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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

vs.

IXL Learning, Inc.,

Defendant.

Case No.: 3:17-cv-02979-VC

**EEOC’S SUPPLEMENTAL BRIEFING ON
DUANE’S MOTION TO INTERVENE**

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INTRODUCTION

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2 The issue before the Court is whether Defendant IXL Learning, Inc. waived res judicata as a
3 defense to Adrian Scott Duane’s motion to intervene in this case and what was the scope of that
4 waiver. The conclusion will determine what legal claims Duane can raise in the EEOC action and
5 what factual assertions he can make in support of those legal claims. IXL fully waived its res
6 judicata defense and cannot now preclude claims it explicitly agreed Duane could bring. The
7 parties’ Stipulation of Dismissal unambiguously restricted dismissal to “all claims pending” in the
8 prior action – not all claims that Duane could have pled. Extrinsic evidence confirms the intent of
9 the parties and supports a determination that IXL fully waived its res judicata defense and cannot bar
10 Title VII, ADA, and FEHA claims that Duane is statutorily authorized to pursue.

FACTS

11
12 Duane filed a federal court action against IXL in January 2017 asserting a Family Medical
13 Leave Act (FMLA) interference claim and a state law tort claim of wrongful termination in violation
14 of public policy. *See* Complaint, *Duane v. IXL Learning, Inc.*, 17-cv-00078 (N.D. Cal. Jan. 6, 2017),
15 ECF. No. 1¹. On May 24, 2017, the EEOC filed this action alleging that IXL unlawfully retaliated
16 against Duane in violation of Title VII and the ADA. The EEOC is pursuing monetary relief for
17 Duane and injunctive relief to redress IXL’s discriminatory employment practices. (Dkt No. 1.)

18 In June 2017, Duane’s private counsel, David Marek informed IXL counsel, Jeff Wilson that
19 Duane intended to intervene in the EEOC action. On June 19, 2017, IXL proposed a draft
20 Stipulation for Dismissal that included a “dismissal of all claims by Plaintiff against Defendant ...”
21 Marek responded on June 21, 2017 with edits to the Stipulation. Marek narrowed the language of
22 the dismissal to “all claims pending in this action by Plaintiff against Defendant.” That same day
23 Wilson accepted Marek’s proposed revisions. Also on June 21, 2017, *before* filing the Stipulation,
24 Wilson and Marek exchanged emails clarifying that IXL did not object to Duane’s intervention in
25 the EEOC action. (Dkt No. 24-3.) The relevant portions of the emails include:

26 Marek: Please see my attached edits. Also, please let me know if you intend to object, and if

27
28 ¹ To avoid confusion, the EEOC will use “ECF No.” for all docket references in the prior action
while using “Dkt. No.” for all docket references in this action.

1 so, on what basis, to my motion to intervene in the EEOC v. IXL matter.

2 Wilson: The change to the stipulated order is fine with me. . .David, by “motion to intervene”
3 do you mean Duane intervening as a party? Or are you asking about making an
4 appearance as counsel of record?

4 Marek: We will intervene as a party in the EEOC case.

5 Wilson: “We” being Duane, correct? . . . If you are asking whether IXL objects to Duane
6 intervening in the EEOC case, we would not object.

7 Marek: The “we” was Duane, and I was asking if you object to Duane intervening in the
8 EEOC v. IXL matter.

8 Wilson: We are clear, and I don’t have any objection to Duane intervening in the EEOC case.
9 I believe, but could be wrong, that he has a right to intervene.

9 (Dkt. No. 24-3.)

10 On June 22, 2017, the parties filed a Stipulation dismissing “*all claims pending in this*
11 *action* by Plaintiff against Defendants with prejudice, waiving all rights to appeal” that was
12 approved by Judge Alsup on June 27, 2017. *See* Stipulation for Dismissal with Prejudice, *Duane v.*
13 *IXL Learning, Inc.*, 17-cv-00078-WHA (N.D. Cal. May 11, 2017), ECF No. 51.

14 On August 21, 2017, Duane moved to intervene in this action. (Dkt. No. 19.) Duane’s
15 proposed complaint raised (1) Title VII and ADA retaliation claims mirroring the EEOC’s factual
16 allegations; (2) one additional factual allegation relating to the federal retaliation claims; and (3) a
17 retaliation claim pursuant to the California Fair Employment and Housing Act (FEHA). Duane’s
18 claims are all related to his underlying charges of discrimination filed contemporaneously with the
19 EEOC and the California Department of Fair Housing and Employment. Defendant opposed this
20 motion, arguing that legal theories beyond those asserted by the EEOC and facts other than those
21 alleged by the EEOC are barred by res judicata. (ECF No. 24.) The Court heard oral argument on
22 this motion on October 12, 2017. There, Defendant stated it did not oppose the EEOC action on res
23 judicata grounds.² (*See* Transcript of Oral Argument on Oct. 12, 2017 at 32:5-6, 16-17) (“I cannot
24

25 ² The EEOC’s right to file suit, however, belongs solely to the agency as “a master of its own case”,
26 not the aggrieved worker. *EEOC v. Waffle House*, 534 U.S. 279, 291 (2002). In *EEOC v. Waffle*
27 *House*, the Supreme Court held that an agreement between an employer and employee to arbitrate
28 employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief,
such as backpay, reinstatement, and damages. *Id.* at 297-98. (overturning cases holding that an
arbitration agreement bars victim-specific relief and rejecting the distinction between injunctive and
victim-specific relief). The EEOC sues in its own name “to vindicate the public interest in

1 apply res judicata to the EEOC based on an individual complaint, lawsuit filed by the complainant.”)
 2 Similarly, Defendant conceded it waived Duane’s intervention as a “co-plaintiff” on the existing
 3 claims that are asserted by the EEOC. (*Id.* at 33:9-11.) (“To the extent there’s a res judicata argument
 4 as to Duane’s intervention as a co-plaintiff on the existing claims that are asserted by the EEOC, then
 5 I waive that.”)

6 On October 19, 2017, this Court requested supplemental briefing addressing the following
 7 questions: (1) whether a partial waiver of an affirmative defense of res judicata is possible; (2) if a
 8 partial waiver is possible, what are the rules for determining the scope of an ambiguous partial
 9 waiver; (3) do Charging Parties typically intervene in EEOC actions and assert state law claims and
 10 should that practice be relevant to the scope of IXL’s waiver?

11 ARGUMENT

12 I. Res judicata is an affirmative defense that can be partially waived by express 13 agreement or acquiescence

14 Res judicata, also known as claim preclusion, is an affirmative defense that bars litigation in
 15 a subsequent action of claims previously raised or that could have been raised in a prior action.
 16 *Owens v. Kaiser Foundation Health Plan, Inc.* 244 F.3d 708, 713 (9th Cir. 2001). Federal courts
 17 recognize a general rule against splitting a cause of action which, in effect, gives rise to the res
 18 judicata affirmative defense. *See Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 328
 19 (9th Cir. 1995) (citing Restatement (Second) of Judgments, at §§ 24, 26 (2nd 1982)). The main
 20 purpose behind the rule against claim splitting is “to protect the defendant from being harassed by
 21 repetitive actions based on the same claim.” Restatement. at § 26, Comment a.

22 Parties can agree to limit the scope of a dismissal’s preclusive effect. *See Perez v. Gordon &*
 23 *Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 U.S. Dist. LEXIS 41080, at *12-14 (N.D. Cal.
 24 Mar. 26, 2012) (collecting cases) (recognizing the parties’ ability to agree to settle one part of a
 25 claim while not precluding a second suit on another part of the same claim); *see also* Restatement, at
 26 §26 (1)(a) ([The general rule against splitting claims] does not apply to extinguish the claim, and

27 _____
 28 preventing employment discrimination,” and its suit authority is neither derivative of, nor limited by,
 the suit rights of the charging parties for whom the agency seeks relief. *Id.* at 291-92.

1 *part or all of the claim subsists* as a possible basis for a second action . . .[where] the parties *have*
2 *agreed in terms or in effect* that the plaintiff may split his claim, or the defendant has acquiesced
3 therein.”) (emphasis added). Upon agreement to split claims, Defendant waived res judicata.
4 *Clements*, 69 F.3d 321 at 328.

5 Here, Duane and IXL agreed that Duane could split his claims. The dismissal in the prior
6 action is memorialized in the Stipulation for Dismissal, which embodies the parties’ agreement to
7 dismiss only the claims pending in the prior action. Interpretation of the Stipulation will establish
8 whether IXL waived its res judicata defense fully (“applying to any factual allegations and legal
9 theories Duane could bring in intervention”) or partially (“applying only to the factual allegations
10 made by the EEOC and the legal theories asserted by the EEOC in support of those factual
11 allegations”). (ECF No. 36.)

12 **II. IXL fully waived its res judicata defense**

13 **A. Interpretation of the Stipulation, pursuant to contract law, governs the** 14 **scope of the IXL’s res judicata waiver.**

15 To determine whether IXL preserved its ability assert res judicata against any legal theories
16 or factual allegations exceeding those asserted by the EEOC, this Court must examine the
17 Stipulation. In California, contract law governs the interpretation of a release or agreement. *See*
18 *Marder v. Lopez*, 450 F.3d 445, 449 (9th Cir. 2006); *Perez*, 2012 U.S. Dist. LEXIS 41080, at *15
19 (citing *Villacres v. ABM Indus., Inc.*, 117 Cal. Rptr. 3d 398 (Cal. Ct. App. 2010)).

20 The primary goal of contract interpretation is to determine the mutual intent of the
21 contracting parties at the time the contract was formed. *Andrews Farms v. Calcot*, 258 F.R.D. 640,
22 647 (E.D. Cal. 2009) (citing Cal. Civ. Code § 1636). When parties dispute the meaning of contract
23 language, courts decide whether the language is ambiguous or reasonably susceptible to a party’s
24 interpretation. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 132 Cal.Rptr.2d 151 (Cal.
25 Ct.App.2003); *see also* 66 Am.Jur.2d Release § 31 (“The scope of a release is determined by the
26 intention of the parties as expressed through a release’s terms considering all the facts and
27 circumstances. This rule stems from the proposition that a release comes about from a meeting of the
28 minds.”) Here, the Stipulation unambiguously reflects the parties’ agreement that Duane would

1 release “all claims pending in this action by Plaintiff against Defendant.”

2 Nevertheless, if the Court finds the Stipulation is ambiguous, the Court next considers
3 extrinsic evidence to interpret the contract. *See SCC Alameda Point LLC v. City of Alameda*, 897 F.
4 Supp. 2d 886, 893 (N.D. Cal. 2012) (citations omitted). An analysis of the plain language of the
5 Stipulation as well as a review of the negotiations giving rise to the Stipulation language
6 demonstrate that IXL fully waived its defense.

7 **B. The plain language of the Stipulation is unambiguous and reflects that**
8 **the parties only intended to dismiss the FMLA interference and state law**
9 **wrongful discharge claims.**

10 When contractual language is clear and explicit and does not involve an absurdity, the plain
11 meaning language governs. *Andrews Farms*, 258 F.R.D. at 647 (citing Cal. Civ. Code § 1638).
12 Here, the Stipulation language was unambiguous. The parties’ intent is clear from the plain
13 language of the Stipulation. By limiting the dismissal to all claims pending in Duane’s action, the
14 parties intended to dismiss only the FMLA interference claim and the state tort law claim.
15 Defendant urges the Court to ignore this clear language and instead give “all claims pending in this
16 action” an entirely different meaning. Defendant now posits that the language actually incorporated:
17 (1) the asserted FMLA interference claim and the state tort claim; PLUS (2) *any* claims that Duane
18 *could* have brought in the original action, EXCEPT (3) those claims mirroring the legal and factual
19 assertions made by the EEOC.” That interpretation is contrary to the plain language of the
20 Stipulation, which governs. The parties only agreed to dismiss two distinct claims with the result
21 that IXL fully waived res judicata as to the claims proposed intervention complaint.

22 Although a partial waiver of res judicata is possible, that is not what happened here. IXL
23 could have included in the Stipulation an express agreement restricting the scope of Duane’s future
24 claims to only federal claims mirroring the EEOC’s claims. It failed to do so. Because IXL’s
25 expansive view of what the narrow language in the Stipulation intended is not ‘reasonably
26 susceptible’ to the interpretation advanced by Defendant, the inquiry ends here. *See SCC Alameda*
27 *Point LLC*, 897 F. Supp. 2d at 892 - 93 (citing *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56 (Cal.
28 2006)).

1 **C. To the extent this Court finds ambiguity in the Stipulation, extrinsic**
2 **evidence supports the conclusion that Defendant fully waived res**
3 **judicata.**

4 When interpreting ambiguous provisions, context matters. Courts consider extrinsic
5 evidence to resolve ambiguities in a written agreement. *SCC Alameda Point*, 897 F. Supp. 2d at
6 893; *see also Perez*, 2012 U.S. Dist. LEXIS 41080, at *16 (internal quotation marks and citations
7 omitted); *Andrews Farms*, 258 F.R.D. at 647 (“The Court considers the contract as a whole and
8 interprets contractual language in context, rather than interprets a provision in isolation.”) (citing Cal.
9 Civ. Code § 1641). Here, there is ample evidence to resolve any ambiguities and conclude that the
10 parties intended the dismissal to apply only to the claims pending in Duane’s action.

11 Duane explained in the pleadings supporting his Motion to Intervene and during oral
12 argument, that “all claims pending in this action” only dismissed the FMLA interference claim and
13 the state tort law claim. This is a reasonable interpretation supported by extrinsic evidence. The
14 drafting and negotiation of the Stipulation clarifies the intent. Defendant proposed broad language,
15 which Duane purposefully narrowed to specify dismissal of “all claims pending” rather than all
16 claims.³ (Exh. A.); *see also* (Dkt No. 24-3.) Defendant agreed to this narrower language. (Dkt. No.
17 24-3.) In the same email exchange, which occurred prior to filing the Stipulation, Duane’s counsel
18 represented that Duane would seek to intervene in the EEOC’s action and asked if IXL objected.
19 (*Id.*) IXL had been served with the EEOC complaint and was aware that it was based on claims
20 arising from Duane’s charge of discrimination. IXL also knew that the charge was dually-filed,
21 alleging and thus preserving both federal and state law claims. Nonetheless IXL explicitly agreed,
22 without limitation or caveat, that it would not oppose Duane’s intervention in the EEOC’s action.
23 (*Id.*) Indeed, Defendant acknowledged Duane’s right to intervene. (*Id.*) Defendant neither asked
24 what claims Duane intended to bring nor sought to clarify whether the intervention complaint would
25 contain the state law claims arising out of Duane’s charge of discrimination.

26 IXL’s proposed interpretation of the Stipulation also is contrary to the documentary evidence

27 ³ Please see attached as Exhibit A, a copy of the redline draft Stipulation submitted as an attachment to an email from
28 David Marek on June 21, 2017 to Jeff Wilson. In support of this brief, David Marek, counsel for Duane, provided this
29 document to the EEOC. David Marek will provide this Court with an authenticated copy of this document.

1 and ignores the circumstances that gave rise to the dismissal. One month before the dismissal, Judge
2 Alsup denied Defendant's motion to dismiss the pending FMLA and state tort claims. (Order
3 Granting in Part Denying in Part Motion to Dismiss, *Duane v. IXL Learning, Inc.*, No. 17-cv-00078-
4 WHA (N.D. Cal. May 12, 2017), ECF No. 47.) Therefore, it defies logic that Duane voluntarily
5 released viable legal claims to become a redundant party in the EEOC's lawsuit after surviving a
6 motion to dismiss. It is similarly illogical that Duane would forego his state law discrimination
7 claims for absolutely no consideration other than the promise that IXL would not oppose Duane's
8 right to intervene in the EEOC action unless he believed and intended by agreeing to the Stipulation
9 that he could bring those pendent state law claims when he intervened in the EEOC action. If
10 Defendant wanted to ensure dismissal of all claims and facts other than the ones asserted by the
11 EEOC, it was incumbent upon IXL to advise Duane's counsel and, more importantly, expressly state
12 that in the Stipulation. It did not take either of these actions. To the contrary, IXL agreed to narrow
13 the language of the Stipulation. Accordingly, this Court should conclude that IXL fully waived its
14 res judicata defense and grant Duane's motion to intervene. Duane should be permitted to bring his
15 FEHA retaliation claim and the additional factual allegation in support of the Title VII and ADA
16 retaliation claims in this action.

17 **D. IXL's waiver must be interpreted broadly.**

18 IXL's waiver should be interpreted broadly. This gives full effect to the claim splitting
19 exception to res judicata and allows the parties to frame the scope of subsisting claims.⁴ Broad
20 interpretation of the waiver is also warranted because the prejudice to Duane outweighs any
21 prejudice to Defendant. "Underlying the res judicata doctrine is the recognition that a plaintiff's
22 interests in a full and fair opportunity to be heard must be considered against the respect for a
23 defendant's efforts and expense in defending itself." *Dixon v. U.S. Postal Serv.*, No. C 10-4220-

24 ⁴ Claim preclusion precludes litigation of claims that were raised or should have been raised in
25 earlier litigation. See *San Remo Hotel, L.P. v. San Francisco City and Cnty*, 364 F.3d 1088 (9th Cir.
26 2004) (citing *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 77, n.1 (1984); *Clements*,
27 69 F.3d at 330. The claims Duane proposes to assert here were not yet pled in the prior action and
28 therefore remain unadjudicated. A broadly construed waiver will not disturb Defendant's private
interests because issue preclusion bars Duane from reasserting the FMLA interference and state tort
law claims. Similarly, a broad waiver will not disturb the public's interest because there is no risk of
inconsistent judgments.

1 DMR, 2011 WL 2748615, at *2 (N.D. Cal. July 14, 2011) (citing *Marin v. HEW Healthcare Fin.*
2 *Agency*, 769 F.2d 590, 594 (9th Cir. 1985). IXL understood that Duane planned to intervene and
3 bring unadjudicated claims distinct from those he had previously pled. IXL explicitly agreed to
4 allow Duane to intervene in the EEOC's action. Based on that representation, Duane agreed to
5 dismiss certain claims with prejudice. IXL's belated assertion of res judicata prejudices Duane. Had
6 Defendant made clear that it intended to limit the scope of the intervention so narrowly, Duane may
7 have chosen to proceed differently. Duane could have negotiated a dismissal without prejudice or
8 continued with the prior action, amended the complaint⁵, and related the two cases. A broad
9 interpretation of the waiver is consistent with the policies underlying res judicata. Moreover,
10 Defendant will not suffer prejudice if this Court permits Duane to bring the FEHA retaliation claim
11 because the burdens of proof are the same under Title VII, ADA, and FEHA. *See e.g., Yanowitz v.*
12 *L'Oreal USA, Inc.*, 116 P.3d 1123, 1130 (Cal. 2005). The additional claims will not change the
13 effort and expense required of Defendant since it is already in Court on the EEOC's claims. Any
14 additional defense effort that may be required because Duane alleges one additional factual assertion
15 is negligible.

16 Finally, broad interpretation of the waiver is consistent with the statutory scheme envisioned
17 by Congress which ensures that private litigants have full access to the courts even though an action
18 has been commenced by the EEOC. Duane is an aggrieved person who has an unconditional
19 statutory right to intervene provided both by Title VII and the ADA. 42 U.S.C. §§ 2000e-5(f)(1); 42
20 U.S.C. §12117(incorporating by reference 42 U.S.C. §2000e-5(f)(1)); *see also E.E.O.C. v. Fry's*
21 *Elects., Inc.*, 770 F. Supp. 2d 1168, 1170 (W.D. Wash. 2011). Congress did not limit this statutory
22 right to only those claims raised by the EEOC. Therefore, Duane is not limited to raising only
23 federal claims in his intervention. Doing so would also run counter to a core principle for
24 intervention, the protection of judicial economy. *See Wilderness Soc'y v. United States Forest Serv.*,
25 630 F.3d 1173, 1179 (9th Cir. 2011) (“[a] liberal policy in favor of intervention serves both efficient

26 ⁵ August 31, 2017 was the last day to amend in the prior action. *See* Civil Minutes for Case
27 Management Conference, *Duane v. IXL Learning, Inc.*, 17-cv-00078-WHA (N.D. Cal. May 11,
28 2017), ECF No. 48. The discussions relating to dismissal and intervention occurred two months
prior to that date.

1 resolution of issues and broadened access to the courts.”) (citing *United States v. City of Los*
 2 *Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (internal quotation marks omitted). This Court should
 3 construe waiver broadly and permit Duane to assert his federal and state claims.

4 **III. The frequency of charging parties intervening in EEOC actions and asserting**
 5 **state law claims is not relevant to the question of how broadly or narrowly to**
 6 **construe IXL’s res judicata waiver.**

7 **A. Charging parties intervene in approximately 12% of EEOC actions and**
 8 **in approximately 42% of the cases involving intervention, charging**
 9 **parties assert state law claims alongside the federal claims the EEOC**
 10 **asserted.**

11 The EEOC does not track the frequency of charging parties intervening in its lawsuits,
 12 although it does maintain general litigation statistics.⁶ According to EEOC statistics, the EEOC filed
 13 614 merit suits from 10/1/2012 – 9/30/2016. Nevertheless, in an effort to answer the Court’s
 14 question about “typical” practices, the EEOC surveyed dockets using Lexis Courtlink. The EEOC
 15 searched federal district court dockets nationwide from October 1, 2012 through September 30,
 16 2016⁷ for cases where the EEOC was listed as a Plaintiff and the docket included either the word
 17 “intervene” or “intervenor”. The Courtlink search identified 76 cases involving interventions.⁸ Of
 18 these, in 32 cases, charging parties asserted additional state law claims. Only one court denied
 19 intervention due to circumstances wholly irrelevant to this case.⁹ Given the unscientific nature of
 20 this survey, the EEOC cannot state with assurance whether it is a “typical” practice for charging
 21 parties to intervene and bring state law claims in EEOC lawsuits.

22 ⁶ <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (Last visited November 1, 2017)
 23 The table reflects EEOC litigation statistics. The category “All Suits Filed” includes subpoena
 24 enforcement proceedings and actions for preliminary relief. The category “Merit Suits” is defined to
 25 include “direct suits and interventions alleging violations of the substantive provisions of the statutes
 26 enforced by the Commission and suits to enforce administrative settlements.

27 ⁷ These dates are in line with the government’s fiscal year.

28 ⁸ The EEOC used the Lexis service Courtlink to search for all cases where the EEOC was listed as a
 plaintiff and where the words “intervene.” The EEOC did not limit this search to Title VII cases.

⁹ The case involved a class ADEA action where the court found that it lacked original jurisdiction
 over the non-parties’ age discrimination claims.

B. The results of this survey are not relevant to Duane's right to intervene and whether IXL's waiver should be construed broadly

The EEOC's informal survey is not a complete answer because there exist myriad reasons why charging parties do not intervene despite their unconditional right to do so. The EEOC maintains a diverse national docket of cases involving individual allegations of discrimination as well as class based allegations of systemic discrimination. Not all cases are appropriate for intervention. In fact, not all the statutes that the EEOC enforces authorize unconditional intervention. Moreover, despite charging parties' rights to intervene in most EEOC actions, doing so would typically require representation by a private attorney. It can be difficult and costly to retain counsel. Other reasons include jurisdictional differences, including timeliness issues where there is no workshare agreement with the corresponding State fair employment agency if one exists. In California, charging parties may intervene more frequently because FEHA does not impose the same statutory caps on damages as federal law imposes. Other states have different limits which may change the calculus of whether intervention makes sense in each case. There are too many fact-based individual explanations for why a charging party does not intervene or bring state law claims in intervention that are inapplicable here and do not inform the Court about Duane's right to intervene and bring state law claims.

The typical practice of other charging parties has no bearing on Duane's unconditional statutory right to assert his claims in this action. This right is based in statute and supported by sound policy reasons of providing litigants access to the courts to efficiently bring the causes of action arising out of the same set of operative facts in one action.

CONCLUSION

Duane has a right to intervene in this action. That right includes his ability to assert additional factual allegations supporting the federal legal theories as well as his FEHA claim. IXL is barred from asserting res judicata. The Stipulation dismissing the prior action only applied to the claims pending in the prior action and therefore Duane is free to assert his FEHA claim and additional facts in support of the Title VII and ADA retaliation provisions. Therefore, to succinctly answer this Court's questions, it is the EEOC's position that:

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- (1) Although a partial waiver of an affirmative defense of res judicata is possible, IXL fully waived its res judicata defense.
- (2) The Stipulation memorialized the parties’ agreement regarding dismissal of the prior action. Contract law governs interpretation of the Stipulation. Interpretation of the Stipulation shows that IXL fully waived its res judicata defense by limiting the preclusive effect of the prior action to the FMLA and state tort law claims.
- (3) In the alternative, if this Court accepts that IXL only partially waived its defense, it should allow Duane to include additional factual allegations in support of his Title VII and ADA retaliation claims. Nothing in the Stipulation or the evidence giving rise to it supports the conclusion that Defendant sought to limit the intervention to facts and legal theories asserted by the EEOC.
- (4) What is typical for charging parties in other actions in other jurisdictions is irrelevant to Duane’s unconditional right to intervene and assert state law claims.

Respectfully submitted,

Dated: November 2, 2017

/s/ Ami Sanghvi
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EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ADRIAN SCOTT DUANE,

Plaintiff,

v.

IXL LEARNING, INC. and PAUL MISHKIN,

Defendants.

Case No.: 3:17-cv-00078-WHA

**STIPULATION FOR DISMISSAL
WITH PREJUDICE**

To the Honorable William H. Alsup, United States District Judge:

Defendants IXL Learning, Inc. (“IXL”) and Paul Mishkin (“Mishkin”) (collectively, the “Defendants”) and Plaintiff Adrian Scott Duane (“Plaintiff”), by and through their undersigned counsel, hereby agree and stipulate pursuant to Fed. R. Civ. P. 41(a) to the dismissal of all claims pending in this action by Plaintiff against Defendants with prejudice, waiving all rights of appeal. The parties agree not to pursue, and without costs or attorneys’ fees awarded to any party pursuant to Fed. R. Civ. P. 41(a), any costs or attorneys’ fees incurred during the course of this action.

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IT IS SO STIPULATED.

DATED: June 16, 2017

/s/
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