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Attorneys for Defendant
IXL Learning, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. IXL LEARNING, INC., Defendant.	Case No.: 3:17-cv-02979-VC

DEFENDANT'S SUPPLEMENTAL BRIEF TO PROPOSED PLAINTIFF-INTERVENOR'S NOTICE OF MOTION TO INTERVENE

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IXL Learning, Inc. ("IXL") respectfully submits this Supplemental Brief to Proposed Plaintiff-Intervenor's Motion to Intervene submitted by Proposed Plaintiff-Intervenor Adrian Scott Duane (Duane) and in response to this Court's Order requesting supplemental briefing.

I. INTRODUCTION

The Court states that "in this case, it appears that [IXL] waived its right to assert res judicata, at least to a certain extent…" in emails between counsel for IXL and Adrian Scott Duane from June 21-22 and July 24, 2017. IXL respectfully disagrees with this conclusion, upon which the Court bases several questions about the nature and extent of such waiver. The correspondence between counsel for IXL and Duane, all of which occurred before Duane filed his motion to intervene in this case, is neither ambiguous nor constitutes a waiver of any rights by IXL. Duane's counsel asked IXL if it would object to Duane personally intervening in this case, and IXL's counsel confirmed multiple times that IXL would not object because Duane has a statutory right to intervene in this case.[1]

The June/July correspondence between attorneys occurred prior to Duane's motion to file an intervenor complaint in this case. While IXL acknowledges that the defense of res judicata can be waived if not timely asserted, IXL in fact asserted res judicata as an affirmative defense in its Answer and Affirmative Defenses to Plaintiff's Complaint (ECF No. 12, at 11) and immediately upon being provided a copy of Duane's motion to intervene. In fact, the June 21-22 correspondence occurred before IXL had a res judicata defense at all because it was prior to Judge Alsup's entry of stipulated dismissal with prejudice in the litigation between Duane and IXL. *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, Case No.: 3:17-cv-0078-WHA (the "Judge Alsup Action"). Thus, IXL respectfully submits that correspondence between counsel, before IXL was even required to assert its affirmative defense of res judicata, should not be construed as a voluntary relinquishment of that affirmative defense.

IXL has not sought to preclude Duane from participating in this litigation as a party. To the contrary, Duane's intervention as a party will require him to comply with discovery obligations that will

[1] IXL submits that it acted in a manner expected of litigants and their attorneys before this Court. IXL simply acknowledged Duane's statutory right to intervene in this matter and stated it would not object to Duane's intervention. To contort that courtesy into an alleged intentional relinquishment of its affirmative defenses, in whole or in part, seems to run counter to attorneys' obligations of civility and candor.

streamline this litigation. Duane, as a charging party whose retaliation claim the EEOC is pursuing, will be a participant in hearings, depositions, settlement facilitations, etc., which is customary in these cases. These facts, which IXL trusts the EEOC will confirm, are indeed relevant to the Court's consideration because it provides context for IXL's choice not to obstruct and delay these proceedings by making a blanket objection to Duane's intervention as a party.

IXL has not sought to preclude the EEOC from pursuing those claims, despite the Judge Alsup Action filed by Duane, because in that case Duane did not and could not assert the two causes of action the EEOC asserted in this case. Duane has not recovered any damages from prior cases (despite an NLRB trial against IXL and the Judge Alsup Action), and if he had, then IXL would seek preclusion of any double recovery in this case. But, in these circumstances where the EEOC is entitled by statute to bring these narrow Title VII and ADA retaliation claims that Duane did not and could not assert in the earlier proceedings, IXL has waived no defense whatsoever.

The affirmative defenses IXL *has* timely asserted are statute of limitations and res judicata. As IXL has already argued, it is undisputed that Duane's state law discrimination claim is time-barred.[2] *See* ECF No. 31. But even if IXL can be found to have partially waived its right to preclude the Title VII and ADA retaliation claims, it would apply only to the factual allegations and legal theories asserted by the EEOC in the Complaint. In this regard, California recognizes such a partial waiver, and it would be warranted in the circumstances in this case.

For all of these reasons, IXL requests the Court find that IXL's decision not to object to Duane's intervention as a party (but its immediate objection and assertion of res judicata and other defenses upon being informed of the intervenor complaint) should not be construed as a waiver, in whole or in part, of IXL affirmative defenses.

II. FACTS

On January 6, 2017, Duane filed a complaint against IXL and IXL's CEO, Paul Mishkin, alleging retaliation in violation of the Family and Medical Leave Act against IXL and wrongful termination in violation of public policy against IXL and Mishkin in the Judge Alsup Action. On May

[2] In fact, because his state law claims are time-barred, the question of waiver of res judicata is moot.

24, 2017, the U.S. Equal Employment Opportunity Commission (EEOC) filed this instant lawsuit alleging one count of retaliation pursuant to Title VII and the ADA. ECF No. 1.

On June 15, 2017, Duane sought IXL's stipulation to dismiss the Judge Alsup Action with prejudice. Wilson Decl. at 2. IXL confirmed with Duane that a dismissal of the Judge Alsup Action would preclude Duane from bringing any claims that he could have raised in the Judge Alsup Action. Wilson Decl. at 2. On June 19, 2017, IXL informed Duane that IXL agreed to the stipulated dismissal of the Judge Alsup Action with prejudice. Wilson Decl., Ex. 1.

Two days later, and after the parties agreed to the dismissal with prejudice, Duane asked for the first time whether IXL would object to Duane filing a motion to intervene in this EEOC litigation and if so, the basis for such an objection. Wilson Decl., Ex. 1. On June 22, 2017, IXL informed Duane that it did not object to Duane intervening in the EEOC litigation because Duane has a statutory and unconditional right to intervene. Wilson Decl., Ex 1.

On June 27, 2017, the Court entered the Stipulation for Dismissal with Prejudice in the Judge Alsup Action. Wilson Decl. at 3.

On July 24, 2017, Duane informed IXL that Duane would be moving to intervene in the EEOC litigation and that he would represent in the motion that IXL did not oppose the intervention. Wilson Decl., Ex 1. At no time did Duane inform IXL that Duane planned on making additional claims and, if so, what those additional claims would be. Wilson Decl. at 3. It is illogical that IXL would give Duane carte blanche to add any and all claims against IXL without objection and without even knowing what those claims were.

On Friday, August 4, 2017, Duane sent IXL two attachments: (1) a Joint Stipulation and [Proposed] Order Granting Plaintiff-Intervenor Adrian Scott Duane's Request to Intervene, and (2) [Proposed] Complaint in Intervention. Wilson Decl. at 3. These documents illustrated that, in addition to intervening in this case, Duane now sought to bring individual anti-retaliation claims under Title VII, the ADA, and the California Fair Employment and Housing Act ("FEHA"). On Tuesday, August 8, 2017, IXL responded to Duane: "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." Wilson Decl. at 3. On August 11, 2017, IXL reiterated in an email: "[W]e do not object to

Duane's intervention as a party in this case, which I told you from the beginning. Our objection was when we saw the proposed additional claims asserted in the intervenor complaint. . . . 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." Wilson Decl. at 3.

On August 21, 2017, Duane filed a motion to intervene. ECF No. 19. IXL filed an opposition in response. ECF No. 22. On October 19, 2017, this Court requested that the parties provide supplemental briefing to address the following: (1) whether it was possible to have a partial waiver of an affirmative defense such as res judicata; (2) whether a partial waiver should be interpreted broadly or narrowly; and (3) whether parties typically assert state law claims when intervening in a lawsuit filed by the EEOC. ECF No. 36.

III. LEGAL ARGUMENT

A. IXL did not waive, in whole or in part, its affirmative defense of res judicata.

Res judicata is an affirmative defense and is ordinarily waived if not specifically pleaded. *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990); Fed. R. Civ. P. 8(c). The purpose of such a rule is to give the opposing party notice and a chance to argue the application of res judicata. *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971). The Ninth Circuit has articulated two grounds for finding that a res judicata defense is waived: (1) first, a res judicata defense may be waived if it is not raised in the pleadings, and (2) the defense may be waived by the failure of a defendant to object to the prosecution of split proceedings while both proceedings are still pending. *Herrera v. Cty. of Los Angeles*, No. CV097359PSGCWX, 2013 WL 12120073, at *3 (C.D. Cal. June 17, 2013) (citing *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 328-29 (9th Cir. 1995)).

The Ninth Circuit has liberalized the requirement that defendants must assert affirmative defenses in their initial pleadings. *Magana v. Com. of the N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997), *as amended* (May 1, 1997). In fact, res judicata can be properly raised for the first time on summary judgment in the absence of prejudice to the plaintiff. *Beaver v. Hotels*, No. 11CV1842-GPC(KSC), 2016 WL 4142345, at *4 (S.D. Cal. Aug. 4, 2016) (*citing Magana*, 107 F.3d at 1446); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) ("In the absence of a showing of prejudice, however, an affirmative defense may be raised for the first time at summary judgment."). In *McGinest v.*

GTE Serv. Corp., 247 F. App'x 72, 75 (9th Cir. 2007), the court held that the employer did not waive its res judicata defense to an employee's Title VII claims by failing to expressly plead it as a defense and acquiescing in the employee's splitting of his cause of action between state and federal courts. Because the employee did not contend that he was prejudiced by any delay, the res judicata defense was not waived simply because the employer failed to plead it as an affirmative defense. The court also held that it was not clear that any significant delay occurred since defendant could not have succeeded on a res judicata defense until after the state judgment became final so "[a]ny affirmative defense pleaded before that time would have been speculative." *Id*.

IXL did not waive its right to assert the affirmative defense of res judicata. First, IXL could not possibly assert a res judicata defense prior to Judge Alsup's entry of the Stipulation for Dismissal with Prejudice (the "Dismissal"). ECF No. 22-03, Ex. 2. Second, IXL timely asserted res judicata in its initial pleadings. Third, at no time did IXL represent that it waived or relinquished its right to assert res judicata. Fourth, there can be no waiver when Duane has not been prejudiced by IXL's timely assertion of res judicata.

1. IXL could not assert res judicata before the Court entered the Dismissal.

It is not possible for IXL to waive its defense of res judicata *in this case* in an email discussion in the prior Judge Alsup Action on June 21-22, 2017, before that court entered the Dismissal on June 27, 2017 and before Duane filed any motion to intervene. Specifically, any affirmative defense pleaded before entry of the Dismissal and before Duane filed a motion to intervene would have been speculative; in this sense, *IXL did not gain the right to argue res judicata until Judge Alsup entered the Dismissal*. *McGinest*, 247 F. App'x at 75.

Thus, IXL gained the right to argue res judicata upon entry of the Dismissal. Because this Dismissal was with prejudice, Duane, from that point forward, was and is precluded from relitigating claims that were or could have been raised in the Intervenor Action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). While Duane had a statutory and unconditional right to intervene pursuant to 42 U.S.C. § 2000e-5(f)(1), this Dismissal precludes him from bringing claims that go beyond the EEOC's claims, including any state law claims.

2. IXL timely asserted the affirmative defense of res judicata.

The Ninth Circuit has held that waiving the affirmative defense of res judicata occurs when a party fails to timely assert it. *Magana,* 107 F.3d at 1446. Here, when presented with Duane's Joint Stipulation to Intervene and corresponding Complaint, IXL immediately stated: "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." Wilson Decl., Ex. 1. Thus, IXL specifically and timely raised its objections to Duane's attempt to add new claims and allegations in his proposed intervenor complaint. Further, IXL timely raised the affirmative defense of res judicata in its initial pleadings. IXL raised this defense in its Answer (ECF No. 12, at 11) and in its Response to Duane's Motion to Intervene (ECF No. 22, at 5).

IXL timely asserted the defense of res judicata once IXL had the ability to argue such a defense following the Court's entry of the Dismissal in the Judge Alsup Action.

3. At no time did IXL represent that it waived or relinquished its right to assert res judicata.

At no time did IXL represent that it waived or relinquished its right to assert res judicata. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (noting that there was not a waiver of the affirmative defense of res judicata in the absence of any representation by the employer that it did not intend to assert that defense before trial). Under California law, a waiver of a right must be "voluntary, knowing and done with adequate awareness of the relevant circumstances and likely consequences." *In re GVF Cannery, Inc.*, 202 B.R. 140, 145 (N.D. Cal. 1996) (internal citation omitted). Specifically, waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 59, 35 Cal. Rptr. 2d 515, 518 (1994); see *City of Ukiah v. Fones*, 410 P.2d 369, 370–71 (Cal. 1966) ("Waiver always rests upon intent.").

The burden is on the party claiming a waiver to prove it by clear and convincing evidence, and doubtful cases will be decided against the existence of waiver, especially when the right alleged to be waived is one that is favored by law. *In re GVF Cannery, Inc.*, 202 B.R. at 145 (internal citations omitted); *see City of Ukiah*, 410 P.2d at 370–71 ("The burden, moreover, is on the party claiming

a waiver of a right to prove it by clear and convincing evidence ***that does not leave the matter to speculation***.") (internal citation omitted) (emphasis added).

Here, IXL did not directly or indirectly waive or relinquish its right to assert the affirmative defense of res judicata. At no time was this IXL's intent as evidenced by IXL's consent to the Dismissal with prejudice (meaning that Duane was legally barred from bringing claims he did or could have brought) and IXL's immediate assertion of its rights following Duane's attempt to allege additional claims in his Motion to Intervene. It cannot be proven by clear and convincing evidence that it was IXL's intent to waive this affirmative defense. The fact that the Court finds the email communication between Duane and IXL to be ambiguous indicates that the clear and convincing standard cannot be met, and doubtful cases must be decided against the existence of wavier. *In re GVF Cannery, Inc.*, 202 B.R. at 145.

4. There can be no waiver when Duane has not been prejudiced by IXL's assertion of res judicata.

Not only did IXL assert res judicata in its initial pleadings, but the Ninth Circuit has also liberalized the requirement of asserting res judicata. The Ninth Circuit requires that there be prejudice in order to apply a waiver of the affirmative defense of res judicata. Even if the email correspondence between the parties is considered ambiguous (or was a waiver of res judicata before the Court entered the Dismissal in the Judge Alsup Action), there is no prejudice shown by Duane given IXL's timely assertion of res judicata.

Generally, prejudice occurs from the application of res judicata where the plaintiff has *not had the opportunity to actually litigate* claims that were part of the same cause of action, but not actually raised in the first case that went to judgment. *McGinest*, 247 Fed. Appx. at 73. It is now clear that Duane had the opportunity to bring state law claims in the Judge Alsup Action, but chose to cast his lot with the EEOC case. Counsel for each party discussed this, and Duane believed he was advantaged to ride along with the EEOC (which bears the costs of the litigation instead of him). Thus, Duane cannot be heard to claim prejudice now by the proper assertion of res judicata. Equally importantly, Duane's state law claims are undisputedly time-barred. Preclusion of those claims by res judicata would not constitute prejudice as required to establish waiver.

B. Partial waiver of res judicata is recognized by California law and would apply in these circumstance, and any ambiguity must be resolved in IXL's favor.

Although IXL did not waive its right to assert an affirmative defense of res judicata, it is possible to have a partial waiver under California law. *See Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425 (N.D. Cal. Mar. 26, 2012) (citing *Miller & Lux, Inc. v. James*, 179 P. 174 (Cal. 1919)). However, IXL has been unable to find any authority for the proposition that a partial waiver requires the wholesale relinquishment of a defendant's affirmative defense of res judicata.

IXL did not waive or relinquish its right to assert res judicata. As previously discussed, a waiver of a right under California law must be "voluntary, knowing and done with adequate awareness of the relevant circumstances and likely consequences." *In re GVF Cannery, Inc.*, 202 B.R. at 145 (internal citation omitted). The burden is on the party claiming a waiver to prove it by clear and convincing evidence, and ***doubtful cases will be decided against the existence of waiver***, especially when the right alleged to be waived is one that is favored by law. *Id.* (emphasis added). California courts have held that the clear and convincing evidence must "not leave the matter to speculation." *City of Ukiah*, 410 P.2d at 370–71 (Cal. 1966) (holding that, when the court would be required to speculate on the motives that dictated the choice of language used in a stipulation, the very necessity of such speculation demonstrated that the plaintiff's proof of waiver was not clear and convincing).

Here, it cannot be proven by clear and convincing evidence that it was IXL's intent to waive res judicata. The Court finds the email communication between Duane and IXL to be ambiguous, and the necessity of the Court to engage in such speculation demonstrates that the clear and convincing standard regarding IXL's alleged waiver is not met. Therefore, in cases of ambiguity or speculation, the default rule is that cases will be decided against the existence of waiver.

C. Defendants commonly do not to object to participation of a charging party, but object to their attempt to add claims beyond those asserted by the EEOC, including state law claims.

While it is common for charging parties to intervene in EEOC actions, IXL cannot say whether it is common for them to also assert state law claims. Defendants typically do not object to a charging party's ability to intervene because such a party has a statutory and unconditional right to intervene. 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil

action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision."); *see also E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) ("If the EEOC brings an action, the charging employee has a right to intervene.") (internal citation omitted); *E.E.O.C. v. Giumarra Vineyards Corp.*, No. 1:09-CV-02255-OWW, 2010 WL 3220387, at *2 (E.D. Cal. Aug. 13, 2010) ("Most courts agree that this statutory provision permits individuals an 'unconditional right to intervene' under Rule 24(a)(1) in a Title VII enforcement action brought by the EEOC against the employer.") (internal citation omitted).

However, while defendants may not object to a party's ability to intervene, it is not unusual for defendants to object to the addition of claims that extend beyond the claims asserted by the EEOC, including state law claims. *See E.E.O.C. v. ABM Indus. Inc.*, 249 F.R.D. 588, 591 (E.D. Cal. 2008) (Defendants did not oppose intervention with respect to the "original claims in the EEOC's complaint," but objected to the six additional state law claims (e.g., false imprisonment, assault, negligent, intentional infliction of emotional distress, etc.) that were not included in the EEOC's complaint.); *U.S. E.E.O.C. v. WirelessComm Inc.*, No. 5:11-CV-04796 EJD, 2012 WL 1711040, at *1 (N.D. Cal. May 15, 2012) (Employer did not oppose the employee's right to intervene but opposed the employee's motion on the grounds that the proposed complaint in intervention expanded the scope of the EEOC action to include two new defendants and four new causes of action, two of which were California state law claims.); *E.E.O.C. v. Giumarra Vineyards Corp.*, No. 1:09-CV-02255-OWW, 2010 WL 3220387 (E.D. Cal. Aug. 13, 2010) (Defendant acknowledged that the three intervenors were entitled to intervene to advance hostile work environment and retaliation claims already made by the EEOC but objected to the addition of a Title VII claim including allegations of discrimination based on national origin and a state law claim pursuant to California's Fair Employment and Housing Act.).

These cases and the associated typical practice are instructive in IXL's understanding that Duane would be prohibited from making additional claims in this action due to the Dismissal but would be able to intervene as it was his unconditional right to do so.

IV. CONCLUSION

For reasons stated herein, IXL requests the Court find that IXL's decision not to object to Duane's intervention as a party (but its immediately objection and assertion of res judicata and other

defenses upon being informed of the intervenor complaint) should not be construed as a waiver, in whole or in part, of IXL affirmative defenses.

Respectfully submitted,

Dated: November 2, 2017

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Jeffrey D. Wilson*
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PROOF OF SERVICE

STATE OF MICHIGAN, COUNTY OF OAKLAND
U.S. Equal Employment Opportunity Comm. v. IXL Learning, Inc.
Case No.: 3:17-CV-02979-VC

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On November 2, 2017, I served the foregoing document(s) described as **Defendant's Supplemental Brief to Proposed Plaintiff-Intervenor's Motion to Intervene** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Ami Sanghvi Equal Employment Opportunity Commission 350 The Embarcadero, Suite 500 San Francisco, CA 94105 P: (415) 625-5640 F: (415) 625-5657 ami.sanghvi@eeoc.gov	Attorneys for Plaintiff US EEOC
David Marek The Marek Law Firm 228 Hamilton Avenue Palo Alto, CA 94301 P: (917) 721-5042 david@marekfirm.com	Attorneys for Proposed Plaintiff-Intervenor Adrian Scott Duane

☐ **(BY MAIL)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY ELECTRONIC FILING)** I caused such document to be delivered via electronic filing and service of court via Notice of Electronic Filing ("NEF").

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on November 2, 2017, at Troy, Michigan.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. IXL LEARNING, INC., Defendant.	Case No.: 3:17-cv-02979-VC **DECLARATION OF JEFFREY D. WILSON IN SUPPORT OF DEFENDANT'S SUPPLEMENTAL BRIEF TO PROPOSED PLAINTIFF-INTERVENOR'S NOTICE OF MOTION TO INTERVENE**

I, JEFFREY D. WILSON, declare:

1. I am a shareholder at the law firm of Young Basile Hanlon & MacFarlane, P.C., and counsel for the Defendant, IXL Learning, Inc. ("IXL" or "Defendant"). This declaration is in support of Defendant's Supplemental Brief to Proposed Plaintiff-Intervenor's Notice of Motion to Intervene and in response to the Court's Order requesting supplemental briefing on Plaintiff-Intervenor's Motion to

intervene (ECF No. 36). I have personal knowledge of the matters set forth herein and, if called as a witness, I could and would testify competently thereto.

2. On or around June 15, 2017, I spoke with David Marek, counsel of record for Plaintiff-Intervenor Adrian Scott Duane ("Duane"), in which we discussed this lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). Because of and in response to this lawsuit, Mr. Marek sought IXL's stipulation to dismiss the action filed by Duane against IXL in *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, Case No.: 3:17-cv-0078-WHA (the "Judge Alsup Action"). On this phone call, I confirmed with Mr. Marek that if IXL agreed to dismiss the Judge Alsup Action, it would preclude Duane from bringing any FMLA, tort, or other claims that he could have raised in the Judge Alsup Action. Mr. Marek confirmed that Duane understood this. In a document written that same day, I wrote: "David has formally offered to stipulate to the dismissal with prejudice of the case he brought, leaving only the EEOC case. I confirmed with him that if we did so, it would preclude Duane from bringing any FMLA, tort or other claims that could have been raised in the first lawsuit. He said Duane understands that." Without waiving the attorney-client privilege, attorney work product, or any other applicable privilege, I am willing to produce this contemporaneously written document to opposing counsel and for an in-camera review.

3. Attached hereto as Exhibit 1 is the email correspondence between myself and Mr. Marek from June 19, 2017 to July 24, 2017.

4. On June 19, 2017, I confirmed with Mr. Marek that IXL agreed to the stipulated dismissal of the Judge Alsup Action with prejudice. Exhibit 1.

5. Two days later, and after the parties agreed to the dismissal with prejudice, Mr. Marek asked for the first time whether IXL would object to Duane filing a motion to intervene in this EEOC litigation and if so, the basis for such an objection. When I questioned whether Duane would be intervening as a party or whether Mr. Marek would be making an appearance as counsel of record, Mr. Marek confirmed that Duane would be intervening as a party in this case. Exhibit 1.

6. On June 22, 2017, I confirmed that IXL did not object to Duane intervening in this case because Duane has a statutory and unconditional right to intervene. Exhibit 1.

7. On June 22, 2017, Duane and IXL filed a Stipulation for Dismissal with Prejudice with the Court. ECF No. 22-03, Ex. 2. The Court entered the Stipulation for Dismissal with Prejudice on June 27, 2017. ECF No. 22-03, Ex. 2.

8. On July 24, 2017, Mr. Marek informed me that Duane would be moving to intervene in the EEOC litigation and that he would represent in the motion that IXL does not oppose the intervention. At no time did Mr. Marek inform me that Duane planned on making additional claims and, if so, what those additional claims would be. Exhibit 1. At no time was IXL's stipulation to the intervention also an unconditional stipulation for Duane to make any and all additional claims against IXL without IXL knowing what those claims even were.

9. On Friday, August 4, 2017, Mr. Marek sent me two attachments: (1) a Joint Stipulation and [Proposed] Order Granting Plaintiff-Intervenor Adrian Scott Duane's Request to Intervene, and (2) [Proposed] Complaint in Intervention. These documents illustrated that, in addition to intervening in this case, Duane now sought to bring individual anti-retaliation claims under Title VII, the ADA, and the California Fair Employment and Housing Act ("FEHA").

10. On Tuesday, August 8, 2017, I responded to Mr. Marek: "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." On August 11, 2017, I reiterated in an email: "[W]e do not object to Duane's intervention as a party in this case, which I told you from the beginning. Our objection was when we saw the proposed additional claims asserted in the intervenor complaint. . . . 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."

11. It was mutually understood between Duane and IXL that Duane would seek to intervene as a party in this case and that IXL would not object to Duane's intervention.

12. At no time prior to August 4, 2017 did Mr. Marek inform me that Duane would also be seeking to make additional claims against IXL in this case.

13. At no time did IXL stipulate to Duane making additional claims against IXL.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 2nd day of November, 2017 in Troy, Michigan.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson

Exhibit 1

Jeffrey D. Wilson

From: David Marek <david@marekfirm.com>
Sent: July 24, 2017 7:37 PM
To: Jeffrey D. Wilson
Subject: Re: Duane v IXL

thank you.

On Mon, Jul 24, 2017 at 4:00 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

Agreed.

Jeff

Jeffrey D. Wilson, Esq.
Shareholder and Litigation Director
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From: David Marek <david@marekfirm.com>
Sent: Monday, July 24, 2017 5:20:03 PM
To: Jeffrey D. Wilson
Cc: Natasha Menezes
Subject: Re: Duane v IXL

Jeff
I am writing to let you know I intend to move to intervene in the EEOC/IXL matter tomorrow. Per the email exchange below, I will represent in the motion that IXL does not oppose the intervention.

Thank you

On Thu, Jun 22, 2017 at 10:20 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

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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 was asking if you object to Duane intervening in the EEOC v. IXL matter. 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

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

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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

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

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