

United States District Court
Northern District of California

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IXL Learning, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff-Intervenor,

v.

IXL LEARNING, INC.,

Defendant.

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

**STIPULATED PROTECTIVE ORDER
FOR STANDARD LITIGATION**

1 This Stipulated Protective Order is based on the Court’s model Stipulated Protective Order for
2 Standard Litigation (the “Model”), and deviations from this Model have been redlined below.

3 **1. PURPOSES AND LIMITATIONS**

4 Disclosure and discovery activity in this action are likely to involve production of confidential,
5 proprietary, or private information for which special protection from public disclosure and from use
6 for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties
7 hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties
8 acknowledge that this Order does not confer blanket protections on all disclosures or responses to
9 discovery and that the protection it affords from public disclosure and use extends only to the limited
10 information or items that are entitled to confidential treatment under the applicable legal principles.
11 The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective
12 Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth
13 the procedures that must be followed and the standards that will be applied when a party seeks
14 permission from the court to file material under seal.

15 **2. DEFINITIONS**

16 2.1 Challenging Party: a Party or Non-Party that challenges the designation of information
17 or items under this Order.

18 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
19 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of
20 Civil Procedure 26(c). “Confidential” Information includes:

- 21 1) trade secrets and commercial information, including techniques, formulas,
22 processes, and procedures that provide a competitive advantage to a party;
- 23 2) financial and business planning information;
- 24 3) research and development information, including intellectual property; and
- 25 4) medical records and healthcare information pertaining to Charging Party Scott
26 Duane.

27 The Parties shall engage in the process set forth in Section 6 (CHALLENGING
28 CONFIDENTIALITY DESIGNATIONS) to the extent that a Party challenges the designation.

1 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as
2 their support staff).

3 2.4 Designating Party: a Party or Non-Party that designates information or items that it
4 produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

5 2.5 Disclosure or Discovery Material: all items or information, regardless of the medium
6 or manner in which it is generated, stored, or maintained (including, among other things, testimony,
7 transcripts, and tangible things), that are produced or generated in disclosures or responses to
8 discovery in this matter.

9 2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the
10 litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant
11 in this action.

12 2.7 House Counsel: attorneys who are employees of a party to this action. House Counsel
13 does not include Outside Counsel of Record or any other outside counsel.

14 2.8 Non-Party: any natural person, partnership, corporation, association, or other legal
15 entity not named as a Party to this action.

16 2.9 Outside Counsel of Record: attorneys who are not employees of a party to this action
17 but are retained to represent or advise a party to this action and have appeared in this action on behalf
18 of that party or are affiliated with a law firm which has appeared on behalf of that party.

19 2.10 Party: any party to this action, including all of its officers, directors, employees,
20 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

21 2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material
22 in this action.

23 2.12 Professional Vendors: persons or entities that provide litigation support services (e.g.,
24 photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing,
25 or retrieving data in any form or medium) and their employees and subcontractors.

26 2.13 Protected Material: any Disclosure or Discovery Material that is designated as
27 “CONFIDENTIAL.”

28 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from a

1 Producing Party.

2 **3. SCOPE**

3 The protections conferred by this Stipulation and Order cover not only Protected Material (as
4 defined above), but also (1) any information copied or extracted from Protected Material; (2) all
5 copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
6 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.
7 However, the protections conferred by this Stipulation and Order do not cover the following
8 information: (a) any information that is in the public domain at the time of disclosure to a Receiving
9 Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of
10 publication not involving a violation of this Order, including becoming part of the public record
11 through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure
12 or obtained by the Receiving Party after the disclosure from a source who obtained the information
13 lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected
14 Material at trial shall be governed by a separate agreement or order.

15 **4. DURATION**

16 Even after final disposition of this litigation, the confidentiality obligations imposed by this
17 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
18 otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and
19 defenses in this action, with or without prejudice; and (2) final judgment herein after the completion
20 and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time
21 limits for filing any motions or applications for extension of time pursuant to applicable law.

22 **5. DESIGNATING PROTECTED MATERIAL**

23 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or
24 Non-Party that designates information or items for protection under this Order must take care to limit
25 any such designation to specific material that qualifies under the appropriate standards. The
26 Designating Party must designate for protection only those parts of material, documents, items, or oral
27 or written communications that qualify – so that other portions of the material, documents, items, or
28 communications for which protection is not warranted are not swept unjustifiably within the ambit of

1 this Order.

2 Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown
3 to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily
4 encumber or retard the case development process or to impose unnecessary expenses and burdens on
5 other parties) expose the Designating Party to sanctions.

6 If it comes to a Designating Party's attention that information or items that it designated for
7 protection do not qualify for protection, that Designating Party must promptly notify all other Parties
8 that it is withdrawing the mistaken designation.

9 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see,
10 e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or
11 Discovery Material that qualifies for protection under this Order must be clearly so designated before
12 the material is disclosed or produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic documents, but
15 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party
16 affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion
17 or portions of the material on a page qualifies for protection, the Producing Party also must clearly
18 identify the protected portion(s) (e.g., by making appropriate markings in the margins). A Party or
19 Non-Party that makes original documents or materials available for inspection need not designate them
20 for protection until after the inspecting Party has indicated which material it would like copied and
21 produced. During the inspection and before the designation, all of the material made available for
22 inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the
23 documents it wants copied and produced, the Producing Party must determine which documents, or
24 portions thereof, qualify for protection under this Order. Then, before producing the specified
25 documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page that contains
26 Protected Material. If only a portion or portions of the material on a page qualifies for protection, the
27 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
28 markings in the margins).

1 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
2 Designating Party identify on the record, before the close of the deposition, hearing, or other
3 proceeding, all protected testimony.

4 (c) for information produced in some form other than documentary and for any other
5 tangible items, that the Producing Party affix in a prominent place on the exterior of the container or
6 containers in which the information or item is stored the legend “CONFIDENTIAL.” If only a portion
7 or portions of the information or item warrant protection, the Producing Party, to the extent practicable,
8 shall identify the protected portion(s).

9 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
10 designate qualified information or items does not, standing alone, waive the Designating Party’s right
11 to secure protection under this Order for such material. Upon timely correction of a designation, the
12 Receiving Party must make reasonable efforts to assure that the material is treated in accordance with
13 the provisions of this Order.

14 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

15 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
16 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality
17 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens,
18 or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a
19 confidentiality designation by electing not to mount a challenge promptly after the original designation
20 is disclosed.

21 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by
22 providing written notice of each designation it is challenging and describing the basis for each
23 challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite
24 that the challenge to confidentiality is being made in accordance with this specific paragraph of the
25 Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the
26 process by conferring directly (in voice to voice dialogue; other forms of communication are not
27 sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must
28 explain the basis for its belief that the confidentiality designation was not proper and must give the

1 Designating Party an opportunity to review the designated material, to reconsider the circumstances,
2 and, if no change in designation is offered, to explain the basis for the chosen designation. A
3 Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this
4 meet and confer process first or establishes that the Designating Party is unwilling to participate in the
5 meet and confer process in a timely manner.

6 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
7 intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil
8 Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the initial
9 notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not
10 resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent
11 declaration affirming that the movant has complied with the meet and confer requirements imposed in
12 the preceding paragraph. Failure by the Designating Party to make such a motion including the
13 required declaration within 21 days (or 14 days, if applicable) shall automatically waive the
14 confidentiality designation for each challenged designation. In addition, the Challenging Party may
15 file a motion challenging a confidentiality designation at any time if there is good cause for doing so,
16 including a challenge to the designation of a deposition transcript or any portions thereof. Any motion
17 brought pursuant to this provision must be accompanied by a competent declaration affirming that the
18 movant has complied with the meet and confer requirements imposed by the preceding paragraph.

19 The burden of persuasion in any such challenge proceeding shall be on the Designating Party.
20 Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary
21 expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the
22 Designating Party has waived the confidentiality designation by failing to file a motion to retain
23 confidentiality as described above, all parties shall continue to afford the material in question the level
24 of protection to which it is entitled under the Producing Party's designation until the court rules on the
25 challenge.

26 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

27 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
28 produced by another Party or by a Non-Party in connection with this case only for prosecuting,

1 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the
2 categories of persons and under the conditions described in this Order. When the litigation has been
3 terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL
4 DISPOSITION).

5 Protected Material must be stored and maintained by a Receiving Party at a location and in a
6 secure manner that ensures that access is limited to the persons authorized under this Order.

7 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by
8 the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
9 information or item designated “CONFIDENTIAL” only to:

10 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees
11 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for
12 this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that is
13 attached hereto as Exhibit A;

14 (b) the officers, directors, and employees (including House Counsel) of the Receiving Party
15 to whom disclosure is reasonably necessary for this litigation and who have signed the
16 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

17 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
18 reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to
19 Be Bound” (Exhibit A);

20 (d) the court and its personnel;

21 (e) court reporters and their staff, professional jury or trial consultants, mock jurors, and
22 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
23 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

24 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
25 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),
26 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed
27 deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound
28 by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated

1 Protective Order.

2 (g) the author or recipient of a document containing the information or a custodian or other
3 person who otherwise possessed or knew the information.

4 (h) any other individual whose review a party deems necessary to the presentation or
5 defense of claims in the litigation and who has signed the “Acknowledgment and Agreement to Be
6 Bound” (Exhibit A).

7 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER**
8 **LITIGATION**

9 If a Party is served with a subpoena or a court order issued in other litigation that compels
10 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party
11 must:

12 (a) promptly notify in writing the Designating Party. Such notification shall include a copy
13 of the subpoena or court order;

14 (b) promptly notify in writing the party who caused the subpoena or order to issue in the
15 other litigation that some or all of the material covered by the subpoena or order is subject to this
16 Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

17 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
18 Designating Party whose Protected Material may be affected.

19 If the Designating Party timely seeks a protective order, the Party served with the subpoena or
20 court order shall not produce any information designated in this action as “CONFIDENTIAL” before
21 a determination by the court from which the subpoena or order issued, unless the Party has obtained
22 the Designating Party’s permission. The Designating Party shall bear the burden and expense of
23 seeking protection in that court of its confidential material – and nothing in these provisions should be
24 construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
25 from another court.

26 **9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS**
27 **LITIGATION**

28 (a) The terms of this Order are applicable to information produced by a Non-Party in this

1 action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in
2 connection with this litigation is protected by the remedies and relief provided by this Order. Nothing
3 in these provisions should be construed as prohibiting a Non-Party from seeking additional
4 protections.

5 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-
6 Party’s confidential information in its possession, and the Party is subject to an agreement with the
7 Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

8 (1) promptly notify in writing the Requesting Party and the Non-Party that some or all
9 of the information requested is subject to a confidentiality agreement with a Non-Party;

10 (2) promptly provide the Non-Party with a copy of the Stipulated Protective Order in
11 this litigation, the relevant discovery request(s), and a reasonably specific description of the
12 information requested; and

13 (3) make the information requested available for inspection by the Non-Party.

14 (c) If the Non-Party fails to object or seek a protective order from this court within 14 days
15 of receiving the notice and accompanying information, the Receiving Party may produce the Non-
16 Party’s confidential information responsive to the discovery request. If the Non-Party timely seeks a
17 protective order, the Receiving Party shall not produce any information in its possession or control
18 that is subject to the confidentiality agreement with the Non-Party before a determination by the court.
19 Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking
20 protection in this court of its Protected Material.

21 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

22 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
23 Material to any person or in any circumstance not authorized under this Stipulated Protective Order,
24 the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
25 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c)
26 inform the person or persons to whom unauthorized disclosures were made of all the terms of this
27 Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be
28 Bound” that is attached hereto as Exhibit A.

1 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED**
2 **MATERIAL**

3 When a Producing Party gives notice to Receiving Parties that certain inadvertently produced
4 material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties
5 are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to
6 modify whatever procedure may be established in an e-discovery order that provides for production
7 without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
8 parties reach an agreement on the effect of disclosure of a communication or information covered by
9 the attorney-client privilege or work product protection, the parties may incorporate their agreement
10 in the stipulated protective order submitted to the court.

11 **12. MISCELLANEOUS**

12 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek
13 its modification by the court in the future.

14 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order
15 no Party waives any right it otherwise would have to object to disclosing or producing any information
16 or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives
17 any right to object on any ground to use in evidence of any of the material covered by this Protective
18 Order.

19 12.3 Filing Protected Material. Without written permission from the Designating Party or a
20 court order secured after appropriate notice to all interested persons, a Party may not file in the public
21 record in this action any Protected Material. A Party that seeks to file under seal any Protected Material
22 must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to
23 a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local
24 Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at
25 issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a
26 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is
27 denied by the court, then the Receiving Party may file the information in the public record pursuant to
28 Civil Local Rule 79-5(e) unless otherwise instructed by the court.

1 **13. FINAL DISPOSITION**

2 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
3 Receiving Party must return all Protected Material to the Producing Party or destroy such material. As
4 used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations,
5 summaries, and any other format reproducing or capturing any of the Protected Material. Whether the
6 Protected Material is returned or destroyed, the Receiving Party must submit a written certification to
7 the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day
8 deadline that (1) identifies (by category, where appropriate) all the Protected Material that was
9 returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts,
10 compilations, summaries or any other format reproducing or capturing any of the Protected Material.
11 Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion
12 papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and
13 trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if
14 such materials contain Protected Material. Any such archival copies that contain or constitute
15 Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

16 The entry of this Protective Order should not be interpreted as limiting or overriding the Equal
17 Employment Opportunity Commission’s obligation to maintain copies of its files pursuant to and in
18 accordance with the Federal Records Act.

19 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

20
21 Dated: January 17, 2018 /s/ Ami Sanghvi (with consent)
Attorneys for Plaintiff

22 Dated: January 17, 2018 /s/ Natasha R. Menezes
23 Attorneys for Defendant

24 Dated: January 17, 2018 /s/ David Marek (with consent)
25 Attorneys for Plaintiff-Intervenor

26 PURSUANT TO STIPULATION, IT IS SO ORDERED.

27 Dated: _____
28 _____
United States District Judge/Magistrate Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

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I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of _____ **[insert formal name of the case and the number and initials assigned to it by the court]**. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____