UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-6749-GW(SSx)	Date	October 1, 2020
Title	*Halie Bloom, et al. v. ACT, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Terri A. Hourigan	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Jesse M. Creed	Ronald D. Balfour

PROCEEDINGS: **TELEPHONIC HEARING ON MOTION OF PLAINTIFFS FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT UNDER FED. R. CIV. P. 23(e) [273]**

Court and counsel confer. The Tentative circulated and attached, is adopted as the Court's Final Ruling. The Court GRANTS the motion. Counsel for Plaintiff will provide a proposed order forthwith.

The final fairness hearing is set for April 1, 2021 at 8:30 a.m., with final briefs to be filed by March 18, 2021.

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Halie Bloom et al v. ACT, Inc., et al; Case No. 2:18-cv-06749-GW-(KSx)
Tentative Ruling on Plaintiff's Motion for Preliminary Approval of Class Action Settlement

I. Background[1]

Defendant ACT, Inc. ("Defendant") administers the ACT (originally an acronym for "American College Testing) exam, a standardized test widely used for college admissions in the United States. In 2018, the plaintiffs, various individuals who have taken the ACT exam (collectively, "Plaintiffs"), brought this putative class action against Defendant, alleging that it discriminated against examinees with disabilities in violation of, among other things, the Americans with Disabilities Act ("ADA") and California's Unruh Civil Rights Act ("Unruh Act").

The parties have intensely litigated this case, involving a motion for a preliminary injunction, multiple motions to stay pending arbitration, multiple motions to dismiss, and an interlocutory appeal to the Ninth Circuit. However, after engaging in mediation, Plaintiffs and Defendant have reached an agreement to settle all claims. The agreement includes a consent decree enjoining Defendant from continuing the practices challenged in this action, as well as a settlement award of $16 million. Plaintiffs now move for an order preliminarily approving the proposed settlement as fair, adequate, and reasonable as required by Rule 23(e)(2). *See* Mot. For the reasons discussed below, the Court **GRANTS** the motion.

A. Factual background

Plaintiffs challenge three of Defendant's policies that they allege unlawfully discriminate against ACT examinees with disabilities. First, they allege that Defendant flagged to colleges exam results of examinees who required special testing accommodations or who otherwise indicated they had a disability – a breach of the examinees' privacy that also improperly discounted their test scores. Second, Defendant allegedly made it more difficult for examinees who required testing accommodations to participate in the Educational Opportunity Service ("EOS"), a student search service offered by Defendant to examinees and colleges to help the latter identify prospective students to recruit. Third, Defendant allegedly enabled colleges that participated in EOS to filter through participating examinees based on the existence and type of disability – again,

[1] The following abbreviations are used for the filings: (1) Complaint, Exh. A ("Sample Score Report"), ECF No. 1-1; (2) Third Amended Complaint ("3AC."), ECF No. 273; (3) Plaintiffs' Motion for Settlement Approval ("Mot."), ECF No. 273; (4) Settlement Agreement ("Settlement Ag."), ECF No. 273-2, Exh. 1; (5) Proposed Consent Decree ("Consent Dec."), ECF No. 273-2, Exh. 1.

a breach of the examinees' privacy.

The alleged discriminatory practices start from the moment an examinee registers for the ACT exam. Defendant asks every student registering for the exam: "Are you an examinee with a disability who needs accommodations and/or an English learner who needs support to access the ACT?" *See* 3AC ¶ 5. Students who answer "Yes" are then asked to choose between "National Testing" and "Special Testing." The difference between the two is that while National Testing examinees still take the exam at regular test centers, Special Testing examinees require test accommodations that cannot be provided at the regular test centers and so sit for the ACT exam at their school. *Id.* Separate from the accommodations-request component of the registration process, examinees are also asked to fill out the "Student Profile Section" ("SPS"). The SPS section is described to "help [them] think about [their] future education and to help colleges in their planning." *Id.* ¶ 53. Defendant asks *every* examinee – even those who answered "No" to the first question about whether they need accommodations – if they have disabilities that require "special provisions from the educational institution [*i.e.*, the college they ultimately attend]" and asks them to choose from a set of impairments that "most closely describes [their] situation." *Id.* ¶ 6. The choices include hearing, visual, and motor impairments as well as learning, cognitive, and other disabilities.

Examinees who register online are also asked if they want to participate in EOS, a student search service offered by Defendant to examinees and colleges to help the latter identify prospective students to recruit. By participating in EOS, examinees allow their name, contact information, and certain personal data (such as their ACT score and certain demographic and socioeconomic information) to be viewable to participating colleges. Participating colleges use EOS to identify students to recruit. Through EOS, colleges can select search criteria to identify prospective students based on a combination of geographic (*e.g.*, state, zip code), academic (*e.g.*, ACT test score, grades, intended college major), and socioeconomic (*e.g.*, family income, parents' education level) attributes. *Id.* ¶¶ 67-68. Colleges can then purchase from Defendant the names and contact information of students meeting their search criteria. They then use this information to send the identified students targeted marketing and recruiting messages. Participating in EOS provides an obvious benefit to examinees by increasing their chances of being identified for academic, scholarship, and financial aid opportunities that they might otherwise have missed.

The first way in which Defendant allegedly discriminates against examinees with

disabilities is by including in an examinee's ACT score report – the report that is sent to colleges that the examinee applies to – information about any disabilities they may have (the "Score Flagging Practice"). First, the score report includes an indication of whether or not the examinee sat for the ACT with Special Testing accommodations. For Special Testing examinees, their score report had "SCHOOL" marked at the top in all capital letters, a reference to the fact that the examinee sat for the exam at her own school, as opposed to a regular testing center. *Id.* ¶ 21. Furthermore, any information an examinee provided about her disabilities in the SPS – even for students who did not require any special testing accommodations – was included in the score report as well. *Id.* ¶¶ 7, 60-62; *see also* Sample Score Report.

The second way Defendant allegedly discriminates is by making it more difficult for examinees with disabilities to participate in EOS (the "Special Testing EOS Practice"). *Id.* ¶¶ 86-100. Defendant asks all examinees whether they would like to participate in EOS during the online registration process for the ACT exam. For most examinees, simply answering yes during the online registration process guarantees their participation in EOS. However, examinees with Special Testing accommodations are required to reaffirm their interest each time they sit for the ACT exam. When they show up in person (usually at their school) to sit for the exam, they must complete a new form to reiterate their interest in EOS. Failure to do so means that information from that exam sitting (such as their test score) will not be uploaded to EOS for colleges to access. Plaintiffs allege that this additional procedural burden is discriminatory, and that it has greatly depressed the numbers of students with disabilities participating in EOS. They claim that the proportion of Special Testing examinees who participate in EOS is less than a fifth of the proportion of National Testing examinees who participate in EOS. *Id.* ¶ 99.

The third and final way in which Defendant allegedly discriminates against examinees with disabilities is by making information about their disabilities accessible to colleges participating in EOS (the "EOS Disability Search Practice"). The existence of a disability is one of the search criteria that colleges can use to search for prospective students. By simply selecting for examinees without the disability flag, colleges are able to ensure that their targeted messaging goes only to prospective students without disabilities, leaving those with disabilities out of luck *Id.* ¶¶ 67-68.

B. Procedural history

Plaintiffs filed a complaint in August 2018. *See* ECF No. 1. In return for Defendant's assurance on the record that it would stop including in ACT score reports any information about

special testing accommodations or the examiner's disabilities, the Court denied Plaintiffs' motion for a preliminary injunction. *See* ECF No. 45.

The parties engaged in a lot of motion practice. In December 2018, the Court granted Defendant's motion to compel arbitration of several of Plaintiffs' claims and stay the case pending that arbitration. *See* ECF No. 86. New plaintiffs were then added and Plaintiffs also filed a motion for interlocutory appeal of the Court's arbitration ruling. In March 2019, the Court denied Defendant's motion to compel arbitration of the newly-added plaintiffs and granted Plaintiffs' motion to certify the December 2018 ruling compelling arbitration and staying the case for interlocutory appeal. *See* ECF No. 126.

Plaintiffs later filed a first and second amended complaint. In May 2019, Defendant filed a motion to dismiss the claims for lack of personal jurisdiction and a motion to dismiss under Rule 12(b)(6). The Court rejected the former, but granted in part the latter. That led to Plaintiffs filing a third amended complaint in August 2019. Defendant filed a motion to dismiss certain claims under Rule 12(b)(6), which the Court granted in part in November 2019 by dismissing all of Plaintiffs' claims under the Rehabilitation Act, 29 U.S.C. § 701 *et seq*. *See* ECF No. 243.

After the hearing on Defendant's latest motion to dismiss, the parties engaged in settlement discussions. They participated in two mediation sessions, the first in January 2020 and the second in April 2020, both before the Honorable Louis Meisinger, a retired judge for the Los Angeles County Superior Court. *See* Mot. at 4-5. In September 2020, the parties entered into the proposed settlement agreement that is now before the Court. *See* Settlement Ag.

C. The proposed settlement

The proposed settlement consists of a consent decree (the "Consent Decree") and an award of damages.

1. The Consent Decree

The Consent Decree enjoins Defendant from the three allegedly discriminatory practices: the Score Flagging Practice, Special Testing EOS Practice, and EOS Disability Search Practice. Consent Dec. §§ 7-8. Furthermore, Defendant is prohibited from "inquiring into an examinee's disability status during registration for or administration of the ACT Test for reasons unrelated to the provision of testing accommodations." *Id.* ¶ 7(d).

The Consent Decree benefits every member of the proposed class (the "Injunctive Relief Class"), which is defined as:

> All individuals in the United States who meet either of the following criteria: (a) took the ACT Test through Special Testing at any time or (b) provided an Eligible SPS Question 8 response at any time.

Settlement Ag. ¶ 3(b)(ii); Consent Dec. § 5(a). An "Eligible SPS Question 8" is defined to include examinees who in filling out the Student Profile Section (the questionnaire Defendant asks examinees when they register for the ACT test) indicated that they had a disability. The class is purposely not time-bound so that examinees who take the ACT test in the future also fall within the Injunctive Relief Class and therefore will have a right to enforce the injunctions. This class would be certified as an injunctive relief class under Rule 23(b)(2), and therefore the parties do not seek to provide notice. *See* Fed. R. Civ. P. 23(c)(2)(A) (making notice for injunctive relief classes optional); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("[Rule 23](b)(2) does not require that class members be given notice and opt out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory.").

2. The award of monetary damages

Defendant will pay a gross settlement amount of $16 million (the "Gross Settlement Amount") in return for a release of all claims against it related to the facts alleged in the third amended complaint.

- Class counsel's attorney fees are capped at $4 million – 25% of the gross settlement amount.
- The administrative costs are predicted to be $166,481.
- The class representatives will each receive a service award capped at $5,000. There are ten class representatives, so the total amount is capped at $50,000.
- The Net Settlement Amount, which is defined as the Gross Settlement Amount minus the attorney fees, administrative costs, and class service awards listed above, is predicted to be at least $11,783,519 (assuming the awards above are set at the maximum level), is to be distributed on a pro rata basis.

See Mot. at 8-9.

The Net Settlement Amount is to be distributed to the following two subclasses (the "California Subclasses") of the Injunctive Relief Class:

> *California Disclosure Subclass*: All individuals who meet all of the following criteria in connection with any single administration of the ACT Test according to ACT's records: (a) took an ACT Test on or after September 1, 2002, and on or before August 2, 2020; (b) resided in California at the time they took the ACT Test

> or took the ACT Test in California; and (c) satisfies at least one of the following criteria: (i) such individual provided an Eligible SPS Question 8 Response or (ii) such individual was administered the exam through Special Testing.
>
> *California EOS Subclass*: All individuals who meet the following criteria in connection with any single administration of the ACT Test according to ACT's records: (a) took an ACT Test through Special Testing on or after September 1, 2007, and before August 2, 2020; (b) resided in California at the time they took the ACT Test or took the ACT Test in California; and (c) left the response to the EOS enrollment question blank on the Special Testing answer folder for at least one exam.

Settlement Ag. ¶ 3(b)(i). The California EOS Subclass is a subset of the California Disclosure Subclass. Members of the California Disclosure Subclass by definition were subject to the Score Flagging Practice and the EOS Disability Search Practice. Members of the California EOS Subclass were subject to the Special Testing EOS Disability Practice.

Each claimant is entitled to one or two shares of the Net Settlement Amount – one for each of the California Subclasses that she is a member of. The possibilities are: (1) the claimant is a member of both; (2) the claimant is a member of the California Disclosure Subclass but not the California EOS Subclass.[2] Plaintiffs believe that there are 55,984 individuals in the California Disclosure Subclass and 9,749 individuals in the California EOS Subclass. Using the maximum amounts allowed for the attorney fee and service awards as well as the predicted administrative costs, each share is predicted to be worth $179.26. *See* Mot. at 9.

II. Legal Standard

There is "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (internal quotation marks omitted). Nonetheless, the district courts are required to approve class action settlements before they can become effective. "[S]ettlement class actions present unique due process concerns for absent class members[.]" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *see also Allen*, 787 F.3d at 1223 ("[T]he district court has a fiduciary duty to look after the interests of those absent class members."). In cases such as this one where the parties arrive at a settlement before class certification, "courts must peruse the proposed compromise to ratify both

[2] As noted earlier, the California EOS Subclass is a subset of the California Disclosure Subclass, so these are the only two possibilities.

the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

Preliminary approval of class action settlements invokes a two-step inquiry. At the first step, courts decide if a class exists. *Staton*, 327 F.3d at 952. "Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). At the second step, courts consider "whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026. If the parties settle before class certification, the Ninth Circuit requires "a more probing inquiry than may normally be required under Rule 23(e)." *Id.* Courts examine "the settlement taken as a whole, rather than the individual component parts . . . for overall fairness." *Hanlon*, 150 F.3d at 1026. Courts cannot "delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety." *Id.* (internal quotation marks and citation omitted).

III. Discussion

A. Whether class certification is warranted

The proponent of class treatment bears the burden of demonstrating that class certification is appropriate. *See Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012). Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996).

Rule 23 requires the party seeking certification to satisfy all four requirements of Rule 23(a)[3] and at least one of the subparagraphs of Rule 23(b).[4] *Id.* at 1234. "A party seeking class certification must affirmatively demonstrate his compliance with Rule 23 – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores*, 564 U.S. at 350. The court is permitted to consider any material

[3] Rule 23(a) requires that the party/parties seeking certification show:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

[4] Here, Plaintiffs seeks certification of classes under Rule 23(b)(2) and (b)(3).

necessary to its determination, though it should not go so far as to engage in a trial of the merits. *Id.* at 350-51 (noting that the "rigorous analysis" required at class certification will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim").

1. Numerosity

Rule 23(a)(1) requires a demonstration that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "In general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). Here, the smallest subclass – the California EOS Subclass – itself is predicted to consist of 9,749 members. *See* Mot. at 6. The numerosity requirement is easily satisfied.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement has been permissively construed. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Although there must be common questions of law or fact, it is not necessary that all questions of law or fact be common. *See id.* ("The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."); *see also Staton v. Boeing Co.*, 327 F.3d 938, 953-57 (9th Cir. 2003). There need only be a single common question. *See Dukes*, 564 U.S. at 359. Crucially, "[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 350 (omitting internal quotation marks) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-32 (2009)).

The Court is satisfied that the commonality requirement is met here. This lawsuit is particularly well suited for class action treatment given that this involves the administration of a standardized exam. All of the questions of law and fact are centered on the three alleged unlawful practices: the Score Flagging Practice, Special Testing EOS Practice, and the EOS Disability Search Practice. Whether these practices violate the ADA or Unruh Act are common questions that will resolve the claims of the class members. And as far as the Court can tell, these questions do not require any individualized inquiries for any of the class members.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose . . . ." *Id.* (citation and internal quotation marks omitted). "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." *Id.* (citation and internal quotation marks omitted). The representative plaintiffs' claims need not be identical to those of the class, but rather need only be "reasonably co-extensive with those of absent class members . . . ." *Hanlon*, 150 F.3d at 1020. In practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

The Court finds that Plaintiffs meets the typicality requirement. There are ten named plaintiffs here who have all taken the ACT exam and between them represent virtually all possible combinations of interests. There are representatives who are: (1) in all of the three classes/subclasses here (the Injunctive Relief class and the two California Subclasses); (2) in the Injunctive Relief class and the California Disclosure Subclass (but not the California EOS Subclass); and (3) in the Injunctive Relief class but none of the subclasses. *See* Mot. at 12-13.

4. Adequacy

Representative parties must also fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). Generally speaking, "[w]hether the class representative[] satisf[ies] the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (omitting internal quotation marks) (quoting *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) and *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)); *see also Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) ("The record indicates clearly that [the class representative] understands his duties and is currently willing and able to perform them. The Rule does not require more.").

The Court is satisfied that the adequacy requirement is met. Plaintiffs' counsel are well qualified and there do not appear to be any conflicts of interest. *See* Mot. at 24.

5. Whether injunctive relief is appropriate

An injunctive relief class can be certified under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Unlike with a Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class. Rather, only a showing of cohesiveness of class claims is required. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998).

The Court finds that Defendant's alleged unlawful practices – the Score Flagging Practice, Special Testing EOS Practice, and EOS Disability Search Practice – are applied uniformly to the members of the Injunctive Relief Class, but that there may be a small issue concerning Plaintiffs' standing to seek injunctive relief. Although Plaintiffs did not raise the issue in their briefs, "federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (internal quotations omitted).

"In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Not only must at least one named plaintiff satisfy constitutional standing requirements, but the plaintiff "bears the burden of showing that [s]he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

A Rule 23(b)(2) class can only be certified if the named plaintiff shows that she herself is subject to a likelihood of future injury. Allegations that a defendant's conduct will subject unnamed class members to the alleged harm is insufficient to establish standing to seek injunctive relief on behalf of the class. *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir. 1999) ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.").

The Court has a question about Plaintiffs' standing to seek injunctive relief. As far as the Court can tell, the allegedly unlawful practices harm only ACT examinees who are applying or intend to apply to college at some point in the future. However, as of the date the third amended

complaint was filed in August 2019, three of the Plaintiffs were already enrolled in college. *See* 3AC ¶¶ 114, 121, 128. Five of the Plaintiffs planned to apply to colleges and start in the fall of 2019. *Id.* ¶¶ 134, 139, 147, 153, 160. Finally, the remaining two Plaintiffs indicated their intent to apply to transfer to a different college for the 2020-21 academic year. *Id.* ¶¶ 173, 183. If all of these things happened according to plan, there is the possibility that all of the named Plaintiffs have finished with the college admissions process by now and so would not suffer any future injury from the three practices they seek to enjoin. While the Court does not find this a ground to deny a preliminary approval (a new named plaintiff can be added to fix this if needed), the Court asks Plaintiffs to clarify this issue.[5]

6. Predominance and Superiority

Because Plaintiffs also seek to certify the California Disclosure Subclass and California EOS Subclass under Rule 23(b)(3), the Court must analyze whether the proposed subclasses satisfy the predominance and superiority inquiry. Rule 23(b)(3) provides that:

> [a] class action may be maintained if Rule 23(a) is satisfied and if:
> . . .
> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "[A]n individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (quoting *Tyson Foods v. Bouaphakeo*, 136S. Ct. 1036, 1045 (2016)).

While the predominance test is "far more demanding" than the commonality requirement

[5] The explanation may well be that, if one looks at the situation at the time the action was initially filed, one or more of the initially named class representatives clearly had standing even though through the passage of time they emerged from the possibility of future harm.

under Rule 23(a)(2), the Court finds that it is nonetheless met here. *Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (1997). As the Court observed earlier, this lawsuit seems particularly well-suited for class action treatment. All of the major issues – whether the Score Flagging Practice, Special Testing EOS Practice, or EOS Disability Search Practice are unlawful – can be resolved by looking at the same set of evidence for the Injunctive Relief Class. Unlike in consumer-protection class action lawsuits, there are no potential individualized inquiries on issues such as reliance or causation. Even damages, which is often a messy issue, is simplified here because a large component of the damages sought are statutory damages under the Unruh Act. *See Nevarez v. Forty Niners Football Co., LLC*, 326 F.R.D 562 (N.D. Cal. 2018) (certifying Rule 23(b)(3) class after agreeing with Plaintiffs' contention that "only seek[ing] the Unruh Act's statutory minimum of $4,000 minimizes any individual inquiries because class members will not need to show actual damages").

B. Whether the proposed settlement is fair, adequate, and reasonable

To determine whether a settlement is fair, reasonable, and adequate, courts must consider whether: (1) "the class representatives and class counsel have adequately represented the class;" (2) "the proposal was negotiated at arm's length;" (3) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement [made in connection with the proposed settlement];" and (4) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).[6]

At this stage of preliminary approval, the Court does not need to make a final determination as to whether the proposed settlement is fair, reasonable, and adequate, but only that "the court

[6] These factors were added to the Federal Rules of Civil Procedure in 2018. The Advisory committee recognized that "[federal] [c]ourts have generated lists of factors to shed light on this concern [that a proposed settlement be fair, reasonable, and adequate" and observed that the goal of the amendment adding its own set of factors "[was] not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."

For example, the Ninth Circuit has directed courts to consider the following factors: "(1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004).

will likely be able to" do so. Fed. R. Civ. P. 23(e)(1)(B).

1. Adequcy of representation

The first factor asks whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). The Court is satisfied that Plaintiffs' counsel are experienced, competent lawyers who have been tenacious in their litigation of this action thus far. This factor weighs in favor of preliminary approval.

2. Arm's length negotiations

The second factor asks whether "the [settlement] proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B).

Here, the parties arrived at the proposed settlement after a negotiation process that began back in January 2020, when the parties requested and were granted a stay of discovery so that they could focus their efforts on mediation. *See* ECF Nos. 251, 252. Plaintiffs have received over 3,000 pages of documents as part of the class-certification discovery. *See* Mot. at 19. The parties participated in two mediation sessions, the first in January 2020 and the second in April 2020, both before the Honorable Louis Meisinger, a retired judge for the Los Angeles County Superior Court. *See* Mot. at 10; *O'Connor v. Uber Tech., Inc.*, 15-cv-00262-EMC, 2019 WL 1437101, at *7 (N.D. Cal. Mar. 29, 2019) (finding that this factor weighed in favor of approval because "the parties arrived at the Settlement Agreement after three rounds of negotiations overseen by . . . experienced and respected mediators"); *Nielson v. The Sports Auth.*, 11-cv-04724-SBA, 2013 WL 3957764, at *5 (N.D. Cal. July 29, 2013) ([T]he settlement resulted from non-collusive negotiations; *i.e.*, a mediation before . . . a respected employment attorney and mediator.").

With pre-certification settlements, courts must be especially vigilant to ensure that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011) (citations and internal quotation marks omitted); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992) ("Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties."). Signs of collusion include: (1) "when counsel receive a disproportionate distribution of the settlement;" (2) when the parties negotiate a "clear sailing" arrangement under which defendants agree not to oppose an attorneys fee award up to a certain amount separate from the class's actual recovery; and (3) "when the parties arrange for fees not awarded to revert to

defendants rather than be added to the class fund." *In re Bluetooth Headset.*, 654 F.3d at 947.

The Court does not see any red flags. Plaintiffs' counsel request at most 25% of the settlement fund for attorney fees, which is the benchmark in the Ninth Circuit. *See id.* at 942. Given that this settlement proposal was reached after a lengthy and highly contested litigation process, the Court finds this request reasonable. Defendant does not oppose the request, which in other situations would raise concerns about collusion between a settling defendant and class counsel. However, it is not problematic here given that the total settlement amount was agreed to by the parties without any agreement as to attorney fees and costs (except that they would be paid from the common settlement fund). *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (observing that with clear sailing provisions, "lawyers might urge a class settlement at a low figure . . . in exchange for red-carpet treatment on fees."). Finally, any amount of the fee request not awarded to Plaintiffs' counsel will revert to the class members rather than Defendant. *See Bluetooth Headset*, 654 F.3d at 948 (noting that a non-reversionary fund reduces "the likelihood that class counsel will have bargained away something of value to the class").

The Court finds that this factor weighs in favor of preliminary approval.

3. Adequacy of the proposed relief

The next factor requires the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement[7] required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).

a. *Costs, risks, and delay of trial and appeal*

The settlement was reached after a good amount of contested litigation, including a preliminary injunction proceeding, two arbitration motions, a motion for reconsideration, a motion to file an interlocutory appeal, and motions to dismiss for lack of personal jurisdiction and under Rule 12(b)(6). By entering the proposed settlement, the Settlement Class would get prompt monetary relief. As described earlier, each claimant is expected to receive at least $179.26 for each share they are entitled to. Therefore each of the 9,749 individuals in the California EOS

[7] This refers to "any agreement made in connection with the [settlement] proposal." Fed. R. Civ. P. 23(e)(3). Here, there are no other agreements and so this component is not relevant. *See* Mot. at 25.

Subclass is expected to receive at least $358.53, while each of the 46,235 individuals in the California Disclosure Subclass but not in the California EOS Subclass will receive at least $179.26.[8]

Evaluating the monetary relief compared to the value of the class's underlying claims is not an exact science. As Plaintiffs note, the California Subclasses sought statutory damages under the Unruh Act, which are capped at $4,000. While the $179.26 (possibly more, if attorney fees were lowered) and $358.53 are a far cry from $4,000, Defendant has several defenses which make recovery of $4,000 far from certain. First, there is the fact that many of the proposed class members may have to have their claims arbitrated (one of the issues before Plaintiffs' pending interlocutory appeal to the Ninth Circuit). Second, many of the claims not covered by arbitration may be barred by the applicable statute of limitations. Finally, Defendant may raise some defenses that its practices were not in fact discriminatory (such as the argument that the colleges' ability to search through EOS examinees based on the existence of a disability facilitated efforts meant to *include* applicants with disabilities). Given these uncertainties, the Court is satisfied that this monetary relief is fair, adequate, and reasonable given the potential risk and expense of the lengthy litigation (or arbitration) that lay ahead.

b. *Attorney fees and various costs*

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method" in awarding attorney fees. *Bluetooth Headset*, 654 F.3d at 942. "Because the benefit to the class is easily quantified in common-fund settlements," courts may "award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Id.* "Applying this calculation method, courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award." *Id.*

Here, Plaintiffs' counsel seeks 25% of the settlement fund. In determining whether an attorney fee award is justified, a court must evaluate the results obtained on behalf of the class. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (stating that the "most critical factor" to the reasonableness of an attorney fee award is "the degree of success obtained"). Furthermore, courts

[8] The California Disclosure Subclass consists of 55,984 individuals. All 9,749 individuals in the California EOS Subclass are by definition also members of the California Disclosure Subclass. Therefore, there are 46,235 (*i.e.*, 55,984 - 9,749) individuals in the California Disclosure Subclass that are not in the California EOS Subclass.

typically provide "adequate explanation in the record of any 'special circumstances' justifying a departure" from the 25% benchmark to attorney fees. *In re Bluetooth Headset*, 654 F.3d at 942.

The Court is satisfied that the attorney fee amount that Plaintiffs' counsel seek initially appears reasonable. In addition to securing injunctive relief that would enjoin all of the alleged unlawful practices, the California Subclass members will also receive monetary damages. The court sees no special circumstances that would justify a departure from the 25% benchmark.

Plaintiffs also seek a service award of $5,000 for each of them. Service awards to named plaintiffs in a class action are permissible and do not necessarily render a settlement unfair or unreasonable. *See Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). However, the service award must be "reasonable," and the Court "must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.* The Court is satisfied that the requested service award is consistent with an equitable treatment of the proposed class. The requested amount is well within the range regularly awarded by courts in the Ninth Circuit. *See, e.g., Jasper v. C.R. England, Inc.*, 08-cv-5266-GW, 2014 WL 12577426, at *9 (C.D. Cal. Nov. 3, 2014) ("Courts in the Ninth Circuit have granted service awards in varying amounts up to and past $10,000.").

4. Equitable treatment of class members

The settlement funds will be distributed to members of the California Subclasses. Members of the California Disclosure Subclass that are not members of the California EOS Subclass will each receive at least $179.26, while members of the California EOS Subclass will each receive at least twice that amount, $358.53. This roughly treats members equitably, as members of latter – in addition to the disclosure of Special Testing accommodations and any disabilities in their score reports (which all members of the former suffered) – also suffered from the fact that they may have been improperly excluded from participating in EOS.

Accordingly, the Court finds that this favor weighs in favor of approval.

C. Adequacy of class notice for the California Subclasses

Under Rule 23(e), district courts must "direct notice in a reasonable manner to all class members who would be bound" by the proposed settlement. *See* Fed. R. Civ. P. 23(e)(1)(B). For Rule 23(b)(3) classes, such as the California Subclasses, the rule states:

> [T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). It requires that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). In addition, due process mandates that the "notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *See id.* at 174 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Class notice "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

Here, the parties propose appointing KKC as the settlement administrator. *See* Mot. at 26. KKC will maintain an internet website, toll-free phone number, and email address to communicate with class members. Notice will be provided through email sent to the email addresses on file with Defendant. Fortunately, "[v]irtually every class member (if not every class member) provided an email address to [Defendant] at the time of registration [for the ACT exam]." Mot. at 26. Given this, the Court finds that the proposed method should provide sufficient notice.

D. Appoint class counsel and class representatives

The Court finds that Plaintiffs are adequate to represent the class for certification purposes with one small reservation. The Court sees no issue with appointing representatives for the California Subclasses as requested below:

- California Disclosure Subclass: Halie Bloom, Devon Linkon, Jaquel Pitts, M.B., Jane Doe, A.C., and Jane Doe
- California EOS Subclass: Halie Bloom, Devon Linkon, M.B., Jane Doe, A.C., and John Doe

See Bisaccia v. Revel Sys. Inc., No. 17-CV-02533-HSG, 2019 WL 861425, at *5 (N.D. Cal. Feb. 22, 2019) ("Because the Court finds that Plaintiffs meet the commonality, typicality, and adequacy requirements of Rule 23(a), the Court appoints Plaintiffs as class representatives."). However, the Court has one question about the choice of representatives for the Injunctive Relief Class. As noted earlier, the Court would ask Plaintiffs to clarify which of them have standing to sue for injunctive relief.

The Court must also appoint class counsel. *See* Fed. R. Civ. P. 23(c)(1)(B). Factors that the Court considers in this inquiry include "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *See* Fed. R. Civ. P. 23(g)(1)(A). Based on the evidence presented going toward these factors, the Court finds that these factors support appointing Panish, Shea & Boyle LLP and Miller Advocacy Group PC as class counsel.

IV. Conclusion

Based on the foregoing discussion, the Court **GRANTS** the motion.