

1 DAVID MAREK, SBN  
2 THE MAREK LAW FIRM, INC.  
3 228 Hamilton Avenue  
4 Palo Alto, California 94301  
5 [david@marekfirm.com](mailto:david@marekfirm.com)  
6 917-721-5042

7 Attorney for Plaintiff-Intervenor

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
12 COMMISSION,

13 Plaintiff,

14 ADRIAN SCOTT DUANE,

15 Plaintiff-Intervenor,

16 vs.

17 IXL Learning, Inc.,

18 Defendant.

Case No.: 17-cv-02979

**PLAINTIFF-INTERVENOR'S  
SUPPLEMENTAL BRIEF IN  
FURTHER SUPPORT OF HIS  
MOTION TO INTERVENE**

**Date:**  
**Time:**  
**Courtroom: 4-17<sup>th</sup> Floor**  
**Judge: The Honorable Vince Chhabria**

19 The factual record establishes that Duane and IXL Learning Inc. (“IXL” or “Defendant”) agreed that Duane would dismiss his two claims for violation of the Family Medical Leave Act (“FMLA”) and wrongful termination in violation public policy with prejudice that were pending in *Adrian Scott Duane v. IXL Learning, Inc.* (the “Duane Action”). Prior to the dismissal, IXL’s counsel agreed in two separate emails that it did not “have **any** objection” to Duane intervening in this action. (emphasis added) By the unambiguous language of its written statements, in addition to the context of these discussions, IXL knowingly<sup>1</sup> waived its right to assert any res judicata defense it might otherwise have had in connection with Duane’s retaliation claims.<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> IXL’s counsel cannot deny this waiver was knowing because IXL’s counsel represented at the oral argument before this Court that “we researched this at this time.” (DE 35, p. 32)

28 <sup>2</sup> IXL’s counsel reiterated on the record at oral argument before this Court, “To the extent there’s a res judicata argument as to Duane’s intervention as a co-plaintiff on the existing claims that are

1 In two emails from IXL’s counsel prior to the filing of the Stipulation of Dismissal, IXL’s  
2 counsel confirmed that IXL would not object to Duane’s right to intervene. Affidavit of David  
3 Marek (“Aff. Marek”), ¶¶ 24, 27; DE 24-3. These statements by IXL’s counsel were not ambiguous.  
4 On June 21, 2017, IXL’s counsel wrote, “we would not object,” and on June 22, 2017, he wrote, “we  
5 are clear, and I don’t have any objection to Duane intervening in the EEOC case.” (emphasis added).  
6 DE 24-3. IXL’s counsel also “agreed” that it would not object to Duane’s intervention by email  
7 before Duane filed the motion to intervene. See DE 24-3. Indeed, IXL’s counsel represented to this  
8 Court at the October 12, 2017 oral argument that “we did not have any problem with Mr. Duane  
9 joining this lawsuit as a co-plaintiff with the EEOC on the claims that they have asserted, having  
10 now secured for my client a narrowing of this case to just what is in this lawsuit here.” DE 35, p. 34.  
11 The “narrowing of the case” referred to in that statement is the dismissal of the FMLA and wrongful  
12 termination in violation of public policy claims (which included a claim under California Labor  
13 Code Section 232.5(a)), both of which included different factual allegations than the federal law and  
14 state law retaliation claims.  
15

16  
17 The written record establishes that Duane’s counsel asked IXL’s counsel point blank if it  
18 would object to Duane’s intervening and if so on what basis. DE 24-3. Rather than raise any  
19 possible objection, IXL’s counsel wrote it “would not object.” DE 24-3. IXL did not equivocate or  
20 in any way limit its waiver. IXL’s counsel confirmed the meaning of the conversations and emails  
21 from June 21 and 22 when, one month later, on July 24, Duane’s counsel sent an email stating he  
22 would notify the Court that IXL does not object to Duane intervening “per the email exchange.”  
23 IXL’s counsel wrote, “agreed.” DE 24-3. Again, there was no equivocation.  
24

25 However, even if the language was “reasonably susceptible” of IXL’s interpretation, the  
26 Court would use the tools of contract interpretation to construe the meaning of IXL’s waiver. In that  
27  
28 asserted by the EEOC, then I waive that. I don’t believe there was. But if there was, I agree that he  
can intervene as a party.” (DE 35, p. 33).

1 instance, the Court would look at the object, nature, and subject matter of the agreement and the  
2 context in which it was born. When these factors are applied, the words IXL “would not object” and  
3 it does not “have any objection” to Duane’s intervening cannot be construed to mean that IXL would  
4 only partially object to Duane’s intervention. Duane’s counsel could not possibly have understood  
5 from the emails and language used in the Stipulation of Dismissal that IXL intended to communicate  
6 a waiver of its res judicata defense with respect to the federal law anti-retaliation claims but not the  
7 state law anti-retaliation claims arising under the same set of facts.<sup>3</sup>  
8

9 The agreement to voluntarily withdraw the FMLA and wrongful termination in violation of  
10 public policy claims and allow Duane to pursue his retaliation claims by intervening in the EEOC  
11 action arose to avoid unnecessary, vexatious litigation and to reduce the burden on the parties, the  
12 counsel, and the Court. *Aff. Marek*, ¶¶ 13-18. IXL’s counsel admitted he believed he had “secured  
13 for [his] client a narrowing of this case to just what is in this lawsuit here,” which was the retaliation  
14 claims and not the claims under the FMLA and California Labor Code Section 232.5(a). *Aff. Marek*,  
15 ¶¶ 16, 17. Counsel discussed and acknowledged this agreement, and it was also consistent with  
16 Duane’s prior attempts to avoid unnecessary and vexatious litigation. *Aff. Marek*, ¶¶ 13-18.  
17

18 Further, IXL’s proposed interpretation of the agreement that Duane could assert his federal  
19 anti-retaliation claims but not his state anti-retaliation claims is not reflected in the communication  
20 and would yield a harsh, unjust, and inequitable result. The parties agreed that Duane would dismiss  
21 only his FMLA and wrongful termination in violation of public policy claims to streamline the  
22 litigation. The Stipulation of Dismissal only dismisses the claims “pending in [the Duane Action].”  
23 The language used by IXL in the emails expressly waives IXL’s res judicata affirmative defense.  
24 IXL’s counsel admits that IXL agreed it would not object to Duane pursuing his retaliation claims.  
25

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26 <sup>3</sup> IXL objected to Duane’s addition of one factual allegation. The addition of this one allegation  
27 does not change the fact that the Proposed Intervenor Complaint is essentially identical to the  
28 EEOC’s Complaint, and surely all of the claims Duane added arise from the same set of facts  
asserted by the EEOC.

1 Moreover, Duane would not have agreed to dismiss his FMLA and wrongful termination in violatin  
2 of public policy claims without this understanding. Further, adding the state law anti-retaliation  
3 claims to the federal law anti-retaliation claims does not increase the burden on the parties, their  
4 counsel, or the Court. *Aff. Marek*, ¶ 18. These claims have identical discovery, witnesses, proof,  
5 and trial. Accordingly, IXL’s proposed interpretation does not make sense in the context of an  
6 agreement whereby IXL’s counsel “delivered to [his] client a narrowing of this case to just what is in  
7 this lawsuit here.”  
8

9 IXL fully waived its right to assert any affirmative defense of res judicata based on the  
10 agreement to voluntarily dismiss the Duane Action.

11 **1. The Law Permits A Partial Waiver Of An Affirmative Defense.**

12 Under certain circumstances, the law permits a partial wavier of an affirmative defense.  
13 Parties can agree to limit the scope of a dismissal’s preclusive effect. See *Perez v. Gordon & Wong*  
14 *Law Group, P.C.*, 2012 WL 1029425, at \*4-5 (N.D.Ca. 2012) (“[T]he ability of parties to limit the  
15 scope of a judgment’s preclusive effect through the terms of a settlement agreement is an exception  
16 to the rule of res judicata recognized by several federal appellate courts, including the Ninth Circuit.  
17 ...), citing *California v. Randtron*, 284 F.3d 969, 975 (9<sup>th</sup> Cir. 2002) (res judicata does not apply  
18 where ‘[i]t is contemplated at the time of the Consent Decree that other actions would lie against  
19 Randtron and its insurers to the extent not covered under the settlement agreement.”); *United States*  
20 *ex rel. Barajas v. Northrop Corp.*, 147 F3d 905, 911 (9<sup>th</sup> Cir. 2002) (“A settlement can limit the  
21 scope of the preclusive effect of a dismissal with prejudice by its terms.”).  
22  
23

24 Here, however, the parties’ counsel agreed that IXL would waive its affirmative defense to  
25 res judicata. The language of the Stipulation, the representations by counsel in the emails, and the  
26 context in which this agreement was born demonstrates that IXL fully waived its defense.  
27  
28

1       **2. If A Partial Waiver Of An Affirmative Defense Is Possible, The Court Should Look To**  
2       **Rules Of Contract Interpretation To Determine The Scope Of The Wavier.**

3               Contract law governs the interpretation of waiver. It is well settled under California law that  
4       when “applying the doctrine of res judicata, courts may examine the terms of the settlement to  
5       ensure that the defendant did not wave res judicata as a defense.” *Villacres v. ABM Indus., Inc.*, 189  
6       Cal.App.4<sup>th</sup> 562, 577, 117 Cal.Rptr.3d 398 (2010). “[I]t is axiomatic that [a stipulated judgment’s]  
7       res judicata effect extends only to those issues embraced within the consent judgment.” *Ellena v.*  
8       *State of Cal.*, 69 Cal.App.3d 245, 260, 138 Cal.Rptr.110 (1977).

9               The goal of contract interpretation is to give effect to the parties' mutual intent. Cal.  
10       Civ.Code § 1636; *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833  
11       P.2d 545 (1992); *Southern Pac. Transp. v. Santa Fe Pac. Pipelines, Inc.*, 74 Cal.App.4th 1232, 1240,  
12       88 Cal.Rptr.2d 777 (1999). “It is the outward expression of the agreement, rather than a party's  
13       unexpressed intention, which the court will enforce.” *Winet v. Price*, 4 Cal.App.4th 1159, 1166, 6  
14       Cal.Rptr.2d 554 (1992).

15               Here, IXL expressed that it “would not object” to Duane’s intervention and it does not “have  
16       any objection to Duane intervening.” DE 24-3. It confirmed that this was its intent when it “agreed”  
17       that it would not oppose Duane’s motion to intervene based on the language above, and, in fact,  
18       agreed it waived any res judicata affirmative defense with respect to the federal retaliation claims.  
19       DE 24-3. The language of the Stipulation limits the dismissal to the claims pending in the Duane  
20       Action. Marek Aff., Exh. C. The Court should enforce this outward expression of the agreement.  
21       Even if IXL argues that its unexpressed intention was only to waive its res judicata defense with  
22       respect to the Title VII and ADA claims, this was never expressed in the email exchange between  
23       counsel. DE 24-3. Even when Duane’s counsel asked IXL’s counsel if had any objection and if so  
24       on what basis, IXL’s counsel stated only that it “would not object.” DE 24-3. Duane’s counsel  
25       could not possibly have known that IXL only intended to waive its res judicata defense with respect  
26       to the federal retaliation claims.  
27       DE 24-3. Even when Duane’s counsel asked IXL’s counsel if had any objection and if so  
28       on what basis, IXL’s counsel stated only that it “would not object.” DE 24-3. Duane’s counsel

1 to the federal claims and not the state claims.

2 When parties dispute the meaning of language in a contract, “the court must decide whether  
3 the language is ‘reasonably susceptible’ to the interpretations urged by the parties.” *Badie v. Bank of*  
4 *Am.*, 67 Cal.App.4th 779, 798, 79 Cal.Rptr.2d 273 (1998). In determining whether the contract is  
5 reasonably susceptible to a party's interpretation, the court looks at the language of the document  
6 itself. *Id.* Where contractual language is clear and explicit, it governs. *Bank of the West*, 2 Cal.4th at  
7 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.

8 The language used by IXL’s counsel is not “reasonably susceptible” to IXL’s suggested  
9 interpretation. IXL asks this court to interpret its statements in that it “would not object” to Duane’s  
10 intervention and “we are clear, and I don’t have any objection to Duane intervening in the EEOC  
11 case” (DE 24-3) to mean that IXL will only withhold its objection provided Duane limits its claims  
12 and allegations to those pled by the EEOC. The language in these emails is not “reasonably  
13 susceptible” to such an interpretation.  
14

15 Duane’s counsel even provided IXL’s counsel with an opportunity to clarify his intent. The  
16 email exchange establishes that when Duane’s counsel offered proposed edits to the Stipulation of  
17 Dismissal to capture the parties’ intent – namely, that only the two claims pending in the Duane  
18 Action were being dismissed – Duane’s counsel simultaneously sought confirmation that IXL would  
19 not object to the motion to intervene (as was discussed by counsel on the phone (Aff. Marek, ¶¶ 13-  
20 18)), and if so, on what “basis.” See DE 24-3. Here was IXL’s opportunity to express its intent that  
21 it was only partially waiving its defense. IXL did no such thing. Instead, IXL’s counsel clarified  
22 that the “we” in the sentence “We will intervene as a party in the EEOC case” referred to “Duane,”  
23 and then confirmed that “[i]f you are asking whether IXL objects to Duane intervening in the EEOC  
24 case, we would not object.” DE 24-3. After this email, Duane’s counsel confirmed that the “we”  
25 was “Duane,” and reiterated that Duane will intervene in the EEOC v. IXL matter. Duane’s counsel  
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27  
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1 again invited IXL’s counsel to address any possible “miscommunication.” DE 24-3. But, IXL’s  
2 counsel re-confirmed that “we are clear, and I don’t have any objection to Duane intervening in the  
3 EEOC case.” (emphasis added). See DE 24-3. This exchange is not reasonably susceptible to the  
4 interpretation urged by IXL.

5 In addition, the court may consider parol evidence, “not to vary or modify the terms of the  
6 agreement but to aid the court in ascertaining the true intent of the parties [citation], not to show that  
7 the parties meant something other *than* what they said but to show what they meant *by* what they  
8 said.” *Denver D. Darling, Inc. v. Controlled Env'ts Constr., Inc.*, 89 Cal.App.4th 1221, 1236, 108  
9 Cal.Rptr.2d 213 (2001) (internal quotations omitted) (alterations in original); *see Winet*, 4  
10 Cal.App.4th at 1165, 6 Cal.Rptr.2d 554 (“The test of whether parol evidence is admissible to  
11 construe an ambiguity is not whether the language appears to the court unambiguous, but whether  
12 the evidence presented is relevant to prove a meaning to which the language is ‘reasonably  
13 susceptible.’”).

14  
15  
16 When a court is “[f]aced with contract language that is reasonably susceptible to more than  
17 one meaning, certain general rules of contract interpretation come into play to aid the court in  
18 resolving the ambiguity.” *Southern Pac.*, 74 Cal.App.4th at 1240, 88 Cal.Rptr.2d 777. First, the  
19 words of a contract are understood in their ordinary and popular sense unless the parties ascribe a  
20 technical or special meaning. *Id.* The court must “determine the ultimate construction to be placed  
21 on the ambiguous language by applying the standard rules of interpretation” to give effect to the  
22 parties' mutual intent. *Badie*, 67 Cal.App.4th at 798, 79 Cal.Rptr.2d 273. Further, the court can  
23 consider the circumstances under which a contract was negotiated, including its object, nature, and  
24 subject matter. Cal.Civ.Code § 1647; Cal.Civ.Code § 1860; *Southern Pac.*, 74 Cal.App.4th at 1240,  
25 88 Cal.Rptr.2d 777; *Badie*, 67 Cal.App.4th at 800, 79 Cal.Rptr.2d 273. “The terms of a writing can  
26 also ‘be explained or supplemented by course of dealing or usage of trade or by course of  
27  
28

1 performance.” *Southern Pac.*, 74 Cal.App.4<sup>th</sup> at 1240, 88 Cal.Rptr.2d 777.

2 Here, if the Court determines that IXL’s counsel’s language is capable of more than one  
3 reasonable interpretation, then the words used in IXL’s counsel’s emails and in the Stipulation  
4 should be understood in their ordinary and popular sense. Where counsel said IXL “would not  
5 object” to Duane’s intervention and it does not “have any objection to Duane intervening,” the  
6 ordinary and popular meaning of those words is that IXL agreed it would not object to Duane’s  
7 motion to intervene. DE 24-3. Similarly, where the parties agreed that they would dismiss “the  
8 claims pending in [the Duane Action], it means that they are dismissing only those two claims.  
9

10 Furthermore, the Court should consider the circumstances under which this agreement was  
11 negotiated, including its object, nature, and subject matter. The record establishes that this  
12 agreement was reached for the limited purpose of dismissing with prejudice the claims pending in  
13 the Duane Action and allowing all of the anti-retaliation claims to be litigated in one forum. This  
14 purpose was consistent with Duane’s earlier request to stay the Duane Action pending the EEOC’s  
15 completion of its administrative process. It was also consistent with the stated intent of the parties’  
16 agreement to dismiss the “claims pending in the [Duane Action].” IXL’s counsel referenced the  
17 intent of the parties when he stated on the record before this Court that he agreed to this proposal  
18 because he believed he had “secured for [his] client a narrowing of this case to just what is in this  
19 lawsuit here.” DE 35, p. 34.  
20

21 The Court should also look at the supplemental course of dealing between the parties. When  
22 Duane’s counsel wrote IXL’s counsel one month after the June 21-22 email exchange to confirm  
23 IXL’s counsel would not object to the motion to intervene based on the language in the email  
24 exchange, IXL’s counsel wrote “agreed.” DE 24-3. IXL’s counsel did not, even at this time, indicate  
25 in any way that its agreement to allow Duane to pursue his claims in this matter was somehow  
26 limited.  
27  
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1 Courts ascertain the intent of the parties by considering the contract as a whole, not an  
 2 isolated provision. *Id.* at 800, 79 Cal.Rptr.2d 273. The court must also interpret the contract in a  
 3 manner that makes the agreement “lawful, operative, definite, reasonable, and capable of being  
 4 carried into effect” while “avoid[ing] an interpretation that would make it harsh, unjust or  
 5 inequitable.” *Id.* at 800, 79 Cal.Rptr.2d 273.

6 Interpreting the agreement in the manner urged by IXL would be harsh, unjust, and  
 7 inequitable. Duane would not have given up his FEHA anti-retaliation claims, the substance of  
 8 which were already being pursued by the EEOC through the corresponding federal law statutes,  
 9 without any reason. Rather, Duane agreed to dismiss only his FMLA and wrongful termination in  
 10 violation of public policy claims because he wanted to focus the case on the anti-retaliation claims  
 11 and maximize efficiency going forward. Adding state law anti-retaliation claims to the already-  
 12 pending federal law anti-retaliation claims would not impact the amount of effort needed to litigate  
 13 the claims for the parties or the Court and would not make the case more broad. The state law  
 14 claims and federal law claims require the same discovery, witnesses, motions, proof, and trial.  
 15  
 16

17 **3. When Parties Intervene In EEOC Actions Like This One, They Typically Assert The**  
 18 **Corresponding State Law Claims, Which Demonstrates That IXL’s Waiver Should Be**  
 19 **Construed Broadly.**

20 Duane does not know if parties who intervene in EEOC actions like this one they *typically*  
 21 assert corresponding state law claims.<sup>4</sup> However, in this case, when Duane discussed his federal law

22 <sup>4</sup> Courts do typically permit aggrieved parties who intervene in EEOC actions like this one to add the  
 23 state law claims under Fed.R.Civ.P. Rule 24, when the aggrieved parties seek such intervention.  
 24 *EEOC v. PC Iron, Inc.*, 2017 WL 3783905 (S.D. Cal. Aug. 31, 2017) (recognizing that Plaintiff-  
 25 Intervenor’s intervention as a matter of right under both Fed. R. Civ. P. 24(a)(1) and 24(a)(2).);  
 26 Order, *EEOC v. Trans Ocean Shellfish*, 2017 WL 1022781 (W.D. Wash Jan. 28, 2016); *EEOC v.*  
 27 *Evans Fruit Co.*, 872 F.Supp.2d 1107 (E.D. Wash. Jan. 18, 2012) (permitting assertion of federal and  
 28 state claims pursuant to Fed. R. Civ. P. 24(a)(1)); *EEOC v. Cent. Cal. Found.*, No. 1:10-cv-01492  
 LJO JLT, 2011 U.S. Dist. LEXIS 6232 (E.D. Cal. Jan. 18, 2011) (permitting intervention for  
 Plaintiff-Intervenors to assert federal and state claims pursuant to Fed. R. Civ. P. 24(a)); *EEOC v.*  
*Giumarra Vineyards Corp.*, 2010 WL 3220387 (E.D. Cal. Aug. 12, 2010) (DE 24-4) (finding that  
 Plaintiff-Intervenor was an aggrieved person entitled to intervene with state law claims pursuant to  
 Fed. R. Civ. P. 24(a)(1)); *EEOC v. ABM Indus.*, 249 F.R.D. 588 (E.D. Cal. 2008) (granting Plaintiff-  
 Intervenor motion to intervene and assert federal and state claims pursuant to Fed. R. Civ. P. 24(a));

1 and state law discrimination and retaliation claims with IXL, the claims were always grouped  
2 together. Duane jointly filed his federal and state law claims with the EEOC. *Aff. Marek*, ¶ 2. In the  
3 Duane Action complaint, Duane notified IXL he intended to assert claims under Title VII, the ADA,  
4 and FEHA upon the EEOC’s completion of its administrative process. *Aff. Marek*, ¶ 6. Similarly,  
5 when Duane requested that IXL agree to stay the Duane Action pending the EEOC’s administrative  
6 process, Duane referred to the federal law and state law claims together. *Aff. Marek*, ¶ 7.

7  
8 Indeed, the claims under Title VII and FEHA are nearly interchangeable. “[T]he procedures  
9 and remedies of Title VII and the [FEHA] are wholly integrated and related. Moreover, the practical  
10 relationship between Title VII and California’s FEHA [is] embodied in the work sharing agreement  
11 between the EEOC and the [DFEH] *Downs v. Dep’t of Water & Power*, 58 Cal.App.4<sup>th</sup> 1093, 1101  
12 (1997), citing *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1233, 1325-26 (1987).

13  
14 When Courts analyze cases that include both Title VII and FEHA claims, they typically do so  
15 in one section, noting that the claims are essentially the same. *See Beyda v. City of Los Angeles*, 65  
16 Cal.App.4<sup>th</sup> 511, 517, 76 Cal.Rptr.2d 547 (Cal.Ct.App.1998) (“Although the wording  
17 of Title VII differs in some particulars from the wording of FEHA, the antidiscriminatory objectives  
18 and overriding public policy purposes of the two acts are identical. In an area of emerging law, such  
19 as employment discrimination, it is appropriate to consider federal cases interpreting Title VII.”)  
20 (internal quotation marks and citations omitted); *Okoli v. Lockheed Tech. Operations Co.*, 36  
21 Cal.App.4<sup>th</sup> 1607, 1614 n. 3, 43 Cal.Rptr.2d 57 (Cal.Ct.App.1995) (“Since the antidiscrimination  
22 objectives and public policy purposes of [FEHA and Title VII] are the same, we may rely on federal  
23 decisions to interpret analogous parts of the state statute.”) (quoting *Sandhu v. Lockheed Missiles &*  
24 *Space Co.*, 26 Cal.App.4<sup>th</sup> 846, 851, 31 Cal.Rptr.2d 617 (Cal.Ct.App.1994)).

25  
26 *EEOC v. Automated Control Techs., Inc.*, No. CV-08-926-PHX-DGC, 2008 U.S. Dist. LEXIS  
27 115049 (D. Ariz. Sep. 9, 2008) (permitting intervention as of right pursuant to Fed. R. Civ. P.  
28 24(a)(1) and allowing Plaintiff-Intervenor to assert § 1981 claims); *EEOC v. Kovacevich “5” Farms*,  
2006 WL 3060149 (E.D. Cal. Aug. 7, 2006).

1 Duane made clear his intent to intervene, and IXL unambiguously agreed that it would not  
 2 raise “any” objection to such intervention. IXL was on notice, through the Duane action, that Duane  
 3 intended on asserting Title VII, ADA, and FEHA claims. The parties agreed to limit the dismissal to  
 4 the “claims pending in [the Duane Action].” Therefore, Duane is entitled to exercise his right to  
 5 intervene under Fed.R.Civ.P. Rule 24(a) and (b) with claims under both the federal and state anti-  
 6 retaliation statutes. Thus, IXL’s waiver should be construed broadly.

7  
 8 **4. In Addition To IXL’s Waiver Of Any Res Judicata Defense, Res Judicata Is Not An**  
 9 **Appropriate Defense Under These Circumstances.**

10 Defendant’s res judicata defense is not appropriate in this situation. Courts have routinely  
 11 stated the principle that “[e]ven if these threshold requirements are established, res judicata will not  
 12 be applied ‘if injustice would result or if the public interest requires that relitigation not be  
 13 foreclosed.’” *Dunkin v. Boskey*, 82 Cal.App.4<sup>th</sup> 171, 181, 98 Cal.Rptr.2d 44 (2000). Here, allowing  
 14 IXL to raise a res judicata defense would result in an injustice. Duane and IXL agreed to dismiss the  
 15 action only after Duane tried stay the Duane Action<sup>5</sup> and after the EEOC had already commenced  
 16 this action for the sole and express purpose of avoiding vexation of the parties and the court system.  
 17 Prior to the dismissal, IXL agreed repeatedly it did not have any “have any objection” to Duane’s  
 18 intervening. IXL’s counsel also admits it agreed to this waiver knowingly and because he believes  
 19 he had “secured for [his] client a narrowing of the case.” Whereas res judicata is supposed to be  
 20 used to prevent vexatious litigation, here IXL is trying to use the doctrine to thwart Duane and IXL’s  
 21 agreement intended to avoid unnecessary and vexatious litigation.  
 22  
 23

24 <sup>5</sup> Cases hold that where a plaintiff did not assert his Title VII or ADA claims because he did not have  
 25 a right-to-sue letter but did request a stay res judicata cannot be applied. See *Owens v. Kaiser*  
 26 *Foundation Health Plan, Inc.*, 224 F.3d 708, 714-15 (9<sup>th</sup> Cir. 2001); *Woods v. Dunlop Tire Corp.*,  
 27 972 F.2d 36, 40-41 (2<sup>nd</sup> Cir. 1992). In such instances, the plaintiff was not contributing to vexatious  
 28 litigation. Rather, he was preserving his right to allow the EEOC to complete its administrative  
 process. Here, Duane requested IXL (the party now trying to use res judicata) stay the matter, and  
 tried to raise it with the Court but, based on the Court’s reaction and comments, decided it was futile.  
 See *Aff. Marek*, ¶¶ 7, 8, 11.

1 Dated: November 2, 2017

2  
3 THE MAREK LAW FIRM, INC.

4  
5 By:           /s/ David Marek            
6 David Marek  
7 228 Hamilton Avenue  
8 Palo Alto, California 94301  
9 (917) 721-5042  
10 [david@marekfirm.com](mailto:david@marekfirm.com)

11 Attorney for Intervenor-Plaintiff  
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27  
28

1 DAVID MAREK, SBN  
2 THE MAREK LAW FIRM, INC.  
228 Hamilton Avenue  
3 Palo Alto, California 94301  
[david@marekfirm.com](mailto:david@marekfirm.com)  
917-721-5042

4 Attorney for Plaintiff-Intervenor

5 UNITED STATES DISTRICT COURT  
6 NORTHERN DISTRICT OF CALIFORNIA

7  
8 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

9 Plaintiff,

10 ADRIAN SCOTT DUANE,

11 Plaintiff-Intervenor,

12 vs.

13 IXL Learning, Inc.,

14 Defendant.  
15

Case No.: 17-cv-02979

**DECLARATION OF DAVID MAREK IN  
FURTHER SUPPORT OF DUANE’S  
MOTION TO INTERVENE**

**Date:**

**Time:**

**Courtroom: 4-17<sup>th</sup> Floor**

**Judge: The Honorable Vince Chhabria**

16 I, David Marek, declare:

17 1. I am the sole proprietor of The Marek Law Firm, Inc., and counsel for Intervenor and  
18 aggrieved party, Adrian Scott Duane. This declaration is in support of Duane’s Motion to Intervene  
19 in this action. I have personal knowledge of the matters set forth herein and, if called as a witness, I  
20 could and would testify competently thereto.  
21

22 2. On March 17, 2015, Duane filed a Charge of Discrimination with the EEOC alleging  
23 that IXL discriminated and retaliated against him in violation of the Americans with Disabilities Act,  
24 Title VII of the Civil Rights Act of 1964, and the California Fair Employment and Housing Act  
25 (“FEHA”). (DE 20-2) The EEOC has never issued a right-to-sue letter.  
26

27 3. On January 6, 2017, Duane filed a complaint against IXL Learning, Inc. captioned  
28 *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, 17-cv-00078 (referred to as the “Duane

1 Action” and attached as Exhibit D to the Affidavit of David Marek in Support of Duane’s Motion to  
2 Intervene (DE 20)).

3 4. In the Duane Action, Duane asserted only two claims: first, for violation of the  
4 Family Medical Leave Act; and second, a claim for wrongful termination in violation of public  
5 policy. Duane commenced this action at this time because the statute of limitations on those two  
6 claims would have otherwise expired.

7 5. Duane took affirmative steps to avoid causing IXL and the Court to engage in  
8 vexatious litigation in light of the fact that he could not yet assert his Title VII, ADA, or FEHA  
9 claims without giving up his right to have the EEOC complete its administrative process.

10 6. Duane expressly stated in the Complaint that he “intends to amend this Complaint to  
11 assert additional claims under [the Americans with Disabilities Act (“ADA”)], Title VII of the Civil  
12 Rights Act of 1964 (“Title VII”), the California Fair Employment and Housing Act (“FEHA”), and  
13 the California Family Rights Act upon receipt of his right to sue letter from the EEOC.”

14 7. In an email exchange dated April 5-7, 2017, I requested that IXL agree to stay the  
15 Duane Action until the claims pending before the EEOC – including the Title VII, ADA, and FEHA  
16 claims – were able to be asserted. (See Exhibit E to the Affidavit of David Marek in Support of  
17 Duane’s Motion to Intervene (DE 20)).

18 8. Defendant IXL refused my request to stay this matter because “Defendants do not  
19 want the stay because the timing of the EEOC’s decision is uncertain.” (See Exhibit E to the  
20 Affidavit of David Marek in Support of Duane’s Motion to Intervene (DE 20)).

21 9. On April 7, 2017, IXL filed a motion to dismiss Duane’s FMLA and wrongful  
22 termination in violation of public policy claims. IXL argued that the National Labor Relations Act  
23 preempted Duane’s wrongful termination in violation of public policy claim because this claim “is  
24 identical to the controversy presented to the NLRB.” (Motion to Dismiss, p. 8) IXL also argued that  
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1 Duane failed to specifically plead that IXL took any adverse action against him because he took  
2 FMLA leave, which he was allowed to take.

3 10. On April 27, 2017, Duane filed his Opposition to IXL’s Motion to Dismiss. (See  
4 Exhibit A to DE 24-1). In this document, Duane notified the Court that he “informed Defendants’  
5 counsel that, because of the [claims still pending with the EEOC], Plaintiff would agree to stay the  
6 pending action until the EEOC has either brought suit or issued a right-to-sue letter. Defendants did  
7 not agree to this proposal.”  
8

9 11. On May 11, 2017, at the oral argument on the Motion to Dismiss, I reminded the  
10 Court that “the EEOC is still deciding if they are going to bring suit. They did issue a probable  
11 cause finding, so they’re at the a point where they will either bring the lawsuit –” At this point, the  
12 Court stated: “So why – are you saying put this case on hold or something? You brought a case.  
13 I’ve got to deal with it.” I replied: “No. I agree, Your Honor. I’m simply noting – making you  
14 aware of it in case it comes up.” The Court then stated: “Look, if some other case comes up, maybe  
15 I’ll related it. I don’t know. What can I do about it? But right now I’ve got a lawsuit that you  
16 brought that you landed in my court, and here’s my philosophy. When a case comes in here, my is  
17 to get it from one end of the football field to the goalpost on the other. I don’t care about those other  
18 cases out there. My job is to get your case and your case from one end of the filed to the other, and  
19 we don’t let grass grow under our feet.” (A true and correct copy of the excerpt of the transcript is  
20 attached as “Exhibit A.”)  
21

22 12. On May 24, 2017, the EEOC commenced this case against IXL, asserting claims for  
23 violation of Title VII and the ADA.  
24

25 13. In June 2017, I spoke with IXL’s counsel about dismissing the Duane Action so that  
26 Duane and IXL could proceed with all of the claims in one action, and agreed we would dismiss the  
27 FMLA and wrongful termination claims, and only those two claims. On this call, I told counsel that  
28

1 we would intervene in the EEOC action, and IXL’s counsel suggested IXL would not oppose  
2 Duane’s intervention. I communicated that this proposal – like the proposal to stay the Duane  
3 Action – was born out of a desire to avoid vexatious litigation and simplify the case by focusing the  
4 litigation only on the retaliation claims. Both the FMLA claim and the tort claim dealt with issues  
5 that were different than the EEOC claims. The EEOC claims were premised on the allegations that  
6 IXL terminated Duane in retaliation for the Glassdoor.com post. The FMLA claim asserted that IXL  
7 retaliated against Duane because he took a protected leave; and the wrongful termination claim  
8 focused on the assertion that IXL terminated Duane in violation of California Labor Code Section  
9 232.5(a) (which IXL argued is “identical to the controversy presented to the NLRB”). Accordingly,  
10 counsel discussed that dismissing the FMLA and wrongful termination claims, and consolidating all  
11 of the retaliation claims in one action, spearheaded by the EEOC, avoided unnecessary litigation and  
12 was an efficient way to proceed for Duane, IXL, their respective counsel, and the Courts.  
13

14 14. At oral argument before this Court on October 12, 2017, IXL’s counsel indicated that  
15 when we spoke “it was [his] clear belief that Mr. Duane was now free from having to spend money  
16 on a lawyer in *that* case, and it was sort of like a godsend that, ah, the EEOC has decided to pursue  
17 this litigation. So we’re done and we’re just going to be spectators.” (DE 35, page 28) (emphasis  
18 added)  
19

20 15. In fact, I communicated to IXL’s counsel – consistent with my repeated requests to  
21 stay the Duane Action – that Duane’s primary contention was that IXL retaliated for the  
22 Glassdoor.com post and that we asserted the FMLA claim and wrongful termination claim only  
23 because the statute of limitations on those two claims was about to expire and we did not, at that  
24 time, have a right-to-sue letter to assert our federal or state law retaliation claims or know if the  
25 EEOC would file this lawsuit. By intervening in the EEOC Action, Duane could pursue his  
26 retaliation claims without additional work for Duane, IXL, their respective counsel, or the Court.  
27  
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1 Dismissing the Duane Action and intervening in this action would avoid the need for Duane to have  
2 a lawyer working on the Duane Action (i.e., “that case,” referred to by IXL’s counsel). Counsel also  
3 discussed this agreement would avoid the need for IXL to have a lawyer working on the Duane  
4 Action and was more efficient for the Courts.

5 16. On October 12, 2017, at oral argument before this Court, IXL’s counsel stated that  
6 “we did not have any problem with Mr. Duane joining this lawsuit as a co-plaintiff with the EEOC  
7 on the claims that they have asserted, having now secured for my client a narrowing of this case to  
8 just what is in this lawsuit here.” (DE 35, p. 34).  
9

10 17. This statement makes clear that both counsel understood that the benefit to IXL was  
11 “a narrowing of this case.” This reflected counsel’s discussion that the FMLA claim and even more  
12 so the wrongful termination in violation of public policy claim which included claims of violation of  
13 California Labor Code Section 232.5(a) (which was substantially different than the retaliation claims  
14 under Title VII, the ADA, and FEHA, and which IXL’s counsel believed was “identical” to the  
15 NLRA claim without the requirement to prove concerted activity) would result in a more broad  
16 litigation with factual issues that were not included in this case. Thus, at oral argument, IXL’s  
17 counsel admitted that he knowingly (because he claimed they had already done the research (DE 35,  
18 p. 32)) agreed to allow Duane to assert his anti-retaliation claims in this lawsuit because he had  
19 “secured for [his] client a narrowing of this case.” This narrowing did not include denying Duane  
20 the right to assert his FEHA anti-retaliation claims.  
21

22 18. In fact, the addition of the FEHA claim stemming from IXL’s alleged retaliation does  
23 not materially, if at all, add to the work for the lawyers, parties or the Court. The discovery, motion  
24 practice, proof, and trial are effectively identical when litigating retaliation claims under Title VII  
25 and the ADA or their counterparts under FEHA. These claims rely on the same documents,  
26 interrogatories, factual assertions, and witnesses. On the other hand, having two trials and/or  
27  
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1 litigating claims under the FMLA and California Labor Code Section 232.5(a) would greatly impact  
2 the litigation burden.

3 19. By email dated June 19, 2017, IXL's counsel confirmed they would agree with this  
4 proposal, and sent me a draft stipulation of dismissal. (A true and correct copy of the email and  
5 attached DRAFT Stipulation of Dismissal is attached as "Exhibit B.")

6 20. By email dated June 21, 2017, I provided IXL's counsel with a revised DRAFT  
7 Stipulation of Dismissal that explicitly added language that the parties were only dismissing the  
8 "claims pending in the [Duane Action]", which was consistent with what counsel had discussed and  
9 agreed on. (A true and correct copy of the email and attached DRAFT Stipulation of Dismissal with  
10 red line changes is attached as "Exhibit C.")

11 21. In this same email (Exhibit C), I reminded IXL's counsel that we would move to  
12 intervene in the EEOC action (as discussed when we spoke), and – wanting to be clear before filing  
13 the dismissal – asked point blank "if you intend to object [to Duane's Motion to Intervene], and if so,  
14 on what basis."  
15

16 22. Later on June 21, 2017, IXL's counsel agreed to the changes to the Stipulation of  
17 Dismissal, consistent with the counsel's discussion the prior week, and asked for clarification on the  
18 motion to intervene. IXL's counsel asked: "by 'motion to intervene' do you mean Duane  
19 intervening as a party? Or are you asking about making an appearance as counsel of record?" (DE  
20 24-3)  
21

22 23. On June 21, 2017, I responded without ambiguity: "We will intervene as a party in  
23 the EEOC case." (DE 24-3)  
24

25 24. On June 21, 2017, IXL's counsel stated without ambiguity: "If you are asking  
26 whether IXL objects to Duane intervening in the EEOC case, **we would not object.**" (DE 24-3)

27 25. The documents make clear that I provided IXL's counsel an opportunity to raise any  
28

1 issues with or objections to Duane’s intention and right to intervene. IXL did not in any way  
2 indicate that it would agree only to a limited right to intervene.

3 26. I followed up this email by giving IXL’s counsel another opportunity to state if there  
4 was some ambiguity that I was overlooking. On June 22, 2017 at 9:54 AM, I wrote: “I was asking if  
5 you object to Duane intervening in the EEOC v. IXL matter.” (DE 24-3)

6 27. On June 22, 2017 at 10:20 AM, IXL’s counsel reiterated, “We are clear, and I don’t  
7 have any objection to Duane intervening in the EEOC case. I believe, but could be wrong, that he  
8 has a right to intervene.” (DE 24-3)

9 28. This email demonstrates that IXL’s counsel was not sure if Duane had a right to  
10 intervene but was agreeing that, even if no such right existed, IXL was agreeing it would not object  
11 to the intervention.

12 29. On June 22, 2017 at 12:28 PM – after IXL’s counsel had stated in writing on two  
13 occasions that IXL would not object to Duane intervening in this matter – IXL filed the Stipulation  
14 of Dismissal. (A true and correct copy of the ECF proof of filing is attached as “Exhibit D.”)

15 30. On June 27, 2017 the Court entered the Stipulation of Dismissal.

16 31. On July 24, 2017, prior to filing the Motion to Intervene, I emailed IXL’s counsel to  
17 inform him that, pursuant to the email exchange from June 21-22, “I will represent in the motion that  
18 IXL does not oppose the intervention.” (DE 24-3)

19 32. On that same day, IXL’s counsel wrote: “Agreed.” (DE 24-3)

20 33. IXL’s counsel expressed agreement on July 24, 2017 that IXL would not oppose  
21 Duane’s Motion to Intervene “[p]er the email exchange below” is contrary IXL’s counsel’s  
22 statement at oral argument that “there was no agreement ... that we’ll agree ... to a stipulation of  
23 dismissal with prejudice and agree to intervention.” (DE 35, p. 27)

24 34. On October 12, 2017, IXL’s counsel reiterated on the record at oral argument before  
25  
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1 this Court, “To the extent there’s a res judicata argument as to Duane’s intervention as a co-plaintiff  
2 on the existing claims that are asserted by the EEOC, then I waive that. I don’t believe there was.  
3 But if there was, I agree that he can intervene as a party.” (DE 35, p. 33).

4 35. On August 4, 2017, I sent IXL’s counsel a Joint Stipulation to Intervene and attached  
5 Proposed Intervenor Complaint. (A true and correct copy of the email and Joint Stipulation to  
6 Intervene is attached as “Exhibit E.” The Proposed Intervenor Complaint is not attached because it  
7 was previously attached as Exhibit A to the Affidavit of David Marek in Support of Duane’s Motion  
8 to Intervene.)  
9

10 36. On August 8, 2017, IXL’s counsel informed that it would not stipulate to the  
11 proposed intervenor complaint.

12 37. On August 11, 2017, IXL’s counsel sent an email stating his reasons for objecting to  
13 the proposed intervenor complaint. (A true and correct copy of the email is attached as “Exhibit F.”)  
14 IXL’s counsel reiterated that it does “not object to Duane’s intervention as a party in the case, which  
15 I told you from the beginning.” IXL articulated two reasons for objecting. First, it objected to the  
16 additional allegation that IXL’s retaliation flowed from Duane’s meeting with David Keyes and/or  
17 the Glassdoor post, whereas the EEOC only asserted that the retaliation flowed from the Glassdoor  
18 post. Second, IXL objected because “the intervenor complaint alleges that he was terminated for  
19 complaining about being denied disability accommodation.” In this email, IXL did not object to the  
20 addition of the FEHA claim provided it was limited to the factual allegations asserted by the EEOC.  
21

22 38. On August 21, 2017, Duane filed the Motion to Intervene. The Motion to Intervene  
23 included a [Proposed] Complaint in Intervention (Exhibit A to DE 20), which asserted only claims  
24 arising from allegations that IXL terminated in retaliation for Duane’s complaints that IXL  
25 discriminated against him and/or failed to accommodate him. Duane did not assert claims under the  
26 FMLA or for wrongful termination in violation of public policy.  
27  
28



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

ADRIAN SCOTT DUANE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CV 17-00078-WHA
	)	
IXL LEARNING, INC., ET AL.,	)	
	)	
Defendants.	)	
	)	

San Francisco, California  
Thursday, May 11, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

THE MAREK LAW FIRM  
228 Hamilton Aveue  
Palo Alto, CA 94301  
**BY: DAVID MAREK, ESQUIRE**

For Defendants:

YOUNG BASILE HANLON & MACFARLANE P.C.  
3001 West Big Beaver Road - Suite 624  
Troy, MI 48084  
**BY: JEFFREY D. WILSON, ESQUIRE**

Reported By:

Pamela A. Batalo, CSR No. 3593, RMR, FCRR  
Official Reporter

1 Fact discovery cutoff will be March 30. That's also the  
2 day your expert report is due if you have the burden of proof  
3 on the issue.

4 Last day to file a summary judgment, April 19.

5 Final pretrial conference, 2:00 p.m. May 30.

6 Jury trial, June 4.

7 I'm going to refer this case to the ADR unit for  
8 mediation.

9 All right. Do you want to try to talk me out of any of  
10 those dates?

11 **MR. MAREK:** I just want to note one thing, Your Honor.  
12 That as my colleague put in the brief, the EEOC is still  
13 deciding if they are going to bring the suit. They did issue a  
14 probable cause finding, so they're at a point where they will  
15 either bring the lawsuit --

16 **THE COURT:** So why -- are you saying put this case on  
17 hold or something? You brought a case. I've got to deal with  
18 it.

19 **MR. MAREK:** No. I agree, Your Honor. I'm simply  
20 noting -- making you aware of it in case it comes up.

21 **THE COURT:** Look, if some other case comes up, maybe  
22 I'll relate it. I don't know. What can I do about it?

23 But right now I've got a lawsuit that you brought that you  
24 landed in my court, and here's my philosophy.

25 When a case comes in here, my job is to get it from one

1 end of the football field to the goalpost on the other. I  
2 don't care about those other cases out there. My job is to get  
3 your case and your case from one end of the field to the other,  
4 and we don't let grass grow under our feet.

5 **MR. MAREK:** I appreciate it. I was just telling  
6 you --

7 **THE COURT:** Thank you for the heads-up.

8 You've got some dates here. If you blow a date, too bad  
9 for you and too bad for you. So, please, I will work hard to  
10 keep you on track, but you've got to work hard, too.

11 **MR. WILSON:** Understood.

12 **MR. MAREK:** Thank you, Your Honor.

13 **THE COURT:** You have until 5:00 p.m. today on that  
14 other thing. Good luck to both sides. Bye-bye.

15 (Proceedings adjourned at 8:56 a.m.)

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David Marek &lt;david@marekfirm.com&gt;

---

**Duane v IXL**

1 message

---

**Jeffrey D. Wilson** <wilson@youngbasile.com>  
To: "david@marekfirm.com" <david@marekfirm.com>  
Cc: Natasha Menezes <menezes@youngbasile.com>

Mon, Jun 19, 2017 at 6:17 PM

David, thanks for your call last week. I had a chance to speak with IXL and we agree with the stipulated dismissal. Please see attached. Does this work for you?

Thanks,

Jeff

**YOUNG BASILE**

YOUNG BASILE HANLON &amp; MACFARLANE P.C.

**Jeffrey D. Wilson**

Shareholder and Litigation Director

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

T: (248) 244-0173

www.youngbasile.com

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 **Stipulation for Dismissal with Prejudice.docx**  
44K

**IMAI, TADLOCK, KEENEY & CORDERY, LLP**

**R. RANDY WERTZ**

rrwertz@itkc.com  
220 Montgomery Street, Suite 301  
San Francisco, California 94104  
Telephone: (415) 675-7000  
Facsimile: (415) 675-7008

**YOUNG BASILE HANLON & MACFARLANE, PC**

**JEFFREY D. WILSON (PRO HAC VICE)**

wilson@youngbasile.com

**NATASHA R. MENEZES (PRO HAC VICE)**

menezes@youngbasile.com

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

Telephone: (248) 649-3333

Facsimile: (248) 649-3338

Attorneys for Defendants  
IXL Learning, Inc. and Paul Mishkin

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 to the dismissal of all claims by Plaintiff against Defendants with prejudice, waiving all rights of appeal, and without costs or attorneys’ fees awarded to any party pursuant to Fed. R. Civ. P. 41(a).

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IT IS SO STIPULATED.

DATED: June 16, 2017

/s/  
David Marek  
The Marek Law Firm  
228 Hamilton Avenue  
Palo Alto, California 94301  
Telephone: (917) 724-5042  
  
*Attorneys for Plaintiff*

/s/ Jeffrey D. Wilson  
Jeffrey D. Wilson  
Young Basile Hanlon & MacFarlane, PC  
3001 W. Big Beaver Road  
Suite 624  
Troy, Michigan 48084  
Telephone: (248) 649-3333  
Facsimile: (248) 649-3338  
  
*Attorneys for Defendants*



David Marek &lt;david@marekfirm.com&gt;

---

**Re: Duane v IXL**

1 message

---

**David Marek** <david@marekfirm.com>  
To: "Jeffrey D. Wilson" <wilson@youngbasile.com>  
Cc: Natasha Menezes <menezes@youngbasile.com>

Wed, Jun 21, 2017 at 1:54 PM

Jeff  
Please see my attached edits.

Also, please let me know if you intend to object, and if so on what basis, to my motion to intervene in the EEOC v. IXL matter.

On Mon, Jun 19, 2017 at 6:17 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

David, thanks for your call last week. I had a chance to speak with IXL and we agree with the stipulated dismissal. Please see attached. Does this work for you?

Thanks,

Jeff

**YOUNG BASILE**

YOUNG BASILE HANLON &amp; MACFARLANE P.C.

**Jeffrey D. Wilson**

Shareholder and Litigation Director

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

T: (248) 244-0173

www.youngbasile.com

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--  
David Marek

The Marek Law Firm  
917-721-5042  
California New York Florida

Case 3:17-cv-02979-VC Document 38-4 Filed 11/02/17 Page 2 of 4



**Stipulation for Dismissal with Prejudice (dmm edits).docx**

46K

**IMAI, TADLOCK, KEENEY & CORDERY, LLP**

**R. RANDY WERTZ**

rrwertz@itkc.com  
220 Montgomery Street, Suite 301  
San Francisco, California 94104  
Telephone: (415) 675-7000  
Facsimile: (415) 675-7008

**YOUNG BASILE HANLON & MACFARLANE, PC**

**JEFFREY D. WILSON (PRO HAC VICE)**

wilson@youngbasile.com  
**NATASHA R. MENEZES (PRO HAC VICE)**  
menezes@youngbasile.com  
3001 W. Big Beaver Road, Suite 624  
Troy, Michigan 48084  
Telephone: (248) 649-3333  
Facsimile: (248) 649-3338

Attorneys for Defendants  
IXL Learning, Inc. and Paul Mishkin

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/

David Marek  
The Marek Law Firm  
228 Hamilton Avenue  
Palo Alto, California 94301  
Telephone: (917) 724-5042

*Attorneys for Plaintiff*

/s/ Jeffrey D. Wilson

Jeffrey D. Wilson  
Young Basile Hanlon & MacFarlane, PC  
3001 W. Big Beaver Road  
Suite 624  
Troy, Michigan 48084  
Telephone: (248) 649-3333  
Facsimile: (248) 649-3338

*Attorneys for Defendants*

**Activity in Case 3:17-cv-00078-WHA Duane v. IXL Learning, Inc. et al Stipulation**

1 message

ECF-CAND@cand.uscourts.gov &lt;ECF-CAND@cand.uscourts.gov&gt;

Thu, Jun 22, 2017 at 12:28 PM

To: efiling@cand.uscourts.gov

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U.S. District Court

California Northern District

**Notice of Electronic Filing**

The following transaction was entered by Wilson, Jeffrey on 6/22/2017 at 12:28 PM and filed on 6/22/2017

**Case Name:** Duane v. IXL Learning, Inc. et al**Case Number:** 3:17-cv-00078-WHA**Filer:** IXL Learning, Inc.  
Paul Mishkin**Document Number:** 50**Docket Text:****STIPULATION for Dismissal with Prejudice filed by IXL Learning, Inc., Paul Mishkin. (Wilson, Jeffrey) (Filed on 6/22/2017)****3:17-cv-00078-WHA Notice has been electronically mailed to:**

David Marek &amp;nbsp; &amp;nbsp; david@marekfirm.com

Jeffrey D. Wilson &amp;nbsp; &amp;nbsp; wilson@youngbasile.com, jacob@youngbasile.com, litadmin@youngbasile.com, lockhart@youngbasile.com, mcclary@youngbasile.com, samona@youngbasile.com, woodworth@youngbasile.com

Natasha R Menezes &amp;nbsp; &amp;nbsp; menezes@youngbasile.com, litadmin@youngbasile.com, samona@youngbasile.com

Robert Randy Wertz &amp;nbsp; &amp;nbsp; rrwertz@itkc.com, hcherry@itkc.com

**3:17-cv-00078-WHA Please see Local Rule 5-5; Notice has NOT been electronically mailed to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document**Original filename:**C:\fakepath\2017.06.22 Stipulation for Dismissal with Prejudice.pdf**Electronic document Stamp:**

[STAMP CANDStamp\_ID=977336130 [Date=6/22/2017] [FileNumber=13851468-0]

[699bbf2a62d98233bcbfff3c4193ba832c2dd31973231fa6efae91cffcc28ccab35c

3407f453cbb0ff28663819b94666f107347027de0501a71bbed51bd3a656]]



David Marek &lt;david@marekfirm.com&gt;

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**Re: EEOC/Duane v. IXL**

1 message

**Jeffrey D. Wilson** <wilson@youngbasile.com>

Tue, Aug 8, 2017 at 12:20 PM

To: David Marek &lt;david@marekfirm.com&gt;

Cc: AMI SANGHVI &lt;ami.sanghvi@eeoc.gov&gt;, Natasha Menezes &lt;menezes@youngbasile.com&gt;

David, IXL does not stipulate to Duane's proposed intervenor complaint. As I said before, we will stipulate to Duane's intervention in this case, but not the addition of new claims and allegations. I discussed this with Ami today in our Rule 25(f) conference. I am out of the office for the rest of the day, but if you would like to discuss it further I am available tomorrow or later this week.

Regards,  
Jeff

On Aug 4, 2017 at 8:16 PM, <David Marek> wrote:

Jeff & Ami

I am hoping to filing the attached Joint Stipulation to Intervene and attached Complaint on Monday. Can you either send me a signed stip or confirm I have your authorization to sign your name.

Thank you.

--

David Marek  
The Marek Law Firm  
917-721-5042  
California New York Florida

**THE MAREK LAW FIRM, INC.**

**DAVID MAREK**

david@marekfirm.com  
228 Hamilton Avenue  
Palo Alto, California 94301  
Telephone: (917) 721-5042

Attorney for Intervening Party Scott Duane

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Case No.: 17-c-02979-VC

Plaintiff,

ADRIAN SCOTT DUANE,

Proposed Plaintiff-Intervener,

v.

IXL LEARNING, INC.,

Defendant.

**JOINT STIPULATION AND [PROPOSED]  
ORDER GRANTING PLAINTIFF-  
INTERVENOR ADRIAN SCOTT DUANE'S  
REQUEST TO INTERVENE**

**The Honorable Vince Chhabria**

Plaintiff-Intervenor ADRIAN SCOTT DUANE, Plaintiff U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"), and Defendant IXL LEARNING, INC. ("IXL") hereby enter into this stipulation to grant Plaintiff-Intervenor's request to intervene in this matter.

WHEREAS, on May 24, 2017, Plaintiff EEOC commenced this action against IXL alleging unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq.;

WHEREAS, Plaintiff-Intervenor ADRIAN SCOTT DUANE seeks to bring individual anti-retaliation claims under Title VII, the ADA, and the California Fair Employment and Housing Act ("FEHA"), all of which arise from the same set of events as the underlying action.

WHEREAS, Plaintiff-Intervenor is permitted to intervene in this action as a matter of right, pursuant to Federal Rule of Civil Procedure 24(a), Title VII, and the ADA.

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THE PARTIES HEREBY STIPULATE TO THE FOLLOWING:

Plaintiff-Intervenor ADRIAN SCOTT DUANE's intervention in this matter is stipulated to by all parties. The Complaint attached here as Exhibit A shall be filed immediately upon the Court's order approving the instant stipulation.

Respectfully Submitted,

Dated: August 7, 2017

THE MAREK LAW FIRM, INC.

By: \_\_\_\_\_/s/\_\_\_\_\_

DAVID MAREK

Attorney for Plaintiff-Intervenor

Dated: August 7, 2017

U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION

By: \_\_\_\_\_

AMI SANGHVI

Attorney for Plaintiff

Dated: August 7, 2017

By: \_\_\_\_\_

JEFFREY WILSON

Attorney for Defendant

1 Pursuant to General Order No. 45 X.(B), I attest that the concurrence in the filing of this document  
2 has been obtained from Defendant's counsel.

3 Dated: August 7, 2017

THE MAREK LAW FIRM, INC.

4  
5 By: \_\_\_\_\_  
6 DAVID MAREK  
7 Attorney for Plaintiff-Intervenor  
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**[PROPOSED] ORDER**

Having considered the above stipulation and good cause appearing, **IT IS SO ORDERED.**

Dated: \_\_\_\_\_  
THE HONORABLE VINCE CHHABRIA  
UNITED STATES DISTRICT COURT JUDGE

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David Marek &lt;david@marekfirm.com&gt;

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**Re: Duane v IXL**

1 message

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**Jeffrey D. Wilson** <wilson@youngbasile.com>

Fri, Aug 11, 2017 at 2:42 PM

To: David Marek &lt;david@marekfirm.com&gt;

Cc: Natasha Menezes &lt;menezes@youngbasile.com&gt;

Apologies David. I am actually out here in San Francisco in client meetings all day. I meant to have our call earlier this week. I can give you the long version or the short version on our position. The short version is that we do not object to Duane's intervention as a party in the case, which I told you from the beginning. Our objection was when we saw the proposed additional claims asserted in the intervenor complaint. First, when we stipulated to the dismissal of claims with prejudice in the individual case, part of that case involved allegations that Duane was retaliated against because of his meeting with David Keyes. The intervenor complaint includes allegations based on that meeting, again claiming Duane was fired for what he said in the meeting. That is outside the scope of the EEOC's complaint, which is limited to alleged retaliation for the glassdoor.com posting. Also, the intervenor complaint alleges that he was terminated for complaining about being denied disability accommodation. I note the EEOC rejected Duane's charge allegations that he was denied a reasonable accommodation.

So, to clarify, we do not object to Duane's joinder/intervention as a plaintiff, but we do object to the additional claims and allegations proposed in the intervenor complaint.

I'll be back in town next week and can talk directly if you'd like.

Jeff

**YOUNG BASILE**

YOUNG BASILE HANLON &amp; MACFARLANE P.C.

**Jeffrey D. Wilson**

Shareholder and Litigation Director

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

T: (248) 244-0173

www.youngbasile.com

**From:** David Marek <david@marekfirm.com>  
**Date:** Friday, August 11, 2017 at 1:09 PM  
**To:** Jeffrey Wilson <wilson@youngbasile.com>  
**Cc:** Natasha Menezes <menezes@youngbasile.com>  
**Subject:** Re: Duane v IXL

Jeff

I just left you a voice mail. Let me know when you can talk, or, if possible, send me an email on your reasons for objecting to the motion to intervene. I am wondering if you do not object to the intervention, but do object to the addition of the feha claim. If this is accurate, I can indicate in my papers.

Thank you

David Marek

The Marek Law Firm

(917) 721-5042

California • New York • Florida

On Jun 22, 2017, at 11:20 AM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

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

Jeff

**Jeffrey D. Wilson** | Young Basile Hanlon & MacFarlane, P.C.  
3001 WEST BIG BEAVER ROAD, SUITE 624 | TROY, MICHIGAN 48084  
  
DIRECT: (248)244-0173 | FAX: (248)649-3338 | [www.youngbasile.com](http://www.youngbasile.com)

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**From:** David Marek <david@marekfirm.com>  
**Date:** Thursday, June 22, 2017 at 12:54 PM  
**To:** Jeffrey Wilson <wilson@youngbasile.com>  
**Cc:** Natasha Menezes <menezes@youngbasile.com>  
**Subject:** Re: Duane v IXL

Jeff

The "we" was Duane, and I don't know if you object to Duane intervening in the EEOC case. I think we are on the same page, but if not, please don't hesitate to call if that's an easier way to assure no miscommunication.

Thanks

On Wed, Jun 21, 2017 at 3:57 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

"We" being Duane, correct? It may seem like a silly question, but it's not. If you are asking whether IXL objects to Duane intervening in the EEOC case, we would not object. I don't know if we have formally accepted service yet, if that matters. Natasha can let us know. I don't have that information handy.

Jeff

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**From:** David Marek [mailto:david@marekfirm.com]  
**Sent:** June 21, 2017 6:42 PM  
**To:** Jeffrey D. Wilson <wilson@youngbasile.com>  
**Cc:** Natasha Menezes <menezes@youngbasile.com>  
**Subject:** Re: Duane v IXL

We will intervene as a party in the EEOC case.

David Marek

The Marek Law Firm

(917) 721-5042

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On Jun 21, 2017, at 3:32 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

This change to the stipulated order is fine with me. Natasha, can you get it formatted properly and submit to the court?

David, by "motion to intervene" do you mean Duane intervening as a party? Or are you asking about making an appearance as counsel of record?

Thanks,

Jeff

Case 3:17-cv-02979-vc Document 38-7 Filed 11/02/17 Page 4 of 5

From: David Marek [mailto:david@marekfirm.com]  
Sent: June 21, 2017 4:54 PM  
To: Jeffrey D. Wilson <wilson@youngbasile.com>  
Cc: Natasha Menezes <menezes@youngbasile.com>  
Subject: Re: Duane v IXL

Jeff  
Please see my attached edits.

Also, please let me know if you intend to object, and if so on what basis, to my motion to intervene in the EEOC v. IXL matter.

On Mon, Jun 19, 2017 at 6:17 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

David, thanks for your call last week. I had a chance to speak with IXL and we agree with the stipulated dismissal. Please see attached. Does this work for you?

Thanks,

Jeff

**YOUNG BASILE**

YOUNG BASILE HANLON & MACFARLANE P.C.

**Jeffrey D. Wilson**

Shareholder and Litigation Director

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

T: (248) 244-0173

www.youngbasile.com

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The Marek Law Firm

917-721-5042

California New York Florida

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David Marek

The Marek Law Firm

917-721-5042

California New York Florida