

# EXHIBIT 2

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE GEORGE WU  
UNITED STATES DISTRICT JUDGE PRESIDING

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Halie Bloom, et al., )  
PLAINTIFF, )  
VS. ) NO. CV 18-6749 GW  
ACT, Inc., et al., )  
DEFENDANT, )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, AUGUST 5, 2019

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1 LOS ANGELES, CALIFORNIA; MONDAY, AUGUST 5, 2019

2 10:11 A.M.

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7 THE COURT: Let me call the matter of Bloom versus  
8 ACT. On the matter of Bloom versus ACT, in court we  
9 have?

10 MR. CREED: Jessie Creed for the plaintiff, your  
11 Honor.

12 MS. MILLER: Marci Miller for plaintiffs.

13 THE COURT: And on the phone we have?

14 MR. BALFOUR: Ronald Balfour for ACT.

15 MR. BOWER: And also Al Bower for ACT.

16 THE COURT: All right. We are here on a  
17 continuation of the motion to dismiss and also a  
18 motion -- well, motion to dismiss based on 12(b)(6), and  
19 also for lack of personal jurisdiction.

20 I reissued the tentative except I changed a  
21 couple of portions. And I should have kept them or  
22 yellowed them so that you figured out which ones they  
23 were.

24 And I think, if my memory serves me well, they  
25 were primarily -- there is a new paragraph in the middle

1 of page 18, and also the other one was as to the statute  
2 of limitations as to ACT's claim. And I can't remember  
3 what page that is on.

4 MR. CREED: Page 19, your Honor.

5 MR. BALFOUR: Page 19, your Honor.

6 THE COURT: Actually, then, what -- I was wrong.  
7 So page 19 would be the -- I changed the argument because  
8 the Petrella case was cited, and I don't know the extent  
9 to which it really would be applicable here, so I wanted  
10 further argument on that.

11 And I guess the Rehabilitation Act was -- I  
12 guess maybe it was page 18.

13 But otherwise I think my tentative is the one  
14 that I gave out last time. And let me just indicate the  
15 problem that I have with Petrella is that, you know, if  
16 we basically have a situation where -- well, at least in  
17 this case the argument is that AC failed to file her case  
18 within the statute of limitations.

19 But then she says, well, I can in the future  
20 make a request which would raise the issues -- or when I  
21 make the request, you know, raise the issue, but it seems  
22 to me that it is not ripe at this point in time unless  
23 she does make an application -- I guess some sort of  
24 transfer or something like that, and she makes a request  
25 that accompanies it to ACT saying when you do this, don't

1 indicate the status of my testing, whatever.

2 And if they say, well, no, we are going to do  
3 it anyway, then at that point in time I would say  
4 possibly at that point there is a claim that is not  
5 barred by the statute of limitations.

6 But, at this point, I don't think that I could  
7 say, yeah, that she has a claim without something  
8 happening in the future.

9 MR. CREED: Your Honor, this case is obviously  
10 about challenging certain policies of ACT that are in  
11 place at the company. If she were to request her score  
12 reports, those policies would come into play. And she  
13 plans on transferring in the future, as she has alleged.

14 So AC would have a claim in the future, and I  
15 think --

16 THE COURT: But it doesn't mean she has a claim  
17 now.

18 MR. CREED: Well, I think she has a claim now  
19 because under the ADA, if you look at the private cause  
20 of action provision -- I can't remember the specific  
21 section -- but it says that if a plaintiff has reasonable  
22 cause to believe that there will be a violation then they  
23 can bring an action.

24 So either they have had a violation occur or  
25 they have reason to believe a violation will occur.

1           So I think in her situation it is reasonable  
2 to believe that there would be a violation because we  
3 know these policies exist and those policies would apply  
4 to her.

5           THE COURT: But there is also already a lawsuit  
6 now to challenge those policies. And she is not part of  
7 it necessarily because she didn't file within the statute  
8 of limitations.

9           MR. CREED: Well --

10          THE COURT: She wants to now come in and say even  
11 though I didn't file within the statute of limitations,  
12 because I may do something in the future that will give  
13 rise to these policies, that I have a claim now.

14          MR. CREED: I think there is no doubt that she has  
15 the intent to transfer, and I would think that we are  
16 literally in the admission season for transfer.

17          THE COURT: Has she made an application to  
18 transfer?

19          MR. CREED: She has not.

20          THE COURT: Well, again, she may decide not to do  
21 it this year. She may decide to do it next year. She  
22 may decide to do it two years from now. She may decide,  
23 oh, actually I am perfectly happy where I am. I'm not  
24 going to make the transfer.

25          MR. CREED: I think -- so, I mean, we filed this

1 lawsuit in August, and there were a few plaintiffs who  
2 were applying for college at that point in time. They  
3 hadn't submitted an application.

4 THE COURT: Yes, but they did file within the  
5 statute. And also, the other thing is she has also made  
6 this other argument about the discovery. Obviously if  
7 she is successful I am giving her leave to amend in that  
8 regard. If she is successful in that regard, then this  
9 other stuff is all moot, and I would agree with you,  
10 because then she is like the other named plaintiffs, so I  
11 don't have a problem. But if she fails in that regard,  
12 then I would have a problem is what I am saying.

13 MR. CREED: I have been assuming that we are  
14 operating without a discovery rule out.

15 THE COURT: No. Because that was my original  
16 tentative. And I think what was in my original tentative  
17 was to give her leave to see if she can satisfy the  
18 discovery rule, you know, and get around the particular  
19 problem.

20 MR. CREED: So I think under the ADA, a plaintiff  
21 who alleges that they have an intent to use the services  
22 of a business and would be discriminated pursuant thereto  
23 has standing to bring a claim before necessarily using  
24 it.

25 Now, I think that oftentimes there are



1 questions of ripeness or standing when it is someone  
2 else's actions that are required to bring into play the  
3 claim.

4 THE COURT: Let me just do it the easy way. The  
5 easy way is I will give you leave to amend to see if she  
6 can comply with the discovery rule or fall within it. If  
7 she does, then you don't need to argue anything else. If  
8 she doesn't, then I will hear the arguments that you want  
9 to make at that point in time, but as I have indicated to  
10 you, I have a question on it. All right?

11 MR. CREED: Okay.

12 THE COURT: Let me ask defense counsel, do you  
13 have any comment about that exchange I just had with the  
14 plaintiff's counsel?

15 MR. BALFOUR: Just a little, your Honor. I mean,  
16 we agree with you that ripeness is a question. I would  
17 add two things. One is if there is a ripeness and  
18 standing question, under the constitution obviously that  
19 supercedes whatever the NDA says statutorily.

20 The second thing, and we can address this  
21 later, I suppose, but we strongly think that AC is going  
22 to have difficulty in the future raising claims, and that  
23 is for a couple of reasons. But one is you know the  
24 policies here. I think a couple of the policies were  
25 before the policy started -- or one of them was in the

1 context of the preliminary injunction motion, which all  
2 occurred before AC joined the case.

3 If you recall, AC was not part of the original  
4 complaint. So we think there will be standing issues on  
5 future violations as well.

6 THE COURT: But let me put it this way. You would  
7 concede that if she managed to satisfy the discovery rule  
8 then all of those concerns don't come into play.

9 MR. BALFOUR: They don't come into play in terms  
10 of her being a party to the case, correct. We still  
11 might argue that she is not entitled to prospective  
12 relief.

13 THE COURT: All right. That is something we can  
14 address after we decide the issue in regards to the  
15 discovery rule, I think.

16 So any other comments?

17 MR. BALFOUR: That is all, your Honor.

18 THE COURT: Okay. And then as to the  
19 Rehabilitation Act item, which is on page 18, were there  
20 any comments?

21 MR. CREED: None from plaintiffs, your Honor.

22 THE COURT: Because again, the only thing I am  
23 doing at this point is I am giving the plaintiffs leave  
24 to attempt to amend, and either they can or they can't.

25 Anything from the defense on that?

1 MR. BALFOUR: No, your Honor. Just so it is clear  
2 that you are not at this point deciding what would be  
3 sufficient.

4 THE COURT: No. I am just indicating that because  
5 they had raised an argument that they hasn't raised last  
6 time, I think, in regards to the fact that they think  
7 they have a basis for meeting the federal financial  
8 assistance requirement of the Rehabilitation Act.

9 And I had indicated that, you know, maybe they  
10 can, maybe they can't. I cited Logan versus United  
11 States, which I do understand obviously is not published,  
12 and so I shouldn't be referencing it, but it did cite to  
13 another case, the Jacobson case, which was an earlier  
14 decided case that was published. So the rule I think is  
15 the same.

16 And so there is a published Ninth Circuit on  
17 that particular point.

18 So I will give them leave to attempt to amend,  
19 and we will see what happens after that. All right.

20 So in the end I am granting the motion in part  
21 with leave to amend and I am denying the motion as to  
22 other parts.

23 All right. How long is it going to take for  
24 the plaintiffs to file another amended complaint?

25 MR. CREED: I think two weeks, your Honor, would

1 be sufficient.

2 THE COURT: Two weeks. All right. What I will do  
3 is this. Two weeks from today's date would be the 19th  
4 of August.

5 I presume that the defense -- well, actually I  
6 won't make any presumptions. What I will do is I will  
7 simply set a status conference in this matter for  
8 September the 19th. But if the defense responds to the  
9 complaint by filing some sort of motion, I will  
10 automatically take the September 19th date off calendar  
11 and substitute in whatever date that the defense has used  
12 for the hearing on whatever motion they file.

13 Obviously if they answer, then well we will  
14 talk about future dates in this matter on September the  
15 19th.

16 And what I want the parties to do is to treat  
17 the 19th as if it were a 26(f) but without meeting the  
18 requirement of exchanging documents and stuff of that  
19 sort. The only thing I will require a discussion on is  
20 just the scheduling aspect of the 26(f). And you can do  
21 the exchanges of other things like witnesses and experts  
22 and stuff like that after that date and time as long as  
23 you have agreed upon what date those would be.

24 Then what I would want is, again, if it is not  
25 a -- it is just a status conference on the 19th, but I

1 want the parties to file by noon on the 17th a joint  
2 report in regards to recommended dates in this matter --  
3 recommended future dates in this matter. Okay?

4 MR. BALFOUR: Your Honor, for the defense, when  
5 would our responsive pleadings be due?

6 THE COURT: I am going to shorten your responsive  
7 date because you already filed a motion once. So I  
8 presume -- if you decide to file, I would require you to  
9 file it by September the 13th.

10 All right. Anything else I need to do at this  
11 point?

12 MR. CREED: Your Honor, we also had a motion to  
13 intervene that was on calendar for today.

14 THE COURT: Who are are the persons that want to  
15 intervene?

16 MR. CREED: New class representatives, your Honor.

17 THE COURT: Why don't do I this. Let me ask, the  
18 opposition was what?

19 MR. CREED: It was a non opp, your Honor.

20 THE COURT: It was a non opp. Why don't I do  
21 this. I will allow those persons to be thrown into the  
22 new complaint that you are filing, and if the defense at  
23 that point in time has any objections to those people  
24 they can include it in their moving papers.

25 MR. CREED: And then, your Honor, we filed a joint

1 status report for today's hearing. There has been a  
2 dispute over whether discovery should proceed in this  
3 case. We did do our 26(f) conference initially January  
4 among the parties.

5 I understand the direction today. And we have  
6 been doing discovery, both written discovery and we have  
7 a deposition teed up that plaintiffs have served. ACT,  
8 even though they stipulated to doing class discovery  
9 cutoff on November the 15th, is now requesting a stay.  
10 And I think your Honor's guidance on this would be  
11 helpful.

12 THE COURT: Well, let me put it this way. If I  
13 grant the stay, then I would grant a -- change the date I  
14 had previously set for the class certification because  
15 they would go hand and in hand and I couldn't stay  
16 without extending.

17 So let me ask the parties to discuss and see  
18 if you can agree upon that concept.

19 In other words, if the defense wants to stay,  
20 then I am going to continue on the equal period of time  
21 the hearing date for the motion for class certification  
22 and also the opposition in the filing, et cetera. Those  
23 sorts of things.

24 MR. CREED: So as I understand it, your Honor, you  
25 are saying that the stay would be -- you want us to

1 discuss --

2 THE COURT: Yes. In other words, if you guys can  
3 agree, but with the understanding that I am not going to  
4 stay this for a very, very lengthy period of time. It  
5 would be, for example, certainly a 30-day and maybe a  
6 60-day, but after 60 days I probably would be nonplussed.

7 So if you guys want to stipulate amongst  
8 yourselves and give me a stipulation to that effect that  
9 would stay discovery pending this particular date and  
10 time. Because I thought that you -- you guys are going  
11 to the magistrate judge?

12 MR. CREED: We are in front of the magistrate  
13 judge right now, and it is over a dispute that relates  
14 to AC.

15 THE COURT: Okay. But it would seem to me that  
16 could probably be resolved in the next 30 days. So if  
17 that is the case, then why don't you just agree to a  
18 30-day extension of everything, because the magistrate  
19 judge, I presume, will resolve that dispute sometime in  
20 the near future.

21 MR. CREED: And I think -- I hate to speak for  
22 them, but it is just I want clarify on this because there  
23 have been disputes between the parties over it. But the  
24 stay is seeking because of the interlocutory appeal in  
25 the matter.

1 THE COURT: Oh. That is something different.

2 What interlocutory appeal? Refresh my  
3 recollection.

4 MR. CREED: Yes. So, your Honor, you may recall  
5 that you granted ACT's motion with respect to arbitration  
6 for several of the plaintiffs. You denied it as to  
7 several other plaintiffs. You granted certification of  
8 interlocutory appeal --

9 THE COURT: But that was because of the  
10 arbitration aspect. And I presume that the new  
11 plaintiffs that are proposing do not have that  
12 arbitration.

13 MR. CREED: They don't. And we also have three  
14 active plaintiffs now.

15 THE COURT: Yes. So I would think that the case  
16 could go forward on a substantive basis during the Ninth  
17 Circuit interlocutory appeal aspect.

18 MR. CREED: Yes, your Honor.

19 THE COURT: Wait a second. I think the defense  
20 wants to interject at this point.

21 MR. BALFOUR: I do. So I would like to -- we  
22 don't necessarily agree that it makes sense to go forward  
23 with the case right now. A lot of the discovery issues  
24 involve identifying class members and involve counting  
25 the number of class members.



1           And the crucial point here is that the appeal  
2 doesn't justify the fact. It affects who can participate  
3 in a class versus who has a class arbitrability delegated  
4 to an arbitrator.

5           THE COURT: Well, but let me just put it this way.  
6 It seems to me that the issue in -- I mean, I would  
7 separate the substantive issues from that procedural  
8 issue. And frankly, even if there was a class action  
9 that would go forward that class -- there would be a  
10 separate class of people who were involved in some sort  
11 of arbitration element because, you know, their situation  
12 is very different than class members who don't have that  
13 problem. And I would require a separate named  
14 representative for that class, and et cetera.

15           So because that class is -- you know, either,  
16 one, they are going to be bound by the arbitration  
17 provision, in which case that matter is not going to be  
18 in front of me except on I presume on some sort of motion  
19 to confirm the arbitration award, if there is one, et  
20 cetera.

21           So I don't see it as necessarily putting the  
22 brakes on the processes of the remainder of this case,  
23 which I consider the substantive issues.

24           MR. BALFOUR: Well, I think, though, that the  
25 dispute in front of Magistrate Judge Stevenson

1 illustrates why it is more complicated to separate it out  
2 than that.

3 The dispute is over individuals who can  
4 participate in one of the two classes. And we went back  
5 and forth on criteria for getting a list because we  
6 couldn't get the actual list of people.

7 But one of the things we didn't filter out is  
8 whether people would be subject to an arbitration award  
9 versus people who wouldn't. And we don't know of the  
10 people we had who would be part of an arbitration class  
11 versus who would be part of the regular class at this  
12 point.

13 And we don't know how to resolve that without  
14 guidance from the Ninth Circuit.

15 THE COURT: I don't understand, though, what your  
16 point is.

17 I mean, I understand that the issue of  
18 arbitrability is going to be in front of the circuit,  
19 but, you know -- and even if the issue weren't in front  
20 of the circuit now, if this case were to go forward there  
21 would have to be a sub-class of plaintiffs who would fall  
22 within the arbitration issue because their situation is  
23 very different, at least in my opinion, from the other  
24 class members.

25 So, I think they are going to have to be

1 identified sooner or later anyway.

2 MR. BALFOUR: Fair enough.

3 THE COURT: Okay. Anything else we need to  
4 discuss?

5 MR. CREED: No, no. Just so I understand what  
6 your Honor is saying, is that discovery will proceed in  
7 the case.

8 THE COURT: But as to the persons who fall within  
9 the sub-class of plaintiffs who may be bound by an  
10 arbitration provision, as to that sub-class, I will only  
11 allow discovery insofar as identification of those  
12 persons would fall within that sub-class, because I am  
13 not going to reach the merits, because obviously if the  
14 case goes to arbitration, the arbitrator is going to  
15 decide the merits. But I think at some point in time, no  
16 matter when or where, those people have to be identified  
17 for purposes of this litigation. And I will allow that  
18 discovery to go forward here in front of me.

19 MR. CREED: Correct. And that is the dispute  
20 before the magistrate judge right now.

21 THE COURT: Oh. Did I resolve it so she doesn't  
22 have to hear the issue?

23 MR. CREED: Well, no. What is surprising to me is  
24 that actually the parties came to an agreement on the  
25 substantive scope of that discovery. All these arguments

1 we are hearing now are actually new ones where from  
2 plaintiff's perspective they are backing out of an  
3 agreement that we already had.

4 THE COURT: I wouldn't characterize it in that  
5 fashion.

6 MR. CREED: I know. I know. But the way that  
7 they were to respond to our discovery, I had understood  
8 that there was an agreement between the parties.

9 What was before the magistrate is really some  
10 procedural protections to protect the privacy of some of  
11 those individuals, and we are fully cooperating and  
12 respectful of that. There are just disputes about how  
13 that would play out.

14 So the magistrate has actually asked for us to  
15 have an IDC on Wednesday to discuss the impact of your  
16 Honor's ruling in this case on that discovery because AC  
17 is the requesting party.

18 We have also propounded it for the other  
19 plaintiffs at this point. So it should still continue to  
20 live and go forward.

21 THE COURT: Let me ask defense counsel, do you  
22 have any questions?

23 MR. BALFOUR: I don't.

24 THE COURT: Let me ask this question. As I  
25 understand it, the primary issue in this case is really

1 score flagging or test flagging -- what is the phrase  
2 involved here?

3 MR. CREED: Yes. Score flagging, your Honor.

4 THE COURT: Yes. Store flagging. But it is not  
5 actually as to identification of persons with  
6 disabilities per se.

7 MR. CREED: In fact, it is, your Honor.

8 THE COURT: Well, but the problem is that, for  
9 example, one of the things that the plaintiffs seem to be  
10 attacking is -- one of the arguments is that, for  
11 example, there is a -- I can't remember which cause of  
12 action it is going under, but you are claiming that there  
13 is more difficulty in for persons with disabilities to  
14 join in the EOS program than it is for non.

15 But if, in fact, one of the plaintiff's  
16 objections is their identification of being persons with  
17 disabilities, that is part of the EOS program. They  
18 identify persons who have a disability. So it is  
19 somewhat inconsistent to argue you are putting certain  
20 roadblocks of our participating in the EOS program, but  
21 part of that participation will mean that your disability  
22 status will be disclosed.

23 MR. CREED: Your Honor, can I step back and just  
24 sort of give you a little explanation of that because I  
25 understand what your Honor is saying so the EOS challenge

1 is related to two things.

2 The first is if you are a student in EOS, ACT  
3 allowed colleges to search for students on the basis of  
4 their disability. So the college could say I want a  
5 student with a score of 32 and a motor impairment because  
6 I don't like people with learning disabilities. So that  
7 could be an example.

8 MR. BALFOUR: I think that is a misstatement of  
9 facts.

10 THE COURT: Let me stop defense counsel, let him  
11 finish.

12 MR. CREED: Okay. So by allowing that search  
13 criterion, there is actually an exclusion that occurs,  
14 and, in fact, this is what the Department of Housing just  
15 brought a case against Facebook on a similar theory.

16 THE COURT: Well, let me stop you. One could make  
17 the same argument for purposes of race. They don't ask  
18 for religion, but I think they do ask for race. So are  
19 you going to make the argument that, oh, they can't  
20 include the designation of race either?

21 MR. CREED: Well, I have two things. One is, on  
22 disability, what is very clear under the law is that  
23 college admissions is disability blind. Every single  
24 college recognizes that. They are not allowed to ask  
25 whether or not you have a disability. They are not

1 allowed to inquire even if it is voluntarily given.

2 On race, now, it is obviously a very thornier  
3 issue. It is a little bit of a thicket. We are not  
4 trying to go into that. However, I mentioned that in the  
5 affirmative action cases against Harvard and UNC, the  
6 first level of --

7 THE COURT: Well, but let me stop, though. The  
8 thing I don't understand is the objection as to the EOS  
9 program, you are objecting because it is more difficult  
10 for persons with disabilities to participate in it  
11 because they have to specifically indicate they want to  
12 participate in it at the time of testing.

13 But there is that portion of the program which  
14 identifies persons with disabilities, but it is voluntary  
15 on the part of the participants. They don't have to  
16 designate that they have disabilities, but there is a  
17 space there and, if they want to designate it, they can.

18 MR. CREED: Well, your Honor, so that is the  
19 second policy we are challenging. So I just was  
20 describing the first one. What we learned through  
21 discovery in this action was that, in fact, ACT was  
22 excluding people with disabilities from EOS. We want an  
23 EOS program that allows them to participate and is  
24 disability blind.

25 Now, as to the exclusion of those students,

1 the EOS program does have benefits. When I was applying  
2 to college, I got a letter from USC that said, hey, we  
3 saw your SAT score, it looks great, apply to us and we  
4 will give you a scholarship. And that is one of the  
5 clear benefits that these types of programs have for  
6 students who are figuring out where to go to college.  
7 And I got a scholarship. I wouldn't have applied to USC,  
8 I wouldn't have applied for that scholarship had I not  
9 been part of that program.

10 Now, the second policy we are challenging is  
11 ACT has a policy and the numbers bear this out  
12 drastically. ACT has a policy where if you are a student  
13 with disabilities and you enroll just like a national  
14 student who doesn't have disabilities, you are not  
15 included in the program unless you take that additional  
16 step which your Honor has identified in the classroom.  
17 We will be able to re-allege that based on the language  
18 in your Honor's tentative.

19 THE COURT: All right.

20 MS. MILLER: And I think there is some confusion  
21 too. So the first way is when you identify and take the  
22 student survey and it identifies having a disability,  
23 that is disclosed, and, then, the disability is used as  
24 the search tool as disability. So it can be excluded in  
25 that way.



1           And the second claim is the manner in which  
2 certain disabled students, the most disabled students who  
3 take special testing, actually take the test. They are  
4 given a different booklet so they are excluded that way.

5           THE COURT: I view those as separate items.

6           MS. MILLER: They could be different.

7           THE COURT: I understand that. All right. Let me  
8 hear from the defense. Again, we are not going to  
9 resolve it at this point in time. I just wanted to see  
10 if I understood what the positions of the parties are.

11           Let me hear from defense, anything you want to  
12 respond? Although, you don't have to because, again, all  
13 this discussion is not binding. It is just a prefatory  
14 explanation. It is not going to be binding on either  
15 side at this point.

16           MR. BALFOUR: Yeah. So I will keep it brief  
17 because I think in general plaintiffs have their  
18 allegations, and we will argue against them at a later  
19 date, but I do think a couple of the ways that they brand  
20 items to be addressed -- (inaudible) have it wrong in  
21 your mind. And the first one is counsel's position, he  
22 can correct me if I am wrong, but it seems to me that if  
23 there is a school out there that has a program for deaf  
24 people, that recruiting deaf people to that program is  
25 somehow excluding people with learning disabilities which

1 just doesn't make any sense to me that schools aren't  
2 entitled to have programs to help out people. I don't  
3 see how that argument is benefitting anybody?

4           Secondly, you know, the idea that people who  
5 register for special testing have their registration,  
6 their opt-in to EOS ignored is simply false. If they opt  
7 in for a national registration and then subsequently  
8 don't take that registration, then that is different than  
9 saying they are opt in through a special test was ignored  
10 altogether. I don't think that is a fair  
11 characterization.

12           THE COURT: All right.

13           MR. BALFOUR: (Inaudible.) I don't really have  
14 anything to add.

15           THE COURT: As I said, this not, what you guys  
16 have said today on this aspect is not going to be  
17 binding. It is stuff that is going to have to be  
18 developed in the course of the litigation. I just wanted  
19 to figure out what the positions were.

20           All right. What else do we need to discuss  
21 today? Anything?

22           MR. CREED: I don't think so, your Honor.

23           THE COURT: Let me ask, have you guys started  
24 mediation discussions or discussions about going into  
25 mediation?

1 MR. CREED: Your Honor, we have invited ACT on  
2 several occasions to go to mediation, and we have made  
3 two demands. And we are open and willing to do a  
4 mediation in this case.

5 THE COURT: Okay. Have I given you guys a  
6 post-mediation status conference date or has that not  
7 been set?

8 MR. CREED: It has not, your Honor.

9 THE COURT: And I guess it is because two things,  
10 obviously, there was the litigation regarding  
11 arbitrability, and, then, since it is a class, usually  
12 what I do is I only talk about a class certification  
13 date. So, obviously, whether or not this case can go  
14 into mediation sometimes depends upon whether or not I  
15 certify or do not certify the class. And I do understand  
16 that.

17 But all that being said, you might want to,  
18 rather than litigate a lot of this stuff, it seems to me  
19 that some of this stuff may be able to be resolved  
20 between the parties on a basis that would avoid a lot of  
21 litigation because litigation is expensive, and discovery  
22 is expensive. But I leave that up to you guys.

23 Let me just ask defense counsel, does defense  
24 have a problem with attempting some form of mediation  
25 prior to the class certification determination?

1 MR. BALFOUR: In theory, no. In practice, there  
2 has been some difficulty, and I would start with what  
3 counsel keeps calling two demands, we consider zero  
4 demands because they haven't actually given us any sort  
5 of monetary demand. But, you know, even though they told  
6 us that money was going to be required.

7 THE COURT: Well, let me put it this way, money  
8 would be required because, again, they don't litigate for  
9 free, and we all understand that. But let me just ask  
10 you this. Insofar as changes in practices, can the  
11 parties agree upon changes in practices that would be  
12 satisfactory to both sides so the primary issue at this  
13 point in time is just money?

14 MR. BALFOUR: No. So I think the changes are  
15 problematic as well. I don't want to get into too many  
16 details.

17 THE COURT: I am not asking you that, but let me  
18 ask -- let's go off the record for a second because I am  
19 going to ask not substantive questions but some  
20 procedural questions.

21 (Discussion off the record.)

22 THE COURT: All right. So what I would want the  
23 parties to do is this: I asked you to give me by  
24 September 17th, you know, the status as to whether or not  
25 there is going to be a motion to dismiss or some sort of

1 motion that is going to be filed in response to the  
2 amended complaint. And I will hold a status conference  
3 on September the 19th. I will still hold the status  
4 conference on September the 19th even if there is a  
5 motion that is filed just to discuss with the parties the  
6 issue of mediation and the scope of mediation.

7 So I want you guys to talk about it in the  
8 interim, and, also, include that in the report that you  
9 filed on the 17th of September. And I will increase --  
10 did I set a page limit on it? I will set a page limit on  
11 the report that is given to me on September the 17th. I  
12 will limit it to seven pages.

13 MR. CREED: Your Honor, may we file that one under  
14 seal?

15 THE COURT: Yes. Anything else we need to discuss  
16 at this point?

17 MR. BALFOUR: Your Honor, I do have one question  
18 that I don't even know that I need an answer to.

19 THE COURT: Okay.

20 MR. BALFOUR: Because, as of right now, we have a  
21 30(b)(6) deposition scheduled for I believe August 28th.  
22 It would be the end of August. Have not discussed  
23 obviously what happened at this hearing with my client  
24 yet. I wouldn't be surprised if their position --  
25 because it doesn't make sense to have someone sit for

1 deposition until we have an operative complaint.

2 THE COURT: I would agree that I don't understand  
3 why you would have a 30(b)(6) at this point since you  
4 haven't finalized the pleading in that regard. So it  
5 might be a better situation to postpone the 30(b)(6)  
6 until after the amended complaint is filed, and you  
7 discuss it some more.

8 MR. CREED: Okay. Your Honor, we have had a  
9 little trouble trying to get ACT to agree to a deposition  
10 so I understand your Honor's concerns.

11 I would request that, if it is acceptable with  
12 your Honor, that when the time for such a deposition  
13 would be ripe that ACT provide us with dates within 30  
14 days of our request.

15 THE COURT: I would think they would have to. Let  
16 me ask ACT, why would that be a problem?

17 MR. BALFOUR: I don't think it would.

18 THE COURT: Okay. Let me put it this way. He is  
19 agreeable.

20 MR. CREED: We have done one deposition where ACT  
21 failed to appear, your Honor.

22 THE COURT: Well, that is water under the bridge  
23 at this point in time. I don't want to talk about what  
24 has happened in the past. I am always forward thinking.

25 MR. CREED: All right.

1 THE COURT: Anything else we need to do,  
2 everybody?

3 MR. CREED: Just one second.  
4 (Counsel confer.)

5 MR. CREED: Your Honor, just one thing, your Honor  
6 entered an order that set a class certification discovery  
7 cutoff for November 15th.

8 THE COURT: As I indicated, I would extend  
9 everything. If you guys agree on any sort of continuance  
10 up to 60 days, I would agree to continue all the  
11 previously set dates by up to 60 days as well.

12 Okay. Anything else?

13 MR. BALFOUR: Just to clarify on that, my  
14 understanding was the stipulation also struck hearing  
15 date so there isn't one right now. Is that right, or did  
16 I miss something along the way?

17 THE COURT: I think you guys are going to talk  
18 about it because it seems to me that the November,  
19 whatever the November hearing date -- was that the filing  
20 date or hearing date?

21 MR. CREED: That was the hearing date.

22 THE COURT: For you guys to meet the November  
23 hearing date would be a little bit difficult at this  
24 point in time. So I presume you guys are going to talk  
25 about continuing it if you guys want. But it seems to

1 me, from all the stuff that we have discussed so far,  
2 that might be somewhat problematic.

3 MR. CREED: Yes, your Honor. The November hearing  
4 date was vacated because of the interlocutory appeal.

5 THE COURT: Okay. All right. But you guys are  
6 going to have to talk about a new date for a class  
7 certification hearing date.

8 MR. CREED: Okay.

9 THE COURT: But with the understanding that that  
10 hearing date obviously does not reflect the issue that is  
11 in front of the Ninth Circuit in regards to the sub-class  
12 of potential class plaintiffs who would be -- fall within  
13 an arbitration agreement of some form.

14 MR. CREED: Okay.

15 THE COURT: All right. Okay. Anything else? I  
16 have said that too often. There is nothing else at this  
17 point.

18 Have a very nice day, everybody.

19 (Proceedings concluded.)  
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CERTIFICATE

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I hereby certify that pursuant to Section 753, Title 28,  
United States Code, the foregoing is a true and correct  
transcript of the stenographically reported proceedings held  
in the above-entitled matter and that the transcript page  
format is in conformance with the regulations of the  
Judicial Conference of the United States.

Date: August 7, 2019

/s/ Katie Thibodeaux, CSR No. 9858, RPR, CRR

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