SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALLAN CANDELORE, on his own behalf and on behalf of others similarly situated,

Plaintiff,

vs.

TINDER, INC.; and DOES 1 through 50,

Defendants.

Case No.: BC583162

ORDER RE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: June 14, 2024
Time: 10:00 a.m.
Dept.: SSC 17

This is a putative class action by Plaintiff Allan Candelore against Defendant Tinder, Inc. alleging Defendant's age-based discounts for its premium services violated the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) by discriminating against older users.

Proposed Class: On January 25, 2022, Plaintiff moved to certify a class of "All persons who purchased Tinder Plus or Tinder Gold in California from March 2, 2015 through the date of

class notice, who were over the age of 29 at the time of initial purchase (or over the age of 28, if the initial purchase was on or after March 2, 2016) and who were charged a higher price by Tinder due to their age." (Motion at p. 5.)

On January 25, 2022, Plaintiff also proposed two sub-classes.

Subclass One: "All persons who purchased Tinder Plus in California from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of initial purchase (or over the age of 28, if the initial purchase was on or after March 2, 2016) and who were charged a higher price by Tinder due to their age." (Motion at p. 5

Subclass Two: "All persons who purchased Tinder Plus in California from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of initial purchase, who were charged a higher price for Tinder Plus or Tinder Gold due to their age, and who did not subsequently agree to be bound by Tinder's 'Terms of Use' dated May 9, 2018 or later." (Motion at p. 6.)

On April 8, 2022, Defendant moved to stay the action pending the Ninth Circuit's review of a settlement in a parallel federal class action, *Lisa Kim v. Tinder, Inc.* On June 27, 2022, the court granted the motion to stay this action (except for motions to amend the pleadings or to compel arbitration) and denied without prejudice the motion for class certification.

On December 5, 2023 the Ninth Circuit vacated the approval of the federal court settlement. On December 18, 2023, the court set a schedule for supplemental briefing on the motion for class certification and a hearing. The parties filed supplemental briefing.

In the later supplemental briefing filed in February 2024, Plaintiff revised its class and subclass definitions as follows:

New Class: "All persons who purchased Tinder Plus or Tinder Gold in California at any time from March 2, 2015 through the date of class notice, who were over the age of 29 at the time of such purchase (or over the age of 28, if the purchase was on or after March 2, 2016) and who were charged a higher price by Tinder due to their age." (Second Amended Propose Order at p. 1.)

New Subclass One: "All persons who purchased Tinder Plus in California at any time from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of such purchase and who were charged a higher price for Tinder Plus or Tinder Gold due to their age, and who either: (a) did not, on or after May 9, 2018, complete the sign-in process first implemented by Tinder on July 31, 2015; or (b) opted out of retroactive application of the arbitration clause in Tinder's 'Terms of Use' dated May 9, 2018 or later." (Second Amended Propose Order at p. 1.)

New Subclass Two: "All persons who purchased Tinder Plus in California at any time from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of that purchase, who were charged a higher price for Tinder Plus or Tinder Gold due to their age, and who did not thereafter complete the sign-in process first implemented by Tinder on July 31, 2015." (Second Amended Propose Order at p. 1.)

I. OBJECTIONS

A. Defendant's March 10, 2022 Objections

Candelore Declaration

Nos. 1, 2, 8, 9, 10, 11, 12: Overruled.

No. 3: Sustained as to "prevents me from using Tinder's app without waiving my rights herein" as a legal conclusion. Otherwise overruled.

Nos. 4, 5: Sustained.

No. 6: Sustained as to "I did not agree to be bound by any Tinder 'Terms of Use'" as a legal conclusion. Otherwise overruled.

No. 7: Sustained as to everything after "On information and belief . . . ." as argumentative. Otherwise overruled.

Nos. 13, 14, 16: Sustained as a legal conclusion.

No. 15: Sustained up to "For these reasons, ..." as a legal conclusion. Otherwise overruled.

Kralowec Declaration

Nos. 1-4: Overruled.

Rava Declaration

Nos. 1-3: Overruled.

B. Plaintiff's April 16, 2022 Objections

Ciesla Declaration

Nos. 1-17, 19, 21, 22: Overruled.

Nos. 18, 23: Sustained to the extent the sentence can be read as concluding Plaintiff accepted the arbitration agreement by signing into Tinder, otherwise overruled.

No. 20: Sustained to the extent the sentence can be read as concluding users accepted the arbitration agreement by signing into Tinder after May 9, 2018. Otherwise overruled.

No. 24: Sustained as a legal conclusion.

Brown Declaration

Nos. 1-3: Sustained as hearsay to the extent the articles are offered to prove Plaintiff was involved in a men's rights group and has filed other cases.

Lyons Declaration

The court did not rely on this declaration.

Fee Declaration

No. 1: Overruled.

Nos. 2-8: Sustained to the extent the sentence can be read as concluding users accepted the arbitration agreement by signing into Tinder. Otherwise overruled.

Nos. 9-25: Sustained as irrelevant.

C. Defendant's May 2, 2022 Objections

Rava Declaration

No. 1: Sustained as lacking foundation and irrelevant.

Kralowec Declaration

Nos. 1, 2: Sustained as argumentative.

No. 3: Sustained as argumentative. If a party did not produce all requested documents during discovery, the issue should have been addressed via the discovery process and if necessary, a motion to compel further responses.

D. Plaintiff's March 18, 2024 Objections

Kwak Declaration

Nos. 1-7: Overruled.

The court considered all of the evidence presented, except that to which an objection was sustained or as to which the court stated it did not rely, even if not specifically referenced below.

II. LEGAL STANDARD

" 'The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines "whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." ' [Citation.]" (*Imperial County Sheriff's Assn. v. County of Imperial* (2023) 87 Cal.App.5th 898, 912.) "At class certification, the court considers the commonalties and differences of the claims, but does not reach the merits of those claims unless it is necessary to assess whether common issues predominate." (*Id.* at p. 918.)

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) Numerosity asks if the proposed class is numerous in size. (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1222.) A class is ascertainable when it is defined "in terms of objective characteristics and common transactional facts" that make "the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980, citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.) Community of common interest refers to whether common questions of law or fact predominate, and whether class representatives have claims or defenses typical of the class and can adequately represent the class. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) Finally, superiority exists if proceeding with the case as a class action is superior to other methods of adjudication. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

III. BACKGROUND FACTS

On March 2, 2015, Defendant released Tinder Plus, a subscription for premium services with a "standard monthly price [of] $19.99 for subscribers over the age of 29, and $9.99 for younger subscribers." (Ciesla Decl., ¶¶ 3-4; Fee Decl., ¶ 3.) On July 31, 2015, Defendant implemented a sign-in-wrap process that required users to accept the TOU, which contained an arbitration provision. (Fee Decl., ¶ 7.) In March 2016, "the cutoff age for the youth discount for Tinder Plus was lowered from 29 to 28." (Fee Decl., ¶ 3.) In June 2017 Defendant released Tinder Gold, a premium service with a "similar price distinction" based on age. (*Ibid.*) On May 9, 2018, Defendant revised the TOU. (Ciesla Decl., Ex. 1.) On February 5, 2019, Defendant ceased its youth discount in California and started charging all users the higher price. (Ciesla Decl., ¶ 4; Fee Decl., ¶ 4.)

In March 2015, Plaintiff purchased Tinder Plus for $19.99 per month until he upgraded to Tinder Gold on September 27, 2017 for $29.99 per month, which he has paid to the present. (Candelore Decl., ¶¶ 4-5.) Plaintiff used Defendant's premium services until Defendant updated its TOU on or around May 9, 2018. (Candelore Decl., ¶¶ 5, 7, 9.) On about June 7, 2018, he sent an email to Defendant stating he was opting out of the "Retroactive Application of this Arbitration Agreement" in the May 9, 2018 TOU. (*Id.* at ¶ 8, Ex. C.)

IV. ANALYSIS

A. Prior Settlement

Defendant argues that putative class members' claims were released by the federal court's approval of a class action settlement. (Opposition at p. 5.) Because the Ninth Circuit vacated the settlement approval, that argument fails.

B. Pleading Issue

Defendant raises a threshold issue – that the complaint does not allege claims relating to Tinder Gold, and Plaintiff should have amended the complaint to add Tinder Gold. (Opposition at pp. 5, 6.) Plaintiff argues Tinder Gold and Tinder Plus are merely different names for Tinder's premium services and both are subject to age-based pricing. (Reply at pp. 5-6.)

Defendant cites *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, which recited that in connection with a previous motion, the trial court had denied class certification because the motion sought to certify a class different from the class definition in the complaint. (*Id.* at p. 66.) This is dicta. Defendant cites *Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, stating "Before a hearing may be held on the propriety of a class action, the complaint must contain sufficient allegations of class interest or the pleading is vulnerable to a general demurrer." (*Id.* at p. 1435.) That statement concerned a demurrer, not a motion for class certification. Defendant cites *Lampe v. Queen of the Valley Medical Center* (2018) 19 Cal.App.5th 832, where the plaintiffs tried to certify a class based on claims that had been stricken from the complaint. (*Id.* at p. 838.) That is not the situation here. Finally, Defendant cites *Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435, stating "Before a hearing may be held to offer proof of the propriety of a class action, the threshold requirement that the complaint contain sufficient allegations of class interest must first be met, absent which the pleading is vulnerable to a general demurrer." (*Id.* at pp. 437-438.) Again, that statement is about demurrer to a class action complaint.

Plaintiff cites one case discussing certification of a class different from the class definition in the complaint. (Reply at p. 5.) In *Sarun v. Dignity Health* (2019) 41 Cal.App.5th 1119, to address class manageability issues, the court redefined the class by taking part of the definition from the complaint and part of the definition from the class certification motion. (*Id.* at pp. 1137-1138.) However, in that case the court certified a class that was a subset of the class defined in the complaint. Here Plaintiff asks for a class that Defendant argues is more expansive than the class defined in the complaint.

" '[I]f necessary to preserve the case as a class action, the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable.' [Citation.] As it is the court's duty to certify an identifiable and ascertainable class, the court is not limited . . . to the class description contained in plaintiff's complaint." (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 747-748.) Defendant did not cite any case holding that a factor in deciding a class certification motion – in addition to

numerosity, ascertainability, predominance of common issues, adequacy, typicality, and superiority – is whether the class definition in the motion matches the class definition in the complaint.

Plaintiff's complaint defined the class as "All California consumers who were over 30 years of age when they subscribed to and paid $19.99 per month for defendants' Tinder Plus service during the period beginning on March 1, 2015 and continuing through the date of trial." (Complaint, ¶ 23.) The complaint alleged Defendant discriminated against class members by charging more for premium services than users under 30. (*Id.* at ¶ 1.) Thus, the complaint gave Defendant notice that Plaintiff claimed Defendant discriminated based on age due to the pricing scheme. The years of litigation since Plaintiff filed the complaint in May 2015 gave Defendant notice that Plaintiff bases his discrimination claims on the age-based pricing of its premium services, both Tinder Plus and Tinder Gold. Tinder Gold is sufficiently within the scope of the pleadings for the class and subclasses to include both Tinder Plus and Tinder Gold users.

C. Ascertainability and Numerosity

A class is ascertainable if defined in terms of "objective characteristics and common transactional facts" that permit "the ultimate identification of class members" when necessary. (*Noel, supra,* 7 Cal.5th at p. 980.) A class is numerous if "the class is too large to make joinder [of each class member] practicable." (*Hendershot, supra,* 228 Cal.App.4th at p. 1222.)

Plaintiff estimates 240,592 people meet the original class definition through February 5, 2019. (Kralowec Decl., Ex. B at pp. 7-8; Brown Decl., ¶ 5; Fee Decl., ¶ 6.) The parties' supplemental briefing does not say whether this number changed in any substantial way with regard to the new class definition. Defendant does not challenge numerosity of the proposed class (either the original or new definition) or offer evidence contradicting Plaintiff's estimate.

Regarding the New Subclass One, Plaintiff states there are 21,250 members. (Plaintiff's Supp. Brief at p. 2 n. 3.) Plaintiff also says "up to 250 putative class members affirmatively opted out of retroactive application of the arbitration clause in its May 9, 2019 'Terms of Use'." (*Ibid.*) Plaintiff's statements are vague about whether the 250 is included in the 21,250. In any event, Defendant does not challenge the numerosity of this subclass.

Regarding the New Subclass Two, Plaintiff states there are 7,435 members. (Plaintiff's Supp. Brief at p. 2 n. 2.) Defendant does not dispute this number.

Plaintiff argues the class and subclasses can be ascertained through Defendant's database, and cites evidence supporting that. (See, e.g., Motion at p. 7; Fee Decl.) Defendant does not directly dispute ascertainability except in the context of arguing about whether individual questions predominate, which is discussed below. (Opposition at p. 18.)

Plaintiff has shown the class and subclasses are numerous and ascertainable.

D. Predominance of Common Issues

The predominance analysis "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' . . . 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' " (*Brinker, supra,* 53 Cal.4th at pp. 1021-1022.) "In the certification context . . . common issues may be present when a defendant's tortious acts . . . 'allegedly are the same with regard to each plaintiff.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 331.)

"[C]lass treatment is not appropriate if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the class judgment on common issues." (*Duran v. U.S. Bank Natl. Assoc.* (2014) 59 Cal.4th 1, 28.) "Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Save-On, supra,* 34 Cal.4th at p. 334; see also *Brinker, supra,* 53 Cal.4th at p. 1024 [court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence"].)

"In examining whether common issues of law or fact predominate, the court must consider the plaintiff's legal theory of liability. [Citation.] The affirmative defenses of the defendant must also be considered because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues

presented by that defense predominate over common issues. [Citations.]" (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.)

Plaintiff argues the common issues are the legality of the age-based pricing structure and the validity and enforceability of the arbitration provision in Defendant's TOU. (Motion at pp. 8, 14.) Defendant argues the issues require individualized determinations.

1. Age-Based Pricing

Plaintiff contends the Court of Appeal previously decided "Tinder's age-based pricing model . . . violated the Unruh Act," citing *Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138. (Motion at p. 9.) Defendant argues the *Candelore* court "emphasized the 'individualized' nature of the statutory right to be free from invidious age discrimination." (Opposition at p. 17.)

The *Candelore* decision addressed whether the complaint in this case alleged youth as "a reasonable proxy for economic disadvantage such that the complaint did not state a claim for arbitrary age discrimination." (*Candelore, supra,* 19 Cal.App.5th at p. 1146.) The decision explained that the Unruh Act does not allow a defendant to act against "an entire class of individuals on the basis of a generalized prediction" about the class as a whole. (*Id.* at p. 1147, citation omitted.) Because Defendant's "alleged discriminatory pricing model" operates on the "'generalized prediction' that an individual over the age of 30 earns more and is less budget constrained than another individual over the age of 30," which will "not hold for all members of the respective age classes," the class-based pricing model "constitutes arbitrary discrimination under the Act." (*Id.* at p. 1148.) The decision noted it made "no judgment about the true character of Tinder's pricing model, or whether evidence exists to establish a sufficient justification for charging older users more than younger users." (*Id.* at p. 1155.) It merely held that "the complaint's allegations are sufficient to state a claim for age discrimination in violation of the Unruh Act." (*Ibid.*)

Neither side accurately characterizes the holding in *Candelore*. Plaintiff is not correct that the court actually decided the Unruh Act prohibits Defendant's age-based pricing. Rather the decision only decided that the complaint stated a claim under the Act. In doing so, the decision rejected Defendant's arguments, at the pleading stage, that youth is a reasonable proxy for

economic disadvantage (*id.* at p. 1146) and that there is a public policy basis for the differential treatment. (*Id.* at pp. 1154-1155.) But it also recognized the possibility at a later stage of evidence establishing sufficient justification for charging older users more. (*Id.* at p. 1155.)

Likewise, Defendant is not correct that the holding in *Candelore* concluded individualized inquiries are necessary to decide if Defendant violated the Act. Defendant argues that under *Candelore*, "only those members of the group that did not receive the discount who *in fact* were less well off than the members of the group that received the discount could have such a claim" under the Act. (Opposition at p. 17-18.) But the decision does not hold that Plaintiff must prove anything about the economic disadvantage of individual class members to establish a violation of the Act. Plaintiff's claim is for age discrimination, not economic discrimination. Nor does the *Candelore* decision hold that Defendant can show sufficient justification for its blanket policy by establishing that some individual class members had plenty of money to afford the higher price. Defendant did not cite any legal authority saying a person can be discriminated against on the basis of age if that person can afford it. The *Candelore* decision's discussion about the individual nature of the statutory right was in the context of explaining why Defendant's blanket policy did not have a legitimate predictive or policy basis; it was not in the context of establishing a new element a plaintiff must prove to establish an Unruh Act violation.

Whether Defendant violated the Unruh Act, and whether it had sufficient justification for charging older users more than younger users, are common issues across the class and subclasses because both issues apply uniformly to class members and will depend on common proof about Defendant's policy.

2. Terms of Use

Plaintiff contends that whether the arbitration agreement and class action ban contained in the TOU bars this litigation is a matter of common proof. (Motion at p. 13.) Defendant argues 95% of the proposed class agreed to arbitration, and for the remaining 5%, "individual inquiries are necessary to determine whether they are also bound." (Opposition at p. 8.)

The parties spend many pages arguing about whether the various iterations of the TOU are valid and enforceable arbitration agreements. Since 2014, a user has had to create an account to

use Tinder. (March 10, 2022 Ciesla Decl., ¶ 6.) By November 1, 2014, the TOU included an arbitration provision, but it was not until July 2015, that a user had to affirmatively assent to the TOU when the user created an account or logged in. (*Id.*, ¶¶ 6, 7, Ex. 1.) In July 2015, Defendant implemented a "sign-in-wrap" that "required users to expressly assent to the TOU whenever they created an account or logged back into an existing account." (*Ibid.*) The sign-in-wrap screen stated that by tapping a button, the user was agreeing to the TOU, and it contained a link to the TOU. (*Id.*, Ex. 2.) On May 9, 2018, Defendant revised the TOU to require users to accept the TOU or stop using Tinder. (*Id.*, ¶ 13.) The May 9, 2018 version contained a provision making the arbitration agreement apply retroactively, but it also contained an opt out of the retroactivity provision. (Fee Decl., ¶ 8(c); Ciesla Decl., Ex. 6, ¶ 16.) Thus, there are three versions of the TOU at issue: (1) the pre-July 2015 TOU that did not require any affirmative indication of assent, (2) the July 2015 to May 9, 2018 TOU that required assent to the TOU by clicking a button, and (3) the May 9, 2018 MOU that required assent to the TOU by clicking a button and included the retroactive provision and opt out provision.

The different versions in different time periods requiring separate analysis for the class and subclasses.

New Class: The New Class definition covers purchasers of Tinder from March 2, 2015 to the date of the class notice, encompassing all three versions of the TOU. The different versions of the TOU raise different issues.

The parties dispute whether the pre-July 2015 TOU's arbitration provision is effective at all given that it did not require an affirmative assent. The validity and enforceability of an arbitration provision in a TOU that did not require affirmative assent is a legal issue only for the users of Tinder from March 2, 2015 to July 2015, which encompasses New Subclass Two discussed below. Plaintiff states the pre-July 2015 TOU's arbitration provision has no effect because no user expressly agreed to it. (Reply at pp. 8-9.) Defendant argues users could be bound by the pre-July 2015 TOU arbitration provision if they were aware of it, but Defendant does not cite legal authority supporting that assertion, nor evidence that any user was aware of the provision. (Opposition at p. 8 n.10.) Thus Defendant did not show that the questions of the pre-

July 2015's TOU arbitration provision' validity and enforcement requires an individualized inquiry.

For the post-July 2015 users, the issue of the validity of the sign-in wrap assent is disputed. Plaintiff argues the sign-in process was too inconspicuous, with the arbitration provision buried in the TOU, for there to be a valid, enforceable agreement. (Motion at pp. 14-15; Reply at p. 7; Supp. Brief at p. 3.) Defendant contends sign-in wrap agreements create enforceable arbitration agreements "where the terms are easily accessible for review, such as through an adjacent hyperlink," and many courts have approved that form of asset. (Opposition at pp. 7, 9.)

The cases highlighted by the parties do not hold that the validity of a sign-in wrap arbitration agreement depends on individualized inquiries. In *Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, the court analyzed the process for signing onto the Internet service and the format and content of the screen that the user encountered to determine whether users were bound by the arbitration provision in the terms of service. (*Id.* at pp. 480-482, 483-484.) The court held that "in order to establish mutual assent for the valid formation of an internet contract, a provider must first establish the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting to those very terms when checking a box or clicking on a button." (*Id.* at p. 461.) The court did not consider whether the user actually read the terms of service.

Similarly, in *B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931, which involved a service (online platform to play videogames) that contemplated a "continuing, forward-looking relationship" (*id.* at p. 951) perhaps similar to Defendant's service in that respect, the court followed *Sellers*' lead in analyzing the transactional context and screens that users experienced in signing on to the service. (*Id.* at pp. 951-952.)

Defendant cites *Conde v. Sensa* (S.D. Cal. Sept. 10, 2018) 2018 WL 4297056 and *Pablo v. Servicemaster Global Holdings, Inc.* (N.D. Cal. Aug. 9, 2011) 2011 WL 3476473 to argue that the arbitration agreement raises individual issues. (Opposition at p. 14.) In *Condo,* the arbitration agreement's choice of law provision applied the law of the state of the purchaser's residence, thus requiring individualized analysis of each purchaser's state law. (*Condo, supra*, 2018 WL 4297056

at p. *11.) Here, the arbitration agreement applied Texas law to all users, thus avoiding the *Condo* problem. (Kralowec Decl., Ex. D at ¶ 17; Ex. H at p. 16.) In *Pablo*, the court barely analyzed the issue. That decision does not even state whether the arbitration agreements were signed individually by each plaintiff or were sign-in wrap agreements. Unpublished district court cases with conclusory, superficial analysis have no persuasive value. (Most of Defendant's citations on this issue are non-precedential federal district court cases instead of the applicable California law. (See Opposition at pp. 9-10; Supp. Opposition at p. 4.) Although the TOU state Texas law applies, the parties do not contend Texas law applies to the issue of the formation and validity of the arbitration agreement and do not cite Texas law.)

To the extent the cases recognize a sign-in user could be bound by an arbitration agreement if the user was aware of the provision, and to the extent Defendant contends some users had actual notice of the arbitration agreement because they clicked on and read through the terms of service and therefore agreed to those terms, Defendant did not present evidence of any such users.

Thus, the issue of the validity of the arbitration agreement in the post-July 2015 TOU can be determined by examining the process of signing into Defendant's service, the screens the users encountered, and the TOU pursuant to *Sellers* and its progeny. This is a common issue for the post-July 2015 users.

For post-May 9, 2018 users, the retroactivity provisions raises additional issues. Plaintiff contends the retroactive arbitration provision is unlawful. (Supp. Brief at p. 5.) Defendant contends it is permissible. (Supp. Opposition at p. 2.) Whether an arbitration agreement is retroactive and lawful even though retroactive depends on the language of the agreement, and whether the attempt to apply the agreement retroactively results in a unilateral modification of the agreement.. (*Franco v. Greystone Ridge Condominium* (2019) 39 Cal.App.5th 221, 230, 231-232.) Interpreting the language of the TUO is a common issue. Defendant did not show individual questions on this issue.

While different questions arise regarding these different groups of users, the evidence does not reveal individualized questions within the groups. The issues discussed above can be managed with the subclasses.

New Subclass One: The New Subclass One covers purchasers from March 2, 2015 through July 30, 2015 who either: (a) did not, on or after May 9, 2018, complete the sign-in process first implemented by Tinder on July 31, 2015; or (b) opted out of retroactive application of the arbitration clause in Tinder's 'Terms of Use' dated May 9, 2018 or later. All the members of this subclass signed up under the pre-July 2015 TOU and therefore have the issues concerning that TOU in common. Also, no members of this subclass are impacted by the May 9, 2018 TOU because they either did not use Tinder after May 9, 2018 or they opted out of the May 9, 2018 TOU's retroactivity provision. Therefore, the retroactivity issues concerning the May 9, 2018 TOU do not impact this subclass. That means that if the May 9, 2018 TOU's retroactivity provision is valid and enforceable, New Subclass One will allow users not impacted by the May 9, 2018 TOU to be class members.

There are some members of New Subclass One who did not use Tinder after July 2015 and therefore are not impacted by the post-July 2015 TOU (this is New Subclass Two). Therefore issues concerning the post-July 2015 TOU impact only some members of this subclass, which can be managed via New Subclass Two. For example, if there is a determination that the post-July 2015 TOU created a valid, enforceable arbitration agreement for post-July 2015 users that bars class membership in this case, New Subclass Two will allow the pre-July 2015 users to continue as class members.

New Subclass Two: New Subclass Two covers purchasers from March 2, 2015 through July 30, 2015 who did not thereafter complete the sign-in process first implemented by Tinder on July 31, 2015. They are impacted only by the pre-July 2015 TOU. The issues about whether that TOU created an enforceable arbitration agreement is common.

The parties also argue about whether the court can decide the validity and enforceability of the various versions of the TOU's arbitration agreement now. Defendant urges that the court can. (Supp. Opposition at pp. 1-2.) Plaintiff contends the court cannot. (Reply at p. 7.) Generally, merits-based arguments should not be decided as part of the certification process unless essential to class certification. (*Brinker, supra,* 53 Cal.4th at p. 1023 (["resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided"];

Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 440-441 ["Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections [as those afforded motions on the merits] would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims"].) Issues of the formation, validity, and enforceability of the arbitration agreement are decided via motions to compel arbitration, which can be made both pre- and post-certification. It is not essential to resolve the issues of the formation, validity and enforceability of the TOU arbitration provision at this point. As discussed below, these arbitration issues can be decided if and when Defendant files a motion to compel arbitration. Resolving on a class-wide basis disputes about the arbitration agreement is advantageous to all parties. (*Fireside Bank, supra,* 40 Cal.4th at pp. 1078-1079.)

Another disputed issue is waiver. Plaintiff contends Defendant waived the right to compel arbitration by litigating this case for years without filing a motion to compel arbitration. (Supp. Brief at p. 4.) Defendant said it did not. (Supp. Opposition at p. 4.) This issue does not raise individualized issues and is discussed further below in connection with typicality.

In its Supplemental Opposition, Defendant for the first time raises the question whether users have multiple Tinder accounts, contending this requires an individualized inquiry. (Supp. Opposition at p. 3.) However, Defendant named only one such user with double accounts (Rich Allison). Defendant did not explain why it did not make this argument two years ago in the initial briefing so that Plaintiff had sufficient time to respond. It is too late to make this new argument, which does not rely on new facts or law, in a supplemental opposition. And in any event, evidence of one user with double accounts is not sufficient to show individualized questions across the class.

E. Superiority

In deciding whether a class action would be superior to individual lawsuits, courts usually consider four factors: (1) "The interest of each member in controlling his or her own case personally;" (2) "The difficulties, if any, that are likely to be encountered in managing a class action;" (3) "The nature and extent of any litigation by individual class members already in progress involving the same controversy;" and (4) "The desirability of consolidating all claims in a

single action before a single court." (*Ali v. U.S.A. Cab. Ltd.* (2009) 176 Cal.App.4th 1333, 1353, quoting *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120-21.)

A class action here will reduce the costs of repetitious discovery concerning the same premium services and pricing practices, eliminate court congestion from managing many individual actions, and allow more complete resolution of claims relating to Defendant's premium services (a benefit to Defendant who could otherwise endure many individual suits for statutory damages and attorney fees). (*Wolin v. Jaguar Land Rover North America LLC* (9th Cir. 2010) 617 F.3d 1168, 1176 ("Proposed class members face the option of participating in this class action, or filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of proposed class members' individual injuries. Thus, classwide adjudication . . . is superior to other means of adjudicating this case"].) In addition, class certification will allow the formation, validity, and enforceability of the arbitration provision to be determined on a class-wide basis rather than piecemeal and in various forums. Similarly, if Plaintiff plans to argue Defendant waived the right to move to compel arbitration as to the class (not just Plaintiff), certification allows this issue to be decided as to the class.

Defendant argues the arbitration agreement makes the class unmanageable. (Opposition at p. 14.) "Class certification is appropriate only if . . . individual questions can be managed with an appropriate trial plan." (*Duran, supra*, 59 Cal.4th at 27.) " 'Trial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class.' " (*McCleery v. Allstate Ins. Co.* (2019) 37 Cal.App.5th 434, 449-450, citations omitted.) Manageability requires the plaintiff to set forth a complete trial plan explaining how the policy complained of will be established without violating the defendant's due process rights. (*Id.* at 451.)

"In certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (*Duran, supra,* 59 Cal.4th at pp. 28-29.) "[W]hether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual

issues. [Citations.]" (*Brinker, supra,* 53 Cal.4th at p. 1054.) "[A] class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." (*Duran, supra,* 59 Cal.4th at p. 34.)

"Courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. . . . " '[T]he trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class.' [Citations.]" (*Sav-On, supra,* 34 Cal.4th at p. 339.) For example, if during subsequent proceedings it becomes apparent that "some matters bearing on the right to recovery require separate proof by each class member," and if those issues are unmanageable, "the trial court retains the option of decertification." (*Id.* at p. 335.)

New Subclass One and New Subclass Two make the disputed arbitration issues manageable because the issues impacting the different groups of class members can be decided on a subclass basis as discussed above. If Defendant does not file a motion to compel arbitration, the case can be litigated on a class basis. If Defendant files a motion to compel arbitration, and if one or more issues are decided in a way that makes the New Class not feasible (for example, that the sign-in wrap resulted in the formation of a valid arbitration agreement and Defendant did not waive the right to compel arbitration as to the New Class), then the New Class can be decertified and the case can continue with one or both subclasses.

Plaintiff has submitted a reasonable trial plan for managing the litigation, which Defendant does not critique beyond arguing about the arbitration issue discussed above.

Defendant argues a class action is not a superior mechanism because it exposes Defendant to liability approaching $1 billion, which "would violate the constitutional due process prohibition on disproportionate statutory damages." (Opposition at p. 2.) Defendant relies upon *St. Louis, I.M. & S. Ry. Co. v. Williams* (1919) 251 U.S. 63, 66-67 and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, which recognize due process limits on statutory damages. However, Defendant cites no authority that class certification should be denied due to the *possibility* that unconstitutional damages will be imposed. Indeed, the only case Defendant cites concerning class certification concluded this possibility did not preclude certification because an unconstitutional

award of damages could be reduced later. (Opposition at p. 19, citing *Bateman v. Am. Multi-Cinema, Inc.* (9th Cir. 2010) 623 F.3d 708, 723 [potential exposure to unconstitutional damages did not preclude certification]; see also *Wakefield v. ViSalus, Inc.* (9th Cir. 2022) 51 F.4th 1109, 1120-1125 [remanding for trial court to assess whether class damages award was unconstitutional].)

Thus, Plaintiff has satisfied these factors.

F. Adequacy and Typicality

These factors require "class representatives with claims or defenses typical of the class." (*Sav-On Drug, supra,* 34 Cal.4th at p. 326.) Plaintiff argues he is typical because he was charged the higher price and is a member of each subclass. (Motion at p. 18.) Defendant argues Plaintiff's interests conflict with the class because he denies he agreed to arbitration while 95% of the class are bound by the arbitration agreement. (Supp. Opposition at p. 5; Opposition at pp. 15-16.)

Plaintiff states he purchased Tinder Plus in March 2015. (Candelore Decl., ¶ 4.) When he signed up in March 2015, he was not presented with any TOU during the sign-in process and was not asked to click on anything to agree to the TOU. (*Id.* at ¶ 6.) He upgraded to Tinder Gold on about September 27, 2017. (*Ibid.*) Plaintiff does not state whether he clicked any button assenting to the TOU when he upgraded in September 2017. On June 7, 2018, he sent an email opting out of the May 9, 2018 TOU. (*Id.* at ¶ 8.) Defendant presents evidence that Plaintiff signed onto Tinder at least six times between July 24 and August 30, 2015 and had to click a button accepting the TOU. (Ciesla Decl., ¶ 10.) After July 2015, to log in a user had to click a button to accept the TOU. (*Id.* at ¶ 7.) In the 45 days after May 9, 2018, Plaintiff used Tinder 219 times. (*Id.* at ¶ 14.) To do so, he had to accept the May 9, 2018 TOU. (*Ibid.*) The May 9, 2018 TOU only allowed opt-out of the retroactivity provision. (*Ibid.*)

This evidence shows that after July 24, 2015, including when he upgraded to Tinder Gold, Plaintiff accepted the post-July 2015 TOU. It also shows Plaintiff accept the prospective aspects of the May 9, 2018 TOU. (Obviously, the legal effect of those clicks remains disputed.) Based on this evidence Plaintiff is a typical member of the New Class – he used the service when there was no sign-in wrap, also during the period post-July 2015 when Defendant initiated the sign-in wrap,

and then under the May 9, 2018 TOU. Thus, he shares the various arbitration issues with the others during each of those time periods. If the May 9, 2018 TOU's retroactivity provision becomes an issue that is not otherwise resolved (for example, by a ruling that the arbitration provisions are retroactive by their own terms and without the specific retroactivity provision), and if Plaintiff is not a typical class member because he effectively opted out of the May 9, 2018 retroactivity provision, a new representative can be appointed or the case can proceed based on the subclasses.

Based on this evidence, Plaintiff is also a typical member of New Subclass One because he opted out of the May 9, 2018 retroactivity provision.

Regarding New Subclass Two, Plaintiff completed the sign-in process implemented by Defendant in July 2015 because he upgraded to Tinder Gold on about September 27, 2017. (Candelore Decl., ¶ 6.) And according to Defendant's evidence, he signed in several times after Defendant required affirmative consent to the July 2015 TOU. (Ciesla Decl., ¶ 10.) However, he used the service before July 2015 and therefore shares with the New Subclass Two the issue whether the pre-July 2015 TOU created a valid arbitration agreement with users. If it is later determined that the post-July 2015 TOU created a valid arbitration agreement as to Plaintiff, that the post-July 2015 TOU was retroactive as to Plaintiff and covered the pre-July 2015 time period, and that Defendant did not waive the right to compel Plaintiff to arbitrate, then a new representative for this subclass can be appointed.

Defendant also argues Plaintiff's claim is contrived because he purchased Tinder Plus after it was released and then sued and because Defendants disagree with his declaration. There is no evidence Plaintiff intended to sue before he purchased Tinder Plus, and disagreements and different interpretations about the facts are common in litigation.

Class counsel are adequate. Plaintiff's attorneys Alfred G. Rava, Michael Rubin, and Kimberly A. Kralowec have substantial class action litigation experience, and Rava in particular has substantial Unruh Act litigation experience. That Rava and Plaintiff have brought other discrimination cases in the past is not a reason to find them inadequate.

V. CONCLUSION

Plaintiff's Motion for Class Certification is GRANTED, and the court certifies the following class and subclasses:

New Class: "All persons who purchased Tinder Plus or Tinder Gold in California at any time from March 2, 2015 through the date of class notice, who were over the age of 29 at the time of such purchase (or over the age of 28, if the purchase was on or after March 2, 2016) and who were charged a higher price by Tinder due to their age."

New Subclass One: "All persons who purchased Tinder Plus in California at any time from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of such purchase and who were charged a higher price for Tinder Plus or Tinder Gold due to their age, and who either: (a) did not, on or after May 9, 2018, complete the sign-in process first implemented by Tinder on July 31, 2015; or (b) opted out of retroactive application of the arbitration clause in Tinder's 'Terms of Use' dated May 9, 2018 or later."

New Subclass Two: "All persons who purchased Tinder Plus in California at any time from March 2, 2015 through July 30, 2015, who were over the age of 29 at the time of that purchase, who were charged a higher price for Tinder Plus or Tinder Gold due to their age, and who did not thereafter complete the sign-in process first implemented by Tinder on July 31, 2015."

Plaintiff is to give notice.

Dated: 7/15/2024

Laura Seigle

LAURA A. SEIGLE
JUDGE OF THE SUPERIOR COURT