC 3.300.) The cases might be appropriate for management as a coordinated proceeding. (CCP 404 et seq; CRC 3.501 et seq.)

OPTION D. TRIAL LIMITED TO SEEKING INJUNCTIVE RELIEF

The fourth model involves a single trial but with the remedy limited to injunctive relief. Plaintiffs suggested this possibility. (Moving at 17-18.) Califiornia law and federal law take different analytical approaches on this issue.

California has a single standard for class certification under CCP 382. The development of class certification law has been guided by equity. (Estrada v. Royalty Carpet Mills, Inc. (2024) 15 Cal.5th 582, ___, 317 Cal.Rptr.3d 219, 238-239.) (See also Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 528.)

Federal law, in contrast, has different requirements for different types of claims. All class actions must meet the general set of requirements in FRCP 23(a). Claims for "final injunctive relief or corresponding declaratory relief" must meet the requirements of FRCP 23(b)(2). Claims for damages and other monetary relief must meet the requirements of FRCP 23(b)(3).

No California Court of Appeal has held that the federal FRCP 23(b)(2) standard can, or must, be used in California law. "No California authority supports the contention that ascertainability, predominance and superiority are not required when a proposed class action would be certified under Federal Rules of Civil Procedure, rule 23(b)(1)(A) or (b)(2) (28 U.S.C.) if it were proceeding in federal court." (Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 533.) (See also Kendall v. Scripps Health (2017) 16 Cal.App.5th 553, 577-578; Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 691 fn 12.) This trial court must follow the Court of Appeal decisions. (Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455.)

A plaintiff can, however, define the claims and elect to seek declaratory and injunctive relief rather than damages and thereby focus the class certification analysis on policies and procedures, and alleged systemwide violations, rather than on the effects of those alleged systemwide violations on the individual member of the class. Hefczyc states, "California courts have never adopted Rule 23 as 'a procedural strait jacket.' To the contrary, trial courts [are] urged to exercise pragmatism and flexibility in dealing with class actions." (Hefczyc, 17 Cal.App.5th at 531.)

In Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, the Court of Appeal reversed the trial's denial of class certification and directed that the trial court was required to certify the class. In Capitol People the plaintiffs sought only declaratory and injunctive relief. (155 Cal.App.4th at 686.) The trial court denied class certification. The Court of Appeal found that the trial court failed to focus on the allegedly unlawful systemwide policies and practices and the theory of recovery in the commonality inquiry. (155 Cal.App.4th at 693.) The Court of Appeal held that the trial court had turned pattern and practice "upside down" by improperly focusing on the individualized effects of the alleged practice to determine whether there was a pattern rather than the common evidence that could be presented to demonstrate the existence of an alleged common practice or policy. (155 Cal.App.4th at 696.) The Court of Appeal held that the trial court failed to differentiate between classwide injunctive

relief and the existing statutory fair hearing procedure that adjudicates individual claims and grievances (155 Cal.App.4th at 701-702).

Capitol People is noteworthy because it reversed a trial court decision and then directed that the trial court certify the class. Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, and Kendall v. Scripps Health (2017) 16 Cal.App.5th 553, provide less guidance because they affirmed trial court orders that denied class certification. Rather than standing for the proposition that a trial court must reach a particular conclusion, the court reads Hefczyc and Kendall for the more modest proposition that trial courts are vested with discretion in evaluating whether to grant or deny class certification and that the Court of Appeal will affirm if there is no abuse of discretion. (Kaldenbach v. Mutual of Omaha Mutual Life Ins. Co. (2009) 178 Cal.App.4th 830, 844 ["Any valid pertinent reason stated will be sufficient to uphold the order."]; Cohen v. DirecTV (2009) 178 Cal.App.4th 966, 981 ["because the trial court stated at least one valid reason for denying the motion for class certification, we decline to reverse the trial court's order."].)

In Carter v. City of Los Angeles (2014) 224 Cal.App.4th 808, the court discussed class certification in the context of whether it was appropriate to approve a class settlement. In that context, the court quoted Wal-Mart Stores, Inc. v. Dukes (2011) 564 U.S. 338, 362-363, for the proposition that "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." (Carter, 224 Cal.App.4th at 824.)

On the facts of this case, certification of a class to assert the claims in the Second Amended Complaint and to seek the limited remedy of injunctive relief seems appropriate. In Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208, the court of appeal held as a matter of law that a plaintiff could seek a public injunction to prevent discrimination and harassment.

If Tesla currently has the alleged pattern or practice, then it would affect all Black/African-American persons currently at the Tesla Fremont facility and an injunction would be appropriate to compel Tesla to take appropriate action prospectively. Any individual plaintiff currently employed at Tesla could seek a public injunction. (Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208, 227-232) Certification of a class for injunctive relief would ensure that the counsel had a fiduciary duty not just to their client but also to all the persons who might be affected by an injunction. (Allen v. Int'l Truck & Engine Corp. (7th Cir. 2004) 358 F.3d 469, 471.) Certification of a class for injunctive relief would ensure that if the jury found the alleged pattern or practice, and if court found that an injunction were appropriate, then there would be a single injunction and Tesla would not be subject to inconsistent injunctions. The court would set a single trial for the class seeking injunctive relief and the CRD law enforcement action seeking injunctive relief so that the issues concerning the need for and scope of injunctive relief were resolved in a single judgment. (CCP 1048.)

EFFECT OF WAL-MART V. DUKES.

Tesla argues that Wal-Mart v. Dukes (2011) 564 U.S. 338, changed the class certification landscape. Wal-Mart addressed "whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2)." (564 U.S. at 342.) Of significance,

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FRCP 23(b)(2) concerns class actions for injunctive relief and FRCP 23(b)(3) concerns class actions for monetary relief.

Regarding FRCP 23(a)(2) and the requirement that "there are questions of law or fact common to the class" the Supreme Court held that on the issue of liability there must be a "common contention … of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (Wal-Mart, 564 US at 350.) Class certification must consider "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." (Wal-Mart, 564 US at 350.)

Regarding damages, the Supreme Court held that a court may not certify a class under FRCP 23(b)(2) where "the monetary relief is not incidental to the injunctive or declaratory relief." (564 U.S. at 360.) Assuming that the class could seek damages in a FRCP 23(b)(2) class, the Court held that the lower court erred in its plan that a special master would have hearings with a sample set of the class members, the percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. (Wal-Mart, 564 US at 367.) The Supreme Court indicated that even where there is a finding of an unlawful pattern or practice the defendant is still "entitled to litigate its statutory defenses to individual claims." (Wal-Mart, 564 US at 367.)

As a matter of procedure, Wal-Mart is a federal case about "whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2)." (564 U.S. at 342.) California's statute authorizing class certification is CCP 382, and the development of class certification law has been guided by equity. (Estrada v. Royalty Carpet Mills, Inc. (2024) 15 Cal.5th 582, ___, 317 Cal.Rptr.3d 219, 238-239.) Walmart did not address California class action standards.

As a matter of substance, Wal-Mart's analysis of the commonality requirement under FRCP 23(a) is consistent with established California law in holding that common issues of law or fact must predominate and that the class mechanism should be used when "substantial benefits accrue both to the litigants and the courts." (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.) Further, Wal-Mart's analysis of the availability of damages under FRCP 23(b)(2) is immaterial because the plaintiffs in this case are clearly seeking damages. Plaintiffs have proposed the Teamsters model so that Tesla will have the opportunity for a jury trial with each member of the class before that member of the class might be awarded damages against Tesla.

STANDARD FOR CLASS CERTIFICATION

The court applies the settled concerns on a motion for class certification. (Brinker, 53 Cal.4th at 1021.) In considering class certification, the court considers the causes of action alleged. (Brinker, 53 Cal.4th at 1024 [To assess predominance, a court "must examine the issues framed by the pleadings and the law applicable to the causes of action alleged."].) The court also considers plaintiff's theory of recovery. (Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 692, 696.) The court considers the claims asserted and how those might be presented in a trial (1) using the Teamsters model; (2) resolving a single

issue, and (3) seeking injunctive relief only.

NUMEROSITY

The statutory touchstone for numerosity is whether there are so many class members that "it is impracticable to bring them all before the court." (CCP 382.) Although "[n]o set number is required as a matter of law for the maintenance of a class action," classes of more than 30 to 40 class members generally satisfy the numerosity requirement because at that point, joinder is not practical. (Hendershot v. Ready to Roll Transportation, Inc. (2014) 228 Cal.App.4th 1213, 1222; Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934.)

The proposed class of members within the relevant time period is represented to be approximately 5,977 persons at the Fremont factor who self-identified as Black/African-American. (Moving at fn 25 and fn 26.)

ASCERTAINABILITY

Ascertainability requires a class that 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, Inc. (2019) 7 Cal.5th 955, 961, 967, 974.) 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.) "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.)

Plaintiff seeks to certify a Plaintiff class defined as: "Black/African-Americans who were employed on the production floor at the Tesla factory in Fremont at any time from November 9, 2016 to the final disposition of this action, who were not subject to an arbitration agreement for all relief sought for the entire period of their employment at Tesla." (Moving at 2:5-7.)

The court has a few concerns.

First, plaintiffs' proposed class definition has no fixed temporal end date. For purposes of a Teamsters class or a single-issue class, the court would define the end date of the class as the date this decision is filed. For purposes of an injunctive relief only class, there is no need for a temporal scope because the class is seeking only prospective relief. (Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 684-685 [injunctive relief class defined without temporal scope].)

Second, the court is troubled by defining a class of "Black/African-Americans." Although for purposes of the proposed injunctive relief class, the definition of the proposed class is less significant because any injunction would have a common effect on all persons, the class must nevertheless be ascertainable. The order of June 5, 2020, concerned an interrogatory that asked Tesla to "Please identify all black individuals who worked at the Tesla Factory during the statutory period." The court limited the response to persons who self-identified as Black in the

EEOC-1 Forms or in a response to a Belaire-West notice. (Vaughn v. Tesla, Inc. (2020) 2020 WL 7223000 at *2.) For purposes of a Teamsters class or a single-issue class, the court would define the class as the approximately 5,977 persons at the Fremont factor who self-identified as Black/African-American. (Moving at fn 25 and fn 26.) The court would require that plaintiffs submit an updated list of those individuals as of the date of this order. The persons on that list would be the persons in the class. The proposed class definition is adequate for the proposed injunctive relief class.

PREDOMINANCE OF COMMON QUESTIONS OF LAW AND FACT - LEGAL FRAMEWORK

Plaintiff's burden on moving for class certification is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate. (Lockheed Martin Corp. v. Superior Court (2003) 29 Cal. 4th 1096, 1108.) The determination of how much commonality is enough to warrant use of the class mechanism requires a fact specific evaluation of the claims, the common evidence, and the anticipated conduct of the trial.

In a claim alleging an unlawful pattern or practice, the issue for determination at trial is whether there was the alleged pattern or practice and not whether or how it affected any specific individual. Duran, 59 Cal.5th at 36, states: “In a pattern and practice case, the employer's actions must be examined in the aggregate to determine whether the employer is liable to any particular plaintiff for discrimination.” Sav-On, 34 Cal. 4th 319, addresses the issue of a policy, pattern or practice in several places, stating, “[p]redominance is a comparative concept,” (34 Cal. 4th at 334), that the community of interest requirement does not mandate that class members' claims be uniform or identical, (34 Cal.4th at 338), and that the “logic of predominance” does not require a plaintiff to prove that a defendant's policy was “either right as to all members of the class or wrong as to all members of the class” (34 Cal. 4th at 338). Williams v. Superior Court (2013) 221 Cal.App.4th 1353, 1370, states: “An unlawful practice may create commonality even if the practice affects class members differently.” Because the claim concerns the aggregate practice, the plaintiff is not required to prove that every member of the proposed class was exposed to the allegedly wrongful practice or the practice was uniformly unlawful as to all members of the class. (See also Hofer v. Southwest Airlines Co (Superior Court 2022) 2022 WL 1296952 at *6 [discussion of “practice”]; Naranjo v. General Nutrition Corp. (Cal Superior 2018) 2018 WL 8058761 at *6-7 [discussion of “practice” and suggestion that it requires a plaintiff to prove that a “standard operating procedure”].)

The class certification inquiry of whether common issues predominate and permit a plaintiff to represent a class is different from the merits inquiry of whether at trial the class can prove an unlawful pattern or practice. The class certification hurdle is lower and requires only that a plaintiff establish that common issues predominate, not that Plaintiff can prove the defendant had an unlawful pattern or practice on the merits. At this stage, the court can certify a class because common issues predominate even if at trial the class might not be able to prove the alleged pattern or practice.

FIRST CAUSE OF ACTION – PATTERN OR PRACTICE OF DISCRIMINATION

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The court finds common issues of fact will NOT predominate on the first cause of action alleging that Tesla's Fremont facility had a pattern or practice of race discrimination.

On the first cause of action for pattern or practice of discrimination, plaintiffs presented declarations from 240 witnesses, many of whom testified that they experienced discrimination or that they observed discrimination in work assignments or promotions. The information is anecdotal. The information does not indicate whether there was a single person at Tesla who was making all the racially discriminatory decisions or whether the alleged discrimination was decentralized and the result of the individual decisions by individual supervisors or managers. There is no information about the job requirements or the qualifications of the applicants for any given job. Regarding work assignments, the witnesses generally described that Black/African American employees were assigned to less prestigious jobs that required less skill. Regarding promotions, the witnesses generally described that Black/African American employees were not promoted.

The information does not indicate whether in the aggregate the members of the proposed class were treated differently from similarly situated persons. There is no evidence that categorizes types of jobs or states that the entry level factory positions were X% Black/African American, that supervisors were Y% Black/African American, and that managers were Z% Black/African American. In contrast, in Stephens v. Montgomery Ward (1987) 193 Cal.App.3d 411, 418 fn 1, plaintiff presented statistics that show women to be significantly underrepresented in the management of "reserve" departments during the proposed class period.

SECOND CAUSE OF ACTION – PATTERN OR PRACTICE OF HARASSMENT

The court finds common issues of fact will NOT predominate on the first cause of action alleging that Tesla's Fremont facility had a pattern or practice of hostile work environment race harassment.

On the second cause of action for pattern or practice of harassment that created a hostile work environment, plaintiffs presented declarations from 240 witnesses, many of whom testified that they experienced or observed harassment on the basis of race. The declarations allege that different persons engaged in harassment and that the conduct took place in different locations and in different time frames. (Plaintiff compendium of declarations; Sadat Dec para 14 [locations]; Sadat Dec., Exh A [time frames]; Oppo at 20-26.) The information suggests that the alleged harassment was decentralized and the result of the individual actions by individual workers, supervisors, or managers. (Reno v. Baird (1998) 18 Cal.App.4th 640, 645-646.) Although the declarations suggest that many individuals might have been the subject of race harassment, the declarations do not suggest that the alleged harassment was the result of the actions of a single person, that it took place at the direction of a single person, or that it took place in a single department.

THIRD CAUSE OF ACTION – PATTERN OR PRACTICE OF FAILING TO PREVENT OR TO RESPOND TO DISCRIMINATION OR HARASSMENT

The court finds common issues of fact WILL predominate on the third cause of action alleging that Tesla had a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and that when Tesla

"[knew] or should have known of this conduct [it failed] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). The court considers the elements of the claim.

TESLA POLICIES

Tesla had common written policies. Since May 2010 Tesla has had a written Code of Business Conduct and Ethics. (Hart Exh A). Since October 2011, Tesla has had a written Anti-Harassment and Discrimination Policy (Hart Exh B.) In December 2016, Tesla revised the written Anti-Harassment and Discrimination Policy (Hart Exh C.) In December 2017, Tesla revised its written Code of Business Conduct and Ethics. (Hart Dec, Exh D) In July 2018, Tesla issued its Policy Against Discrimination & Harassment in the Workplace (Hart Dec Exh E), which Tesla revised in November 2018 (Hart Dec Exh F), and in again in March 2021 (Hart Dec Exh G). These are common formal written policies.

Tiffany Hart, Senior ER (Employee Relations) Partner at Tesla testified that the use of the n-word has been prohibited at the Tesla Fremont factory since at least 2010. (Hart Depo at 80, 87-89, 99-100.)

Tesla also had less than formal written policies. On May 31, 2017, Tesla CEO Elon Musk sent an email to all employees. (Hart Depo at 155-156.) The Musk email of May 31, 2017, referenced a prior April 21, 2013, email when he stated: "Tesla has a strict no a* policy" and then stated:

Part of not being a huge jerk is considering how someone might feel who is part of an historically less represented group. They have endured difficulties that someone born or raised in a more privileged situation did not. This doesn't mean that there is a different standard of performance or that you can't give critical feedback. You should – doing anything else would be an insult to the hard work it took to get there – but don't ever intentionally allow someone to feel excluded, uncomfortable or unfairly treated. Sometimes these things happen unintentionally, in which case you should apologize.

In fairness, if someone is a jerk to you, but sincerely apologizes, it is important to be thick-skinned and accept that apology. If you are part of a less represented group, you don't get a free pass on being a jerk yourself. We have had a few cases at Tesla where someone in a less represented group was actually given a job or promoted over more qualified highly represented candidates and then decided to sue Tesla for millions of dollars because they felt they weren't promoted enough. That is obviously not cool.

(Organ Dec., Exh. 2.) In February 2020 (Evid Code 452), Tesla issued its Anti-Handbook Handbook. (Organ Dec., Exh. 1.)

TESLA PROCEDURES

Tesla had common procedures for training managerial and non-managerial employees. From 2015 through the present Tesla had a procedure under which it trained workers on anti-harassment and anti-discrimination. (Hart para 19.) From 2015 through the present Tesla required training regarding discrimination and harassment. (Hart para 20-21.) These are common procedures.

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In or about 2017, Tesla launched a graffiti remediation program. Under this program, if someone reported graffiti to HR, then HR was supposed to conduct an investigation and partner with security to determine if there were cameras available to determine when the graffiti occurred. If HR could not determine the violator, HR was supposed to reach out to the supervisors or managers of the impacted area to remind them to watch for violations. (Hart para 25.) (Hart Depo at 169-171.) This procedure is common to the class.

EMPLOYEE COMPLAINTS

In 2017, "Tesla created a centralized internal tracking system to document complaints and investigations." (Hart Dec para 24.) This appears to be common evidence of who made what formal complaints.

The court cannot locate in the record a detailed description of Tesla's "centralized internal tracking system," testimony on how it works, or the content of the information in the system. IN THE SUPPLEMENTAL BRIEFING AND AT THE HEARING counsel are to address (1) is information about Tesla's "centralized internal tracking system" in the record (and if so, then where), (2) did plaintiffs seek that information, and (3) did Tesla provide that information. If plaintiffs failed to seek and present that information, then that would be a failure of proof on plaintiffs' part. If plaintiffs sought that information and Tesla failed to provide the information, then on this motion the court may assume (for purpose of this motion only) that the information in Tesla's "centralized internal tracking system" would be adverse to Tesla. (Evid Code 412; CACI 203.)

In filing this motion, plaintiff provided declarations from 240 persons who stated that they observed discrimination or harassment at the Tesla Fremont facility and that some complained about it. Of the 240 plaintiff declarations, all stated that they heard the n-word at the Tesla Fremont facility (Sadat Dec, para 3; Helland Supp Dec, para 2, Exh A), 112 state that they complained to a supervisor, manager or HR about discrimination, but only 16 made written complaints. (Cardozo Dec. para 7.) The number of declarations demonstrates that the sample is sufficiently large. (Duran, 59 Cal.4th at 42 [sample must be sufficiently large].) The selection by plaintiffs' counsel of which declarations to present to the court suggest that the sample was not random. (Duran, 59 Cal.4th at 43-45 [sale must be random].)

In opposing this motion, Tesla provided declarations from 228 persons who generally stated that they did not observe discrimination or harassment at the Tesla Fremont facility or that if they observed it then Tesla took "immediate and appropriate corrective action." Of the 228 Tesla declarations, 99 heard the n-word at the Tesla Fremont facility. (Helland Supp Dec, para 2, Exh A.) Of the defendant declarations, several workers state they made complaints and several supervisors or managers state that they received complaints. (E.g. Robert Brown, Philip Buchannan.) Like the declarations submitted by plaintiffs, the number of declarations demonstrates that the sample is sufficiently large but the selection by defendant's counsel of which declarations to present to the court suggests that the sample was not random. (Duran, 59 Cal.4th at 42-45.)

In opposing this motion, Tesla reviewed the declarations filed by plaintiffs and a prepared a table that provides information on (1) "Did the declarant allege that he or she complained to a supervisor, lead, manager, or HR about harassment or discrimination? and (2) "Did the declarant

allege that he or she made a written complaint to a supervisor, lead, manager, or HR about harassment or discrimination?" (Cardozo Dec, Exh D, Right hand column.) The table indicates that many of the declarants made complaints but that few made formal written complaints. Like the underlying anecdotal declarations, this table is a summary of anecdotal information and suffers from the same deficiencies as the underlying declarations. Without some assurance that the declarations are representative of the experiences of the workers at the Tesla Fremont facility, the court on this motion and the jury at trial cannot extrapolate from the evidence presented to the class as a whole. (Duran, 59 Cal.4th at 39; Dunbar v. Albertson's, Inc. (2006) 141 Cal.App.4th 1422, 1433 fn 2.) The declarations and the table summarizing the declarations are common evidence of who made what complaints, but the evidence is of diminished value because it is anecdotal.

TESLA RESPONSE TO EMPLOYEE COMPLAINTS

In 2017, "Tesla created a centralized internal tracking system to document complaints and investigations." (Hart Dec para 24) Plaintiffs state they will rely on information in this database to demonstrate that Tesla was aware of complaints about race discrimination and harassment and how it responded to the complaints. (Pltf trial plan at 3:18-19, 11:6.) Tesla indicates that it will rely on the existence of the database and the information in this database to demonstrate that Tesla took complaints seriously and that Tesla responded appropriately to complaints. (Oppo at 12:13-14.) Tesla's "centralized internal tracking system" is common evidence that would be directly relevant to whether Tesla had a pattern or practice of failing to respond to complaints of race harassment and discrimination.

As noted above, the court cannot locate in the record a detailed description of Tesla's "centralized internal tracking system," testimony on how it works, or the content of the information in the system.

Tiffany Hart, Senior ER (Employee Relations) Partner at Tesla testified about Tesla's response to complaints. Hart testified that when she was an HR business partner she did twenty investigations per year and that since becoming a Senior ER Partner in June 2022 she has done an average of eight per month. (Hart Depo at 27.) Hart did about fifteen investigations at the Fremont facility (Hart Depo at 28.)

The court has reviewed the declarations provided by plaintiffs and by Tesla and they indicate that when workers complained different things happened on different occasions. Declarations submitted by plaintiffs suggest that Tesla failed to take "immediate and appropriate corrective action." (Govt Code 12940(j)(1).) Plaintiff declarant Adrianna Leaks states that she complained to a supervisor, the supervisor was terminated, and there was no change in the racist behaviors. (Leaks para 11, 12.) Plaintiff declarant Albert Blakes complained to HR, and there was no change in the racist behaviors. (Blakes, para 12) Plaintiff declarant Alvin Patterson complained to leads and supervisors, they denied that racism was a factor in promotions. Alvin Patterson also complained about his supervisor to his supervisor, was referred to HR, then received more harassment from his supervisor, and was then warned by HR about his own workplace conduct. (Patterson para 9, 14.) Tatiana Smith testified that she was subject to race harassment, she complained verbally to her supervisor, and her supervisor advised her to not go to HR. On Tatiana Smith's last day of work, she sent an email to HR setting out the race harassment and

HR never responded to her email. (Tatiana Smith Dec at 8, 9, 10, Exh A.) Marcus Vaughn testified that when he reported that someone said "These niggas is lazy and they're hella slow" that the person taking the complaint "just kind of like giggled and laughed and then just, you know, told me to not worry about it, and that's where we left it at, to not worry about it and that everything would be okay, I guess." (Vaughn Depo at 150-151.) Perry Wiley testified that he was the subject of racist incidents, made complaints to his supervisor twice. Perry Wiley was threatened with retaliation the first time he complained and was retaliated against the second time. (Perry Wiley at para 9, 18.) Many declarants stated that they did not report things to Human Resources because they thought that if managers or supervisors were discriminating or harassing that Human Resources already knew about it and that Human Resources had already demonstrated that Tesla would not take appropriate action.

Declarations submitted by Tesla suggest that if Tesla was informed about racist incidents, then Tesla took "immediate and appropriate corrective action" (Govt Code 12940(j)(1).) Tesla Declarant Robert Brown is a supervisor and states that he has counseled workers who use the term "nigga," that in 2017 or 2018 he observed an incident involving the term and reported it to HR, and that in 2019 he counseled his team that music with the word was not appropriate for the workplace. (Brown Dec, para 13-16.) Tesla Declarant Philip Buchannan is a supervisor and states that an employee reported to HR that a coworker called him monkey, that HR promptly investigated, and that Tesla terminated the employee who used the inappropriate language. (Buchannan Dec, para 13) Tesla Declarant Jeremiah Clark states "I personally have seen graffiti using racial slurs. When I see it, I see that it is removed quickly by the building facilities team." (Clark Dec., para 21.) Tesla Declarant Macey Harrison states: "On a few occasions I have heard the "N" word stated during an argument. And the employees who were arguing were counseled that having a public altercation was not acceptable, nor was using the "N" word." (Harrison Dec, para 19.)

Like the declarations and summary table about whether workers complained, the declarations about whether and how Tesla responded are a statistically significant number of non-representative witnesses. The court gives them diminished weight other than for the fact that they demonstrate that there is a substantial number of witnesses with relevant information. This suggests that there are a large number of witnesses with highly relevant and probative information and that the parties (with court assistance if required) could identify a Duran compliant sample of witness who could testify in a manageable class trial.

The court explains why it finds the over 500 declarations to be of diminished value. In a regular single plaintiff case the claim concerns what happened to a specific individual and counsel has the discretion to select which witnesses to present to make that showing. In a class action, however, the trier of fact's focus is on whether there was a policy, pattern, or practice that applied to the class as a whole.

Testimony from managers, supervisors, and persons with a similar overview can testify about a policy, pattern, or practice. (E.g. Hart.) Non-managerial employees can testify only about their individual experiences. There will likely be a bell curve of individual experiences, and the bell curve might be weighted to one side or the other. If there is testimony from the non-managerial individuals, then the court or jury must hear from a representative sample of sufficient size. Without that requirement, the trier of fact will hear from "disgruntled employees" selected by

counsel for plaintiff and "happy campers" selected by counsel for defendant, each of which might be witnesses from the extremes of the bell curve. If counsel select their witnesses, then the trier of fact will have no meaningful information about the shape of the bell curve and thus no reliable information about the alleged pattern or practice. As a result, the trier of fact cannot reliably extrapolate from the evidence presented to the class as a whole. (Duran, 59 Cal.4th at 39; Dunbar, 141 Cal.App.4th at 1433 fn 2.)

The issue on class certification is not whether the alleged pattern or practice exists, but whether plaintiff can present the claim with common evidence. Tesla's "centralized internal tracking system" is common evidence. The declarations submitted by plaintiffs and by Tesla about Tesla's response to complaints appear to be statistically significant numbers of declarations, but there is no assurance they are a representative sample.

SUMMARY

The parties have presented evidence demonstrating that there are common issues of fact that can be determined with common evidence regarding whether Tesla had a pattern or practice of "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring" (Govt Code 12940(k)) and whether when Tesla "[knew] or should have known of this conduct [it failed] to take immediate and appropriate corrective action" (Govt Code 12940(j)(1)). There is common evidence of Tesla's formal and informal written policies. There is common evidence of Tesla's practices about training employees. There is common evidence in the form of the "centralized internal tracking system" about when workers made formal complaints and Tesla's resulting investigations. There are numerous witnesses with relevant information who can be selected to form a Duran-compliant sample and can testify about informal and formal complaints and Tesla's resulting investigations and remedial actions. There is no evidence in the form of testimony from Tesla's HR department about whether the HR Department had consistent polices during the class period regarding the expected pace and thoroughness of the investigations that followed formal and informal complaints of race discrimination or harassment.

DISCRIMINATION OR HARASSMENT OF AN INDIVIDUAL

The court finds common issues of fact will NOT predominate in the determination of whether any individual class member was discriminated against or harassed. Tesla states: "FEHA individual actions are superior to this class action." (Oppo at 35.) Plaintiff agrees that individual workers need individual trials to determine individual damages. (Trial Plan page 5.) The issue is whether the individualized hearings should be (1) part of this class case or (2) in separately filed cases.

There is case law support that a class case can include individualized hearings. (Teamsters; Duran.) (Option B above.) There is case law support for having a classwide resolution of a common issue followed by the members of the class filing separate individual cases if they want damages. (Option C above.) The court addresses the alternatives in the context of superiority.

INJUNCTIVE RELIEF

The court finds common issues of fact WILL predominate on a claim for injunctive relief. The

court can certify a class for the limited purpose of seeking injunctive relief. (Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676.) (Option D above.) Any individual plaintiff currently employed at Tesla could seek a public injunction. (Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208, 227-232) Certification of a class for injunctive relief has the benefit that counsel would have a fiduciary duty not just to their client but also to all the persons who might be affected by an injunction. (Allen v. Int'l Truck & Engine Corp. (7th Cir. 2004) 358 F.3d 469, 471.) Certification of a class for injunctive relief would protect Tesla from inconsistent injunctions. The court finds that an injunctive relief only class would be superior to having the named plaintiffs seek a public injunction.

APPLICABILITY OF ARBITRATION AGREEMENT

The court finds common issues of fact will NOT predominate on the issue of whether any member of the class must arbitrate some or all of their claims. If the court adopts the Teamsters two-phase option, the determination of whether any individual class member was subject to a Tesla arbitration agreement and for what time frame is an individual issue. The class will be defined as the approximately 5,977 specific individuals who self-identified as Black African American. The court will likely order that those persons have a period of 30-60 days to submit claim forms stating whether they want to proceed further and the nature of their claims for discrimination. The court will likely order that Tesla then has 30 days to produce arbitration agreements for the persons who submitted claim forms. If there is no arbitration agreement, then there is no agreement to arbitrate. If there is an arbitration agreement, then the member of the class and Tesla will need to meet and confer about whether the member of the class was subject to an arbitration agreement for none, some, or all of the relevant time period, and whether the person will pursue their individual claims in court, in arbitration, or in court for one time frame and in arbitration for another time frame. (Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208, 219-226.)

If the court adopts the single-issue option, then any issues with arbitration will be raised in separate civil actions.

If the court adopts the injunctive relief only option, then any issues with arbitration will be raised in separate civil actions.

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STATUS AS EMPLOYEE OF TESLA

The court finds common issues of fact WILL predominate on the issue of whether any individual class member was an “employee” of Tesla under the FEHA.

The law is that the FEHA makes it unlawful for an employer to harass or retaliate against an employee but that to be entitled to relief for allegations of harassment and retaliation, a FEHA claimant must first demonstrate an employment relationship with his or her alleged employer. (Jimenez v. U.S. Cont’l Mktg. (2019) 41 Cal.App.5th 189, 196.) The relationship need not be direct, and a worker can prove an employment relationship through proof of the employer's exercise of direction and control over the employee. (Jiminez, 41 Cal.App.5th at 197.)

The evidence is that the members of the putative class were formally employed by many

different staffing agencies while assigned to work at Tesla, and worked in many different locations in the Fremont facility under many different supervisors and managers. The evidence indicates that after every staffing agency assigned a worker to Tesla that Tesla consistently exercised direction and control over the worker.

Tesla's opposition does not address this issue and appears to acknowledge that class certification would be appropriate on this issue. That noted, this issue is unrelated to the central common fact issue of whether Tesla failed to prevent or failed to remedy discrimination and harassment. Furthermore, this does not appear to be a contested fact issue. Finally, it appears that presentation of the relevant evidence on this issue in any individual trial would take no more than 30 minutes and could be tailored to whether Tesla exercised direction and control over the specific worker who was asserting the claim.

The court will NOT certify this issue for class treatment in the interest of having a manageable trial that is focused on whether Tesla failed to prevent discrimination or failed to take immediate and appropriate action when workers brought complaints to its attention.

TYPICALITY

"The typicality requirement's purpose " 'is to assure that the interest of the named representative aligns with the interests of the class. … Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. … The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. … A class representative who does not have a claim against the defendants cannot satisfy the typicality requirement's " (Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362, 375.) (See also Medrazo v. Honda of North Hollywood (2008) 166 Cal.App.4th 89, 99; Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 473.)

Plaintiff Marcus Vaughn is typical of the members of the class for purposes of seeking retrospective relief. Vaughn worked at the Tesla Fremont facility from April 23, 2017, through October 31, 2017. Vaughn worked through a staffing agency Balance Staffing. Vaughn observed race harassment and graffiti. Vaughn complained in writing to HR, was not interviewed by HR, and is not aware if Tesla ever conducted an investigation. (Vaughn Dec.)

Plaintiff Monica Chatman is typical of the members of the class for purposes of seeking retrospective relief. Chatman worked at the Tesla Fremont facility from November 16, 2016, through September 11, 2019. Chatman worked through staffing agency West Valley Staffing and became a direct Tesla employee on August 2, 2017. Chatman observed race harassment and graffiti. Chatman complained to HR in 2018 and is not aware if Tesla ever conducted an investigation. (Chatman Dec.)

Plaintiff Titus McCaleb is typical of the members of the class for purposes of seeking retrospective relief. McCaleb worked at the Tesla Fremont facility from October 2018 through June 2017. McCaleb worked through staffing agency West Valley Staffing. McCaleb observed race harassment. McCaleb complained to his leads and supervisors and they took no action to stop harassment. McCaleb saw racial graffiti on the bathroom walls and written on employee

announcements and elsewhere in the factory. McCaleb states that Tesla did not appear to be removing or addressing it in any meaningful way. (McCaleb Dec.)

Plaintiff Evie Hall has dismissed her claims.

None of the named plaintiffs have worked at Tesla since Chatman stopped working on September 11, 2019. This raises the issue of whether they are typical of the members of the class for purposes of seeking injunctive relief.

The law is clear that "Where a petitioner seeks declaratory or injunctive relief, it is insufficient that he has been injured in the past; "he must instead show a very significant possibility of future harm in order to have standing." (Coral Construction, Inc. v. City and County of San Francisco (2004) 116 Cal.App.4th 6, 17.) The law is clear that if a class representative lacks standing to seek injunctive relief, then the class representative is not typical of the members of the class who are able to seek injunctive relief for purposes of seeking injunctive relief. (Estrada v. FedEx Ground Package Sys., Inc. (2007) 154 Cal.App.4th 1, 17 [plaintiff "lacked standing to pursue his claims for prospective equitable relief" because, inter alia, "his relationship with FedEx ended before this lawsuit"]; Price v. Starbucks Corp. (2011) 192 Cal.App.4th 1136, 1142 fn. 5 [similar].) The trial court must follow this case law. (Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455.) The court finds that none of the named plaintiffs has individual standing to seek injunctive relief therefore that the named plaintiffs are not typical of the members of the class for purposes of seeking injunctive relief.

The court is unsettled by this result generally. "The typicality requirement's purpose is to assure that the interest of the named representative aligns with the interests of the class." (Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362, 375.) A named plaintiff can meet the requirement for typicality for the purposes of having "a sufficient community of interest" with the members of the proposed class even if the named plaintiff does not have individual standing to assert each and every claim in the proposed class action. (Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 473 [plaintiffs who invested in 5 of 6 related partnerships were sufficiently typical to represent a class of buyers of all 6 partnerships].)

A named plaintiff who allegedly suffered an injury in the past can have interests that are aligned with persons who are continuing to suffer the alleged injury. If a named plaintiff is typical of the members of the class and if certain members of the class are currently employed by Tesla, then the class in the aggregate presumably has standing to seek injunctive relief. The issue seems better analyzed under the concept of adequacy and whether a named plaintiff with no personal "significant possibility of future harm" will adequately represent a class when seeking injunctive relief on behalf of the class.

The court is unsettled by this result on the facts of this case specifically. The putative class seeks a public injunction to address the alleged race discrimination and harassment at Tesla. (Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208, 227-232.) If a person's pursuit of a public injunction is not subject to an arbitration agreement because the public injunction serves a public purpose, then a person who was personally affected by the alleged wrongful action would reasonably have public interest standing to seek injunctive relief. The legislative purpose of the FEHA would be furthered if the named plaintiffs and the members of the putative class could seek prospective public injunctive relief to further the purposes of the FEHA. (Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, [injunctive relief under the FEHA].) That noted, the concept

of "public interest standing" has historically been confined to petitions for writs of mandate against public entities. (Save the Plastic Bag Coalition v. City of Manhattan Beach (2011) 52 Cal.4th 155, 166; Blumhorst v. Jewish Family Services of Los Angeles (2005) 126 Cal.App.4th 993, 1004-1005.) The court has not located any case law on whether the concept of "public interest standing" applies when a person is seeking a "public injunction."

The cases addressing whether a person who has standing when a case is filed can lose standing while a case proceeds are potentially relevant. In Grosset v. Wenaas (2008) 42 Cal.4th 1100, the Supreme Court held that California law "generally requires a plaintiff in a shareholder's derivative suit to maintain continuous stock ownership throughout the pendency of the litigation" and that the plaintiff in that case lost standing to continue a derivative action when he was required to sell his stock as part of a merger. (Grosset, 42 Cal.4th at 1119.) In the more recent case of Turner v. Victoria (2023) 15 Cal.5th 99, the Supreme Court held that a plaintiff who loses his or her position as director of a nonprofit public benefit corporation after start of lawsuit does not lose standing in an action against fellow directors under director enforcement statutes. The court in Turner reasoned that former directors should retain standing to further the public purpose of prosecuting lawsuits aimed at ensuring that nonprofit public benefit corporations serve their charitable purpose. (15 Cal.5th at 108-109.) It seems problematic to require an employee to stay in an allegedly hostile workplace environment if the employee wants to retain standing to seek injunctive relief to address the workplace environment.

Those concerns noted, the court must follow the law as it is. (Auto Equity, supra.) The court finds that none of the named plaintiffs currently work for Tesla, and that as a result none of the named plaintiffs has standing to seek injunctive relief addressing the workplace at Tesla, which means that none of the named plaintiffs is typical of the member of the class for purposes of seeking injunctive relief.

ADEQUACY

The responsibilities of a class representative fall into three categories: (1) to have no interests adverse to the class; (2) to protect the interests of the class, and (3) to select and monitor competent class counsel. (J. P. Morgan & Co., Inc. v. Superior Court (2003) 113 Cal.App.4th 195, 212 [no adverse interests]; McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450 ["whether the plaintiff's attorney is qualified to conduct the proposed litigation"]; Sharp v. Next Entertainment, Inc. (2008) 163 Cal.App.4th 410, 432 ["vigorously and tenaciously protecting the class members' interests"].) (See also Wershba v. Apple Computer (2001) 91 Cal. App. 4th 224, 238.)

The court finds that Marcus Vaughn, Monica Chatman, and Titus McCaleb have no interests adverse to the class. This is not disputed.

The court finds that Marcus Vaughn, Monica Chatman, and Titus McCaleb are adequately motivated to protect the interests of the class and to prosecute the claims of the class both for retrospective relief in the form of damages and in the form of prospective injunctive relief.

The court finds that Marcus Vaughn, Monica Chatman, and Titus McCaleb have retained competent counsel.

The court finds that class counsel does not have a conflict with the members of the class regarding whether claims are resolved in court or in arbitration. Procedurally, the court should

not decide the merits of Tesla's anticipated motions to compel arbitration in the context of defining the scope of a putative class. (Hendershott v. Ready to Roll Transportation (2014) 228 Cal.App.4th 1213, 122-1224.) Substantively, counsel for plaintiffs have no interest in whether the individual claims proceed in court or in arbitration because the FEHA fee shifting statute applies in both venues. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 103 ["arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorneys fees"].) If a member of the putative class stays in the class, then under the Teamsters model they may pursue their claims in this case or in arbitration, and under the single-issue model they may pursue their claims in a separate civil action or in arbitration. Any member of the putative class who wants to pursue claims individually may opt out of the class and pursue those claims individually in court or in arbitration. If the court adopts the Teamsters model, then any class notice must inform the members of the class that if they want to retain their own counsel to prosecute their individual claims then they must opt out of the class.

DETERRING AND REDRESSING THE ALLEGED WRONGDOING AND ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY

The trial courts have "the obligation to consider "the role of the class action in deterring and redressing wrongdoing." (Linder, 23 Cal.4th at 445-446.) "The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity." (Linder, 23 Cal.4th at 446.) "[T]ermination of a defendant's alleged wrongdoing is a factor to be considered." (Blue Chip, 18 Cal.3d at 386.) "[D]efendants should not profit from their wrongdoing "simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." (State of California v. Levi Strauss & Co. (1986) 41 Cal.3d 460, 472.)

The trial courts must also consider whether "class action is superior to individual lawsuits or alternative procedures for resolving the controversy." (Bradley v. Networkers Internat., LLC (2012) 211 Cal.App.4th 1129, 1142.)

On the facts of this case, there are significant incentives for individual persons to file civil actions to recover damages suffered from the alleged discrimination and harassment. Looking at the law, the FEHA states that a prevailing plaintiff can recover damages, plus attorneys fees and costs. (Govt Code 12965(c)(6).) The fee shifting provision in the FEHA is designed to encourage the filing of meritorious civil actions. (Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97, 114.) Looking at the facts of this case, counsel for the putative class stated to the court that if the court were to deny class certification, then counsel expected to file a significant number of individual cases alleging discrimination and harassment based on the facts that are presented in the putative class action. Looking at the court's inventory of cases, it appears that approximately 46 persons have filed individual cases against Tesla alleging discrimination and harassment. (Inventory of cases filed February 16, 2024.) The volume of individual cases suggests that there is sufficient incentive for individuals to file individual cases.

If the court were to deny class certification entirely or to order single issue or injunctive relief only certification, then the court would need to find that individual actions were a superior procedural vehicle for asserting the individual claims of the workers. In order to make the

finding that individual cases are superior to a class action, the court would need to be assured that workers could proceed to the merits on those individual cases (whether in court or in arbitration). The court therefore ORDERS Tesla to file a document or make a statement on the record whether it agrees that the filing of this putative class action tolled the time for the members of the putative class to file administrative charges with the DFEH and to file complaints with the court. (Bernuy v. Bridge Property Management Co. (2023) 89 Cal.App.5th 1174, 1187-1192 [tolling factors]; Hildebrandt v. Staples the Office Superstore, LLC (2020) 58 Cal.App.5th 128 [tolling factors].) The court does not generally seek commitments from parties before making orders, but when the court must choose between procedural vehicles the court on occasion needs clarity on whether a theoretical procedural vehicle is an actual procedural vehicle. For example, in Morris v. AGFA (2006) 144 Cal.App.4th 1452, 1464, the trial court asked defendants if they agreed to jurisdiction in Texas and would not assert the statute of limitations as a defense in Texas before finding that Texas was a "suitable alternative forum" and granting defendants' motion to stay based on forum non conveniens.

On the facts of this case, this case is not the only civil action that is alleging that Tesla had a pattern and practice of failing to prevent discrimination and harassment. The court can deny class certification if a class action would be duplicative of another case that is pursuing the same relief. (Caro v. Procter & Gamble Co. (1993) 18 Cal. App. 4th 644, 660 [class certification denied in part because defendant had already entered into consent decrees with public law enforcement entities].) The CRD has filed and is pursuing a parallel law enforcement action that is alleging a pattern and practice of failing to prevent discrimination and harassment and seeking an injunction that would require Tesla to institute policies and procedures that will do a better job of preventing and redressing discrimination and harassment at Tesla. The EEOC has filed a similar action.

It is unclear as of the date of this motion whether the CRD will be able to pursue the same relief on the merits. In the CRD's law enforcement action Tesla is asserting that the CRD case must be dismissed entirely or narrowed significantly because the CRD failed to comply with the CRD's pre-filing responsibilities. Given the current uncertainty about whether the CRD case will proceed on the merits, the court cannot find that the putative class action is redundant of the CRD's law enforcement action.

On the facts of this case, a class action does not appear to be required to deter Tesla's alleged bad behavior if (1) the members of the putative class are permitted to pursue their claims on the merits and (2) the CRD is permitted to pursue its claims regarding the issues of alleged discrimination and harassment at Tesla's factory in Fremont on the merits.

MANAGEABILITY/TRIAL PLAN

The trial court is ultimately required to manage any class 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.) 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.)

Plaintiffs' trial plan is to follow the two-phase approach described in Teamsters v. United States

(1977) 431 U.S. 324, and Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, 35-37. Plaintiffs adequately set out how the court could manage a trial under the Teamsters model. Phase I of the Teamsters model would be substantially similar to a single-issue trial on the identified issues or a trial seeking injunctive relief only. Both the Teamsters trial plan and the single-issue trial plan would result in a manageable class trial on whether Tesla failed to prevent discrimination or failed to take immediate and appropriate action when workers brought complaints to its attention.

CONCLUSION AND FURTHER PROCEEDINGS

The motion of plaintiff for class certification is GRANTED IN PART.

The court ORDERS [TO BE DECIDED]. Injunctive relief only is not an option because none of the named plaintiffs has individual standing to seek injunctive relief.

The class is defined as the specific approximately 5,977 persons identified by plaintiff who worked at Tesla during the class period from November 9, 2016, through [the date of this order]

The court ORDERS that plaintiffs file and serve an updated list 5 court days after entry of this order. The updated list will define the members of the class.

The motion for class certification is DENIED for all persons who are not on the list. Any such persons may if they wish seek individual remedies through filing civil actions, through arbitration, or otherwise.

The class will pursue claims for TO BE DECIDED].

Following the class trial on the issues of [TO BE DECIDED], the members of the class may prosecute their individual claims for damages by [TO BE DECIDED].

The court ORDERS that the parties meet and confer about class notice, including the content of class notice, the means of distribution, and the cost. (CRC 3.766.) If the parties cannot agree and submit a stipulation within 10 court days of this order, then the plaintiff must file a motion for approval of a plan of class notice and have it heard on the 2nd Wednesday of the month. The court will grant any reasonable request to shorten time so that the notice can be distributed to the members of the class promptly. The plaintiff generally pays the cost of class notice and it is a recoverable cost if plaintiff prevails.

The parties may file motions for summary adjudication or other motions as appropriate to address any common legal issues that might be appropriate for summary adjudication. (CCP 437c(t).) Before filing any motions for summary adjudication or judgment, the court strongly encourages the parties to consider the purpose for and use of separate statements. Beltran v. Hard Rock (2023) 97 Cal.App.5th 865, provides guidance to the parties on the purpose and use of a separate statement of undisputed facts. (See also Insalaco v. Hope Lutheran Church of West Contra Costa County (2020) 49 Cal.App.5th 506, 521.) The court encourages the parties to consider what facts are truly material. “[I]f a triable issue is raised as to any of the facts in your separate statement, the motion must be denied!” (Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 252.) The court encourages the parties to think about what “evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion." (Reid v. Google (2010) 50 Cal.4th 512, 532-533.) (See also Castillo v. Toll Bros., Inc. (2011) 197 Cal.App.4th 1172, 1189 and 1211 [trial court ruled on “focused” objections and not the “repetitive, boilerplate evidentiary

objections."

The parties may file any motions before the opt out period closes but set them for hearing so that the motion is heard afterwards. (Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1083 [defendant waives protection against one-way intervention by seeking adjudication on the merits before class certification].) The court ORDERS Plaintiffs and Tesla to meet and confer about the most appropriate procedural vehicle to address any legal issues presented in the case. The court will decide issues of pure law before the months leading up to trial and not in the context of jury instructions.

Regarding case management, the court sets the [Teamsters Phase I trial/single issue trial/ injunctive relief] trial for the same date as the trial in the CRD parallel law enforcement case, which is October 14, 2024. The court is inclined to order under CCP 1048 to consolidate the public claims for civil liability of a law enforcement entity with the private claims of individuals or a class of individuals. (Serrano v. Cintas Corp. (6th Cir., 2012) 699 F.3d 884, 890 fn 1 [EEOC intervened in class action]; E.E.O.C. v. Von Maur, Inc. (S.D. Iowa, 2006) 237 F.R.D. 195 [EEOC and private plaintiff cases consolidated for pre-trial purposes]; Estate of Ward v. Von Maur, Inc. (S.D. Iowa, 2008) 2008 WL 11336227 [EEOC and private plaintiff cases consolidated for trial].) If the parties cannot reach a stipulation on that issue, then any party may file a motion to present the issue to the court on April 10, 2024. If neither party wants to file such a motion, then this order serves as an ORDER TO SHOW CAUSE why the court should not consolidate any class trial in this case with the trial in the CRD parallel law enforcement case now set for October 14, 2024.

PLEASE NOTE: This tentative ruling will become the ruling of the court if uncontested by 04:00pm the day before your hearing. If you wish to contest the tentative ruling, then both notify opposing counsel directly and the court at the eCourt portal found on the court's website: www.alameda.courts.ca.gov.

If you have contested the tentative ruling or your tentative ruling reads, "parties to appear," please use the following link to access your hearing at the appropriate date and time: https://alameda-courts-ca-gov.zoomgov.com/my/department21 . If no party has contested the tentative ruling, then no appearance is necessary.