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21 UNITED STATES DISTRICT COURT  
22 NORTHERN DISTRICT OF CALIFORNIA

23 U.S. EQUAL EMPLOYMENT  
24 OPPORTUNITY COMMISSION,

25 Plaintiff,

26 and

27 ADRIAN SCOTT DUANE,

28 Plaintiff-Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

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

**PLAINTIFF EEOC AND PLAINTIFF-  
INTERVENOR'S JOINT MOTION FOR  
PARTIAL SUMMARY JUDGEMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

Date: September 20, 2018  
Time: 10:00 am  
Courtroom: 4, 17<sup>th</sup> Floor  
Judge: Hon. Vincent Chhabria

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 2018, at 10:00 a.m., in Courtroom 4, 17<sup>th</sup>  
Floor of the United States District Court, Northern District of California, 450 Golden Gate Avenue,

1 San Francisco, California 94102, Plaintiff U.S. Equal Employment Opportunity Commission (EEOC  
2 or Commission) and Plaintiff-Intervenor Adrian Scott Duane (Duane or Plaintiff-Intervenor) will  
3 move this Court for partial summary judgment in their favor and against Defendant IXL Learning,  
4 Inc. (IXL) pursuant to Rule 56. Fed. R. Civ. P. 56. The motion is based upon this Notice, the  
5 accompanying Memorandum of Points and Authorities below, the Declaration of Ami Sanghvi and  
6 all exhibits attached thereto, all other pleadings and records on file in this action, and such other  
7 material as may come before the Court upon hearing of this matter.

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28

**TABLE OF CONTENTS**

1

2 TABLE OF CONTENTS..... i

3 TABLE OF AUTHORITIES ..... ii

4 I. INTRODUCTION ..... 1

5 II. PROCEDURAL FACTS ..... 1

6 III. SUBSTANTIVE FACTS..... 5

7 IV. ARGUMENT..... 8

8 A. Summary Judgment Standard ..... 8

9 B. Defendant Cannot Plausibly Support a Failure to Mitigate  
 10 (Affirmative Defense No. 4 for both the EEOC and Duane)..... 8

11 C. Plaintiff-Intervenor Has Met All Necessary Conditions Precedent..... 10

12 D. Plaintiffs’ Timely Assertion of Rights Have Not Prejudiced IXL  
 13 (Affirmative Defense No. 3 for both the EEOC and Duane)  
 (Affirmative Defense No. 5 for the EEOC)  
 (Affirmative Defense No. 6 for Duane)..... 11

14 E. IXL Cannot Challenge the Sufficiency of Plaintiffs’ Pleadings  
 15 (Affirmative Defense No. 1 for the EEOC and Duane)..... 14

16 F. Duane’s State Law Claims are Not Time-Barred  
 (Affirmative Defense No. 5 for Duane)..... 15

17 G. The EEOC and Duane Have Not Waived Federal or State Retaliation Claims  
 18 (Affirmative Defense No. 5 for the EEOC)  
 (Affirmative Defense No. 6 for Duane)..... 16

19 H. No Facts Exist to Estop the EEOC or Duane from Asserting their Claims  
 20 (Affirmative Defense No. 5 for the EEOC)  
 (Affirmative Defense No. 6 for Duane)..... 17

21 I. Preclusion Does Not Limit the EEOC and Duane’s Claims  
 22 (Affirmative Defense No. 5 for the EEOC)  
 (Affirmative Defense No. 6 for Duane)..... 18

23 J. Duane’s FEHA Claim is Not Preempted by the NLRA  
 24 (Affirmative Defense No. 7 for Duane)..... 19

25 V. CONCLUSION..... 21

26

27

28

**TABLE OF AUTHORITIES**

**Cases**

1

2

3

4 *Alexander v. Gardner-Denver Co.*,  
415 U.S. 36 (1974)..... 14

5

6 *Anderson v. Liberty Lobby*,  
477 U.S. 242 (1986)..... 8

7

8 *Ashcroft v. Iqbal*,  
556 U.S. 662 (2009)..... 14

9

10 *Bell Atl. Corp. v. Twombly*,  
550 U.S. 544 (2007)..... 14

11

12 *Carrillo v. United States*,  
5 F.3d 1302 (9th Cir. 1993) ..... 17

13

14 *Celotex Corp v. Catrett*,  
477 U.S. 317 (1986)..... 8, 9

15

16 *Clark v. Bear Stearns & Co.*,  
966 F.2d 1318 (9th Cir. 1992) ..... 18, 19

17

18 *Couveau v. Am. Airlines, Inc.*,  
218 F.3d 1078 (9th Cir. 2000) ..... 12

19

20 *Danjaq LLC v. Sony Corp.*,  
263 F.3d 942 (9th Cir. 2001) ..... 11, 12, 13

21

22 *Downs v. Department of Water & Power*,  
58 Cal.App.4th 1093 (1997) ..... 10

23

24 *Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA,  
2017 U.S. Dist. LEXIS 72993 (N.D. Cal. May 12, 2017)..... 20

25

26 *Duane v. IXL Learning, Inc.*, No. CV 17-00078 WHA,  
2017 U.S. Dist. LEXIS 72993 (N.D. Cal. May 12, 2017) ..... 3

27

28 *EEOC v. Cal. Psychiatric Transitions, Inc.*,  
725 F.Supp.2d 1100 (E.D. Cal. 2010) ..... 12

*EEOC v. Catholic Healthcare West*,  
53 F. Supp. 2d 1096 (C.D. Cal. 2008) ..... 13

*EEOC v. Farmer Bros. Co.*,  
31 F.3d 891 (9th Cir. 1994) ..... 9

1 *EEOC v. Global Horizons, Inc.*, 11-cv-00257 LEK,  
2014 U.S. Dist. LEXIS 26342 (D. Haw. Feb. 28, 2014) ..... 16

2 *EEOC v. Global Horizons, Inc.*,  
3 904 F.Supp.2d 1074 (D. Haw. 2012) ..... 12

4 *EEOC v. Lakemont Homes, Inc.*,  
5 718 F.Supp.2d 1251 (Nev. D. Ct. 2010) ..... 12

6 *EEOC v. Red Robin Gourmet Burgers, Inc.*, C04-1291JLR,  
2005 U.S. Dist. LEXIS 36219 (W.D. Wash. Aug. 29, 2005) ..... 9

7 *EEOC v. Wah Chang Albany Corp.*,  
8 499 F.2d 187 (9th Cir. 1974) ..... 11

9 *Ford Motor Co. v. EEOC*,  
10 458 U.S. 219(1982)..... 10

11 *In re Beaty*,  
306 F.3d 914 (9th Cir. 2002) ..... 13

12 *Ingram v. Pac. Gas & Elec. Co.*, 12-cv-02777-JST,  
13 2014 U.S. Dist. LEXIS 9857 (N.D. Cal. Jan. 27, 2014) ..... 9, 10

14 *Int’l Longshoremen’s Ass’n. v. Davis*,  
15 476 U.S. 380 (1986)..... 20

16 *Kaplan v. Intern. Alliance of Theatrical, etc.*,  
525 F.2d 1354 (9th Cir. 1975) ..... 8, 9

17 *Lee v. City of Los Angeles*,  
18 250 F.3d 668 (9th Cir. 2001) ..... 20

19 *Nelson v. Cyprus Bagdad Copper Corp.*,  
20 119 F.3d 756 (9th Cir. 1997) ..... 16

21 *Nissan Fire & Marine Ins. Co., Ltd.*,  
2010 F.3d 1099 (9th Cir. 2000) ..... 8

22 *O’Donnell v. Venor Inc.*,  
23 466 F.3d 1104 (9th Cir. 2006) ..... 12

24 *Odima v. Westin Tucson Hotel*,  
53 F.3d 1484 (9th Cir. 1995); ..... 9

25 *San Diego Building Trades Council Local 2620 v. Garmon*,  
26 359 U.S. 236 (1959)..... 19

27 *Sias v. City Demonstration Agency*,  
588 F.2d 692 (9th Cir. 1978) ..... 9

28

1 *Smith v. Nat’l Steel & Shipbuilding Co.*,  
125 F.3d 751 (9th Cir. 1997) ..... 20

2 *Smith v. Ortiz*,  
3 234 F. App’x 698 (9th Cir. 2007) ..... 20

4 *Texas Dep’t of Comm. Affairs v. Burdine*,  
5 450 U.S. 248 (1981)..... 15

6 *United States v. Lasky*,  
600 F.2d 765 (9th Cir. 1979) ..... 19

7 *United States v. Perez*,  
8 116 F.3d 840 (9th Cir. 1997) ..... 16

9 *University of Texas Southwest Medical Center v. Nassar*,  
10 570 U.S. 338 (2013)..... 15

11 *Van Scoy v. New Albertson’s, Inc.*, No. 2:08-cv-02237-MCE-KJM,  
2010 U.S. Dist. LEXIS 126844 (E.D. Cal. Nov. 30, 2010) ..... 19

12 *Watkins v. United States Army*,  
13 875 F.2d 699 (9th Cir. 1989) (en banc) ..... 17

14 *Yanowitz v. L’Oreal USA, Inc.*,  
15 36 Cal. 4th 1028, 1042 (2005) ..... 15

16 **Other Authorities**

17 *NLRB v. IXL Learning, Inc.*,  
Case 20-CA-153625 (2015)..... 2

18 *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*,  
19 No. 3:17-CV-00078-WHA (N.D. Cal.) ..... 3

20 **Rules**

21 Fed. R. Civ. P 9(c) ..... 11

22 Fed. R. Civ. P. 34..... 10

23 Fed. R. Civ. P. 56(c) ..... 8

24 **Treatises**

25 18 Moore's Federal Practice - Civil § 132.03 (2018)..... 18

26 Wright & Miller, Fed. Prac. & Proc., Ch. 8 §2734..... 8

27

28

**MEMORANDUM OF POINTS & AUTHORITIES****I. INTRODUCTION**

The EEOC and Duane seek to present a focused case for an adjudication on the merits at trial. Duane is a transgender man who reasonably believed IXL discriminated against him based on his gender identity and disability. He opposed the discrimination by publicly accusing the company of treating employees disparately based on race, sexual orientation, and gender identity through a negative review on Glassdoor.com. Duane also charged, based on his experiences, that most management did not know what the word discrimination meant. His post angered IXL management, particularly the CEO Paul Mishkin (Mishkin), who summarily fired Duane the day after discovering the post. IXL admits that it fired Duane because of his post. This is classic retaliation: federal and state law prohibit IXL's unlawful termination of Duane for engaging in protected activity.

The claims and defenses relevant to the central question of whether IXL retaliated should go before a jury in a record uncluttered by superfluous defenses. IXL cannot factually or legally support the following affirmative defenses against the EEOC and Duane: (1) failure to mitigate; (2) laches; (3) failure to state a claim upon which relief can be granted; (4) waiver; (5) estoppel; and, (6) res judicata/issue and claim preclusion. Similarly, IXL cannot support the following affirmative defenses that it asserts only against Duane: (1) conditions precedent; (2) statute of limitations; and, (3) NLRA preemption. IXL should not be permitted to unnecessarily obfuscate the real issues for trial. The EEOC and Duane should prevail on this motion.

**II. PROCEDURAL FACTS**

IXL fired Duane on January 8, 2015. Duane filed a charge of discrimination with the EEOC's New York District Office dated March 10, 2015. [Declaration of Ami Sanghvi (Sanghvi Decl.), Exh. 1 (EEOC Charge); *see also* Def. Answer to EEOC Compl., ECF No. 12 at ¶8.] Duane alleged, inter alia, that IXL retaliated against him for complaining of discrimination. [Sanghvi Decl. Exh. 1 (EEOC Charge) at EEOC\_000005.] After the New York office transferred the charge to the San Francisco District Office on May 6, 2015, the charge was dually filed with the California Department of Fair Employment and Housing (DFEH). [Sanghvi Decl. Exh. 2 (DFEH Notice); Exh. 3 (SFDO Letter); Exh. 4 (NYDO transfer notice)]. The EEOC sent, under DFEH cover, a notice that

1 advised IXL and Duane about the dual filing and provided Duane a state law notice of right to sue.  
2 [Sanghvi Decl. Exh. 2 (DFEH Notice).] Issuance of that DFEH Notice tolled the one-year statute of  
3 limitations to bring state law claims pending the completion of the EEOC's investigation. [*Id.*  
4 (citing Cal. Govt Code §12965(d)(1)).]

5 Within one year, the EEOC investigated Duane's Charge and issued a Letter of  
6 Determination, dated April 22, 2016. [Sanghvi Decl. Exh. 5 (EEOC Determination); *see also* Exh.  
7 11 (IXL Resp. to EEOC RFA) at No. 42, p. 9.] The EEOC found reasonable cause to believe that  
8 IXL discriminated against Duane in retaliation for protesting discriminatory conduct in violation of  
9 Title VII and the ADA. [Sanghvi Decl. Exh. 5 (EEOC Determination) at EEOC\_000002.] The  
10 EEOC found "insufficient evidence that IXL failed to provide a reasonable accommodation or  
11 discriminated against him because he is transgender." [*Id.*]

12 The EEOC invited IXL to eliminate the alleged unlawful employment practice through  
13 "informal methods of conference, conciliation, and persuasion." [*Id.*] To that end, the EEOC  
14 emailed IXL a proposed conciliation agreement on June 22, 2016, to provide it the opportunity to  
15 remedy the practices described in the Letter of Determination. [Def. Answer to EEOC Compl., ECF  
16 No. 012 at ¶11.] The EEOC engaged in conciliation efforts with IXL in June and July of 2016.  
17 [Sanghvi Decl. Exh. 11 (IXL Resp. to EEOC RFA) at No. 45, p.10.] By letter dated July 28, 2016,  
18 the EEOC notified IXL that the EEOC had not been able to secure an acceptable agreement  
19 providing relief for the violation outlined in the Commission's Determination and advised IXL that  
20 further conciliation efforts would be futile or non-productive. [ECF No. 012 at ¶¶12-13; Sanghvi  
21 Decl. Exh. 11 (IXL Resp. to EEOC RFA) at No. 46, p.10.]

22 While the EEOC investigation was pending, Duane filed a charge with the National Labor  
23 Relations Board (NLRB) on June 3, 2015, claiming an unfair labor practice in violation of the  
24 National Labor Relations Act (NLRA). [Sanghvi Decl. Exh. 6 (NLRB Charge) at IXL 000001.] In  
25 July 2015, the NLRB filed a complaint on behalf of Duane against IXL alleging that IXL violated  
26 Section 8(a) of the NLRA. *NLRB v. IXL Learning, Inc.*, Case 20-CA-153625 (2015). On November  
27 5, 2015, Administrative Law Judge (ALJ) of the NLRB held a hearing on Duane's claims. The  
28 NLRB concluded that IXL did not engage in an unlawful labor practice within the meaning of

1 Section 8(a)(1) of the NLRA. The NLRB adopted the ALJ's April 2016 order in June 2016,  
 2 dismissing the NLRB complaint. [Sanghvi Decl. Exh. 6-1 (NLRB Order Dismissing Complaint) at  
 3 IXL 0779.]

4 On January 6, 2017, Duane filed a federal action in the Northern District of California  
 5 asserting two claims: (1) that IXL violated the Family Medical Leave Act (FMLA) by terminating  
 6 Duane's employment because he took FMLA leave for surgery; and, (2) that Paul Mishkin and IXL  
 7 wrongfully terminated Duane's employment in violation of public policy expressed in California  
 8 Code §232.5(a). *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, No. 3:17-CV-00078-  
 9 WHA (N.D. Cal.)<sup>1</sup> [Compl., Duane Action, 17-CV-00078, ECF No. 001.] In March 2017, Duane  
 10 filed an amended complaint to add references to the FMLA, ADA, FEHA, Title VII, and the  
 11 California Family Rights Act (CFRA) in his wrongful termination, in violation of public policy  
 12 claim. [Am. Compl., Duane Action, 17-CV-00078, ECF No. 030].

13 Duane Action Defendants, IXL and Mishkin, jointly moved, pursuant to Rule 12(b)(6), to  
 14 dismiss all claims against them, claiming that Duane failed to state a claim upon which relief could  
 15 be granted, that his claims contradicted the NLRB ALJ's factual findings, and that his state law  
 16 claim was preempted by the NLRA. [Def. Mot. Dismiss, Duane Action 17-CV-00078, ECF No.  
 17 037.] Judge Alsup denied IXL's motion to dismiss.<sup>2</sup> *Duane v. IXL Learning, Inc.*, No. CV 17-  
 18 00078 WHA, 2017 U.S. Dist. LEXIS 72993 (N.D. Cal. May 12, 2017). Judge Alsup found that  
 19 Duane's pleading sufficiently supported a plausible inference that IXL violated the FMLA given the  
 20 temporal proximity of eight days between his return from FMLA-protected leave and his  
 21 termination. *Id.*, at \*10. The Court also held that the state law claim was not preempted by the  
 22 NLRA because Duane did not allege conduct that constituted *concerted* protected activity, but rather  
 23 discrimination. *Id.*

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24  
 25 1 To avoid any confusion, all references to docket entries from Duane's previously filed action will  
 26 be referred to as the Duane Action and contain a citation to that docket number. Any reference to  
 the docket in this action will refer only to the ECF number.

27 2 Judge Alsup partially granted the Motion to Dismiss only on grounds that because Mishkin was  
 28 IXL's agent and not Duane's employer, Mishkin could not be held personally liable for Duane's  
 wrongful termination in violation of public policy claim.

1 The EEOC filed this action on May 24, 2017, alleging that IXL retaliated against Duane in  
2 violation of Title VII and the ADA, by terminating him for engaging in legally protected  
3 employment activities, i.e., posting his opposition to discrimination on a website. [EEOC Compl.,  
4 ECF No. 001 at ¶38] In its Answer, IXL asserted six affirmative defenses against the EEOC. [Def.  
5 Answer to EEOC Compl., ECF No. 012 at pp.10-11] Duane moved to intervene as a statutory right  
6 and asserted retaliation claims under federal and state law. [Pl. Intervenor Mot. Intervene, ECF No.  
7 019-020] After briefing and oral argument, this Court granted Duane's Motion to Intervene. [Order  
8 Granting Mot. Intervene, ECF No. 040] In his Complaint in Intervention, Duane asserted violations  
9 of the Title VII, ADA, and FEHA retaliation provisions. [Pl. Intervenor Compl., ECF No. 041] IXL  
10 asserted seven affirmative defenses against Duane. [Def. Answer to Pl. Intervenor Compl., ECF No.  
11 042 at pp.14-15] Fact discovery concluded on April 13, 2018, and expert discovery concluded on  
12 June 1, 2018. [Case Management Order, ECF No. 027, Sept. 20, 2017.] No party identified experts.  
13 [See Sanghvi Decl. Exh. 13 (EEOC Disclosures) at pp.1-3; Exh. 12 (IXL Disclosures) at pp. 2-6.]

14 Prior to filing this motion, the parties met and conferred to negotiate potential stipulations to  
15 withdraw claims or defenses. [Sanghvi Decl. at ¶¶ 19-28, Exh. 15 (Sanghvi Letter to Menezes);  
16 Exh. 16 (Sanghvi/Menezes Email).] As a result, IXL agreed to stipulate: (1) that the EEOC met all  
17 conditions precedent prior to instituting this action; and, (2) to withdraw Affirmative Defense No. 6  
18 regarding NLRA preemption from its Answer to the EEOC's Complaint. [Sanghvi Decl. at ¶¶21-  
19 22.] Given the benefit of discovery, Duane withdrew his assertion from his federal and state claims  
20 that IXL retaliated because he reported discrimination to his manager David Keyes. He retained the  
21 claim that IXL retaliated because of the Glassdoor.com post. [Sanghvi Decl. Exh. 15 (Sanghvi  
22 Letter to Menezes); Exh. 16 (Sanghvi/Menezes Email).] The parties were unable to reach any  
23 additional stipulations. [*Id.*]

24 The EEOC and Duane seek summary adjudication of the following affirmative defenses: (1)  
25 failure to mitigate; (2) laches; (3) failure to state a claim upon which relief can be granted; (4)  
26 waiver; (5) estoppel; and, (6) res judicata/issue and claim preclusion. Additionally, Duane seeks  
27 summary adjudication of the following affirmative defenses that IXL asserts only against him: (1)  
28 conditions precedent; (2) statute of limitations; and, (3) NLRA preemption.

1 **III. SUBSTANTIVE FACTS**

2 Duane received his doctorate degree in mathematics in June 2013. [Sanghvi Decl. Exh. 21-  
3 11 at EEOC\_000416 (Duane Resume).] He began working at IXL as a Product Analyst on July 10,  
4 2013. [Sanghvi Decl. Exh. 11 (IXL Resp. to EEOC RFA) at p.1, no.1.] IXL is an educational  
5 technology company that provides an array of products, including math-related content for students  
6 preschool-12th grade. [Sanghvi Decl. Exh. 17 (IXL 30(b)(6) Dep.) at 33:11-34:17.] Product  
7 Analysts, like Duane, drafted specifications for the engineers to write code. [Sanghvi Decl. Exh. 18  
8 (Keyes Dep.) at 16:5-20.] The specifications laid out the text, explanation and diagrams for math  
9 problems for IXL's educational website. [*Id.*]

10 IXL fired Duane on January 8, 2015, because of his Glassdoor.com post. [Sanghvi Decl.  
11 Exh. 11 (IXL Resp. to EEOC RFA) at No.37, p.9.] Immediately after IXL terminated him, Duane  
12 diligently searched for work until he received two job offers in December 2015, one of which he  
13 ultimately accepted, with a start date of January 4, 2016. [Sanghvi Decl. Exh. 14 (EEOC Resp. to  
14 IXL First Rogs) at No. 9, pp.8-10; Exh. 27 (Wikispaces offer); Exh. 28 (App Academy offer).]  
15 Thus, the EEOC and Duane seek pecuniary damages from the date of his termination through  
16 December 31, 2015. [Sanghvi Decl. Exh. 14 (EEOC Resp. to IXL First Rogs) at No. 5, p.5.]

17 Duane's job search efforts were varied, extensive, and began within days of his termination.  
18 [Sanghvi Decl. Exh. 19 (Duane Dep.) at 183:24-184:6, 189:5-190:14.] He accessed various  
19 networks, including personal friends and acquaintances, his graduate school network, and his  
20 trans/queer network to inquire about and pursue leads for job opportunities in technology. [Sanghvi  
21 Decl. Exh. 14 (EEOC Resp. to IXL First Rogs) at No. 9, pp.8-10; *see also* Exh 20 (Job Search  
22 through referral).] He primarily used EdSurge<sup>3</sup>, an internet hub for educational technology postings  
23 and news, to identify postings for companies like Khan Academy, Clever, Desmos, Kizoom, Piazza,  
24 Coursera, and Edulastic. [*Id.*; Exh. 21-7 (Khan Academy); Exh. 21-2 (Piazza); Exh. 21-3 (Kizoom);  
25 Exh. 21-8 (Edulastic).] He also utilized Dice.com and Glassdoor.com to identify potential job  
26 opportunities at technology companies like change.org and kiva.org. [Sanghvi Decl. Exh. 14 (EEOC  
27

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28 <sup>3</sup><https://www.edsurge.com/about>, last accessed July 19, 2018.

1 Resp. to IXL First Rogs) at No. 9, pp.8-10.] Duane even searched for jobs on broader platforms like  
2 Craigslist for tutoring or teacher positions. [Sanghvi Decl. Exh. 24-1 (teacher position); Exh. 24-2  
3 (support analyst); Exh. 24-3 (after-school math teacher); Exh. 24-4 (tutor).]

4 Duane spent over 30 hours a week looking for alternate employment and applied to over 50  
5 jobs. [Sanghvi Decl. Exh. 19 (Duane Dep.) at 189:5-190:14.] For the first 2-3 months of 2015,  
6 Duane applied for jobs he identified that were comparable to his Product Analyst position at IXL.  
7 [Sanghvi Decl. Exh. 20-2 (MIND); Exh. 21-1; (study.com); Exh. 21-2 (Piazza); Exh. 21-3 (Kizoom);  
8 Exh. 21-4 (Caliber); Exh. 21-5 (EdSurge); Exh. 21-6 (Salesforce); Exh. 21-7 (Khan); Exh. 21-8  
9 (Edulastic).] He found that there were not many vacancies like the job he held at IXL. [Sanghvi  
10 Decl. Exh. 19 (Duane Dep.) at 186:21-24.] Of those that were similar, he discovered that the skills  
11 he developed at IXL were not transferable to the available positions. [*Id.*, at 184:12-15.] Duane  
12 unsuccessfully interviewed for a Data Analyst position at Caliber Schools in Richmond, CA, a  
13 curriculum design position with an ERP Corp recruiter, another curriculum design position at  
14 study.com, and a data engineering internship at EdSurge. [Sanghvi Decl. Exh. 14 (EEOC Resp. to  
15 IXL First Rogs) at No. 9, pp.8-10.] After several failed attempts at securing employment, Duane  
16 concluded that the skill set developed while at IXL was extremely narrow, leaving him unqualified  
17 for a broad range of positions in educational technology. [*Id.*; *see also* Exh. 22-1 (Education Portal  
18 rejection); Exh. 22-2 (Kizoom rejection); Exh. 22-3 (Microsoft rejection); Exh. 22-4 (Kink  
19 rejection); Exh. 22-5 (Khan rejection); Exh. 22-6 (Insight Fellows rejection); Exh. 22-7 (No RedInk  
20 rejection); Exh. 22-8 (Robert Half Technology rejection); Exh. 22-9 (Remind rejection); Exh. 22-10  
21 (Khan rejection).]

22 In approximately February 2015, Duane endeavored to increase his employability within the  
23 education technology field and to expand his job search beyond the limited number of educational  
24 technology companies. [Sanghvi Decl. Exh. 14 (EEOC Resp. to IXL First Rogs) at No. 9, pp.8-10.]  
25 He participated in an eight-week online data science course beginning in January 2015, through  
26 Coursera.com, which included topics like statistical analysis, programming in R, and data modeling.  
27 [*Id.*; *see also* Exh. 23 (Duane's Coursera programs).] He engaged in self-initiated skill-building  
28 through HackerRank, a recruiting website that includes a platform enabling people to practice and

1 improve their software engineering skills.<sup>4</sup> [Sanghvi Decl. Exh. 14 (EEOC Resp. to IXL First Rogs)  
2 at No. 9, pp.8-10.] Duane also participated in TechSF, a program through Bay Area Video Coalition  
3 for people trying to transition into technology jobs. [*Id.*; *see also* Exh. 20-8 (BAVC programs).]  
4 Through TechSF, Duane received career coaching services and took courses on frontend web  
5 development. [*Id.*] These skill-building efforts enabled Duane to obtain a web development  
6 internship with San Diego Pride. [Sanghvi Decl. Exh. 20-7 (SD Pride application).] From April –  
7 July 2015, Duane honed his web development skills while interning for San Diego Pride. [*Id.*; *see*  
8 *also* Sanghvi Decl. Exh. 21-11 at EEOC\_000415 (Duane Resume).] During this time, Duane  
9 nonetheless continued to research employment opportunities in either data science or software  
10 development. [Sanghvi Decl. Exh. 14 (EEOC Resp. to IXL First Rogs) at No. 9, p.9.]

11 After completing the San Diego Pride internship in July 2015, Duane continued enhancing  
12 his software engineering skills. [Sanghvi Decl. Exh. 14 (EEOC Resp. to IXL First Rogs) at No. 9,  
13 pp.8-10.] After approximately 10-15 job interviews during the first half of 2015, Duane recognized  
14 that he still lacked a necessary skill set to secure employment in the technology market. [Sanghvi  
15 Decl. Exh. 19 (Duane Dep.) at 186:25-187:18.] Duane applied for, was accepted into, and attended  
16 App Academy, a software “bootcamp” geared toward teaching coding languages, which began with  
17 a four-week pre-course of 20-30 hours per week starting on July 20, 2015. [Sanghvi Decl, Exh. 14  
18 (EEOC Resp. to IXL First Rogs) at No. 9, pp.8-10; *see also* Exh. 25 (App Academy acceptance).]  
19 The full-time bootcamp began August 24, 2015, and lasted 12 weeks. [*Id.*] During the full-time  
20 bootcamp, App Academy provided both training and career placement services. [Sanghvi Decl.  
21 Exh. 19 (Duane Dep.) at 188:23-189:4; *see also* Exh. 26 (Required Job Search Agreement).] His  
22 participation in App Academy resulted in additional job opportunities and twelve additional  
23 interviews. [Sanghvi Decl. Exh. 19 (Duane Dep.) at 190:3-5; *see also* Exh. 21-9 (Honk); Exh. 21-10  
24 (Persist IQ); Exh. 21-11 (Sensor Tower); Exh. 21-12 (Customer Lobby); Exh. 12-13 (Open Door);  
25 21-14 (Robert Half Technology); 21-15 (Salesforce); 21-16 (Amazon).]

26 In December 2015, Wikispaces offered Duane a full-time software development position.  
27

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28 <sup>4</sup> <https://www.hackerrank.com/aboutus>, last accessed July 13, 2018.

1 [Sanghvi Decl. Exh. 27 (Wikispaces offer).] App Academy also offered Duane the Teaching  
2 Assistant position that he ultimately accepted. [Sanghvi Decl. Exh. 28 (App Academy offer).]  
3 Duane began his job with App Academy on January 4, 2016. [Sanghvi Decl. Exh. 13 (EEOC  
4 Disclosures).]

#### 5 **IV. ARGUMENT**

##### 6 **A. Summary Judgment Standard**

7 Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and  
8 admissions on file, together with the affidavits, if any,” demonstrate “there is no genuine issue as to  
9 any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ.  
10 P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby*, 477 U.S.  
11 242, 257 (1986). The summary judgment procedure identifies and disposes of factually unsupported  
12 claims and defenses. *Celotex*, 477 U.S. at 323; *see also* Wright & Miller, Fed. Prac. & Proc., Ch. 8  
13 §2734 (“The general principles of practice under Rule 56 also apply to the assertion of defenses by a  
14 motion for summary judgment.”). Here, after the benefit of discovery, the EEOC and Duane  
15 affirmatively move for summary judgment on nine of IXL’s asserted affirmative defenses. The  
16 EEOC and Duane, as moving parties will demonstrate the absence of a genuine issue of material fact  
17 as to each claim. *Celotex*, 477 U.S. at 323. IXL cannot produce sufficient evidence to support its  
18 defenses. *See Nissan Fire & Marine Ins. Co., Ltd.*, 2010 F.3d 1099, 1103 (9th Cir. 2000). The  
19 EEOC and Duane are thus entitled to judgment as a matter of law on IXL’s legally and factually  
20 unsupported affirmative defenses.

##### 21 **B. Defendant Cannot Plausibly Support a Failure to Mitigate** 22 **(Affirmative Defense No. 4 for both the EEOC and Duane)**

23 IXL bears the burden of proving that Duane failed to mitigate damages. *Kaplan v. Intern.*  
24 *Alliance of Theatrical, etc.*, 525 F.2d 1354, 1363 (9th Cir. 1975). To satisfy its burden, IXL must  
25 establish both that “(1) the damage suffered by [Duane] could have been avoided, i.e., that there  
26 were suitable positions available which plaintiff could have discovered and for which he was  
27 qualified; and (2) that [Duane] failed to use reasonable care and diligence in seeking such a  
28 position.” *Sias v. City Demonstration Agency*, 588 F.2d 692, 696-97 (9th Cir. 1978) (*citing Kaplan*,

1 525 F.2d at 1363) (citations omitted). Here, the relevant period for this inquiry is from January 8,  
2 2015, through December 31, 2015. [Sanghvi Decl. Exh. 14 (EEOC's Resp. to IXL Rogs) at No. 8,  
3 pp. 7-8.] Defendant cannot satisfy either of these elements, let alone both, as required. *See EEOC v.*  
4 *Red Robin Gourmet Burgers, Inc.*, C04-1291JLR, 2005 U.S. Dist. LEXIS 36219, \*21 (W.D. Wash.  
5 Aug. 29, 2005) (refusing to eliminate employer's burden of satisfying both prongs of the test).

6 IXL does not have the evidence to support the first prong of the defense. To prevail, IXL  
7 must present evidence of specific available positions "substantially equivalent" to the Product  
8 Analyst position from which Duane was discharged. *See Odima v. Westin Tucson Hotel*, 53 F.3d  
9 1484, 1947 (9th Cir. 1995); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994); *see also*  
10 *Ingram v. Pac. Gas & Elec. Co.*, 12-cv-02777-JST, 2014 U.S. Dist. LEXIS 9857, \*16-17 (N.D. Cal.  
11 Jan. 27, 2014) (substantially equivalent employment affords virtually identical promotional  
12 opportunities, compensation, job responsibilities, working conditions, and status as the position from  
13 which the Title VII claimant has been discriminatorily terminated)(citations omitted). To date, IXL  
14 has not identified a single position, let alone a substantially equivalent position, that Duane could  
15 have obtained during the relevant period.

16 IXL disregarded multiple opportunities in discovery to make such facts or evidence a part of  
17 the record. "[A] complete failure of proof concerning an essential element of the non-moving  
18 party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23. First, IXL  
19 did not identify in its Fed. R. Civ. P. 26(a) disclosures experts qualified to present evidence of any  
20 available substantially equivalent jobs. [Sanghvi Decl. Exh. 21-11 at EEOC\_000416 (Duane  
21 Resume).] Second, in response to the EEOC's Interrogatories asking for facts underlying the  
22 mitigation defense, IXL responded, simply, that "Duane's claim that he was unable to find  
23 employment is not credible given his advanced degree and the job market in Northern California."  
24 [See Sanghvi Decl. Exh. 8 (IXL Resp. to EEOC First Rogs) at No. 8, pp. 7-8.] IXL did not, then or  
25 ever, provide any facts regarding the Northern California job market to substantiate that assertion.  
26 Third, when asked to identify the factual bases and any documents that form the basis of IXL's  
27 denial that Duane suffered actual damage, including losses in compensation and benefits, IXL only  
28 repeated that Duane failed to mitigate his damages and referred to its previous Interrogatory

1 response. [Sanghvi Decl. Exh. 9 (IXL Resp. to EEOC Third Rogs) at No. 18, p.4.] Fourth, pursuant  
2 to Fed. R. Civ. P. 34, the EEOC sought documents upon which Defendant planned to rely to support  
3 its affirmative defenses, such as the failure to mitigate. [Sanghvi Decl. Exh. 10 (IXL Resp. to EEOC  
4 RFP) at No. 15, p.16.] There too, IXL failed to produce documents identifying even one  
5 substantially equivalent position that Duane could have obtained. [*Id.*] The record is entirely devoid  
6 of facts that would allow a jury to conclude that IXL can meet this necessary prong of its burden.

7 Moreover, the overwhelming evidence of Duane’s diligent job search during his year of  
8 unemployment eliminates Defendant’s ability to sustain the second prong of its defense. The law  
9 only requires reasonable exertions to secure comparable employment. *See Ingram*, 2014 U.S. Dist.  
10 LEXIS 9857, \*17 (citations omitted); *see also Ford Motor Co. v. EEOC*, 458 U.S. 219, 231(1982)  
11 (finding suitable employment does not require a party to “go into another line of work, accept a  
12 demotion, or take a demeaning position...”). Duane exceeded this standard. Duane searched for jobs  
13 through a variety of sources, pursued additional education to acquire marketable skills, and spent  
14 approximately 30 hours per week pursuing employment opportunities. [Sanghvi Decl. Exh. 20  
15 (referral opportunities); Exh. 21 (broad based applications); Exh. 23 (educational course); *see also*  
16 Exh. 19 (Duane Dep.) at 189:5-190:14.] Duane estimates that between his individual searches and  
17 the career placement assistance through App Academy, he likely submitted 50 - 100 applications.  
18 (*Id.*, at 189:9-4.) The EEOC produced evidence of Duane’s diligent attempts to mitigate his  
19 damages. [Sanghvi Decl. Exh. 20 (referral opportunities); Exh. 21 (broad based applications); Exh.  
20 23 (educational course); Exh. 24 (job opportunities).] As a result, there are simply no facts in the  
21 record that allow IXL to prove that Duane failed to mitigate his damages.

### 22 **C. Plaintiff-Intervenor Has Met All Necessary Conditions Precedent**

23 Duane took the necessary procedural steps prior to asserting both federal and state law  
24 claims. *See* 42 U.S.C. §2000e-5; *see also Downs v. Department of Water & Power*, 58 Cal.App.4th  
25 1093 (1997) (“the employee filed a discrimination charge against the employer with the EEOC,  
26 which automatically filed the charge with the DFEH under their worksharing agreement”). [Sanghvi  
27 Decl. Exh. 3 (SFDO Letter).] As a condition to filing suit in federal court, Title VII also requires  
28 that Duane submit a timely charge to the EEOC that must “be in writing under oath or affirmation”

1 and “contain such information and be in such form as the [EEOC] requires.” 42 U.S.C. § 2000e-  
 2 5(b). Duane filed his signed and verified written charge well short of the 300-day federal statute of  
 3 limitations. *See* 29 C.F.R. §§ 1601.9; 1601.3. It is indisputable that Duane has met his conditions  
 4 precedent.

5 Moreover, Duane appropriately pled details regarding his performance of the conditions  
 6 precedent, thereby exceeding the general allegations permitted by Rule 9(c). Fed. R. Civ. P. 9(c); *see*  
 7 *also EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 190 (9th Cir. 1974) (holding it was sufficient  
 8 for plaintiff in a Title VII action to generally allege compliance with conditions precedent). Duane  
 9 not only pled that the conditions precedent had been met, but also specifically pled that he exhausted  
 10 all his administrative remedies, timely filed his charge of discrimination with both the California  
 11 DFEH and the EEOC, and received notice of the EEOC’s failure to achieve voluntary conciliation.  
 12 [*See* Pl. Intervenor Compl., ECF No. 041 at ¶¶ 6, 7, 9, 10.] This stands in stark contrast to IXL’s  
 13 Answer, which improperly denies, without specificity, that Duane met the conditions precedent. *See*  
 14 Fed. R. Civ. P. 9(c) (requiring particularity when denying that a condition precedent has occurred or  
 15 been met). IXL cannot attack Duane’s pleading and cannot point to any evidence to contradict the  
 16 assertions that Duane exhausted his administrative remedies and met his conditions precedent prior  
 17 to asserting both federal and state claims in this action.

18 **D. Plaintiffs’ Timely Assertion of Rights Have Not Prejudiced IXL**  
 19 **(Affirmative Defense No. 3 for both the EEOC and Duane)**  
 20 **(Affirmative Defense No. 5 for the EEOC)**  
 21 **(Affirmative Defense No. 6 for Duane)<sup>5</sup>**

22 Laches is an equitable affirmative defense that applies to a plaintiff who “with full  
 23 knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.” *Danjaq LLC v. Sony*  
 24 *Corp.*, 263 F.3d 942, 950-51 (9th Cir. 2001). To sustain its burden of establishing a laches defense,

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25 <sup>5</sup> In Affirmative Defenses No. 3 for both the EEOC and Duane, IXL asserts that the “claims fail  
 26 because Plaintiff [and Plaintiff-Intervenor] [have] unreasonable delayed pursuing a right or claim in  
 27 a way that prejudices Defendant.” However, IXL also pled “laches” in its Affirmative Defense No.  
 28 5 against the EEOC and Affirmative Defense No. 6 against Duane. We can discern no difference  
 between the defenses, have received no answer from IXL to this query, and thus assume this was a  
 drafting error and seek summary judgment on these Affirmative Defenses based on laches.

1 IXL must prove by a preponderance of evidence that (1) there was inexcusable delay in the assertion  
2 of a known right *and* (2) the party asserting laches has been prejudiced. *See id.* (citing *Couveau v.*  
3 *Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000)); *see also O’Donnell v. Venor Inc.*, 466 F.3d  
4 1104, 1112 (9th Cir. 2006) (emphasis added). Defendant cannot meet either standard.

5 The first prong requires consideration of both the length of “delay” between charge filing and  
6 lawsuit initiation, as well as the circumstances surrounding that delay. *EEOC v. Lakemont Homes,*  
7 *Inc.*, 718 F.Supp.2d 1251, 1255 (Nev. D. Ct. 2010) (citations omitted). Here, the EEOC brought this  
8 action two years and two months after Duane filed his EEOC charge. The issue of whether this  
9 delay was reasonable depends on the cause of the delay. *Couveau*, 218 F.3d at 1083. In two years  
10 and two months, the EEOC investigated the charge, made a reasonable cause finding, attempted to  
11 conciliate the claims, and recommended and prepared the case for litigation. Defendant will be  
12 unable to demonstrate this passage of time as unreasonable as a matter of law or that it somehow  
13 gives rise to an inference of lack of diligence. *Lakemont Homes*, 718 F.Supp. 2d at 1256 (finding a  
14 time lapse of three years and nine months, standing alone, insufficient to support a finding of lack of  
15 diligence); *see also EEOC v. Global Horizons, Inc.*, 904 F.Supp.2d 1074, 1094-95 (D. Haw.  
16 2012)(finding passage of five years between charge and case filing, does not itself establish  
17 unreasonable delay); *EEOC v. Cal. Psychiatric Transitions, Inc.*, 725 F.Supp.2d 1100, 1118 (E.D.  
18 Cal. 2010) (granting EEOC summary judgment where Defendant could not demonstrate that a three-  
19 year three-month delay by itself was unreasonable and inexcusable delay).

20 Additionally, any relevant period of delay prior to Duane asserting his federal and state  
21 retaliation claims was caused by Duane awaiting the conclusion of the EEOC’s administrative  
22 process and was thus reasonable. When the cause of that delay for employment discrimination is  
23 their pursuit of administrative remedies, they should not be held responsible. *See Couveau*, 218 F.3d  
24 at 1084 (citations omitted). Here, Duane filed his motion to intervene within three months of the  
25 EEOC’s filing, and ultimately two years and five months after filing his EEOC charge. Neither the  
26 EEOC nor Duane slept on their rights.

27 Because laches is an equitable defense, it requires more than the passage of time, but also  
28 proof that the “plaintiff’s delay occasioned the defendant’s prejudice.” *Danjaq*, 263 F.3d at 955

1 (citations omitted); *EEOC v. Catholic Healthcare West*, 53 F. Supp. 2d 1096, 1108 (C.D. Cal. 2008)  
2 (finding Defendant’s laches defense fails as a matter of law absent evidence of prejudice). The  
3 Court in *Danjaq* recognized two primary forms of prejudice in the laches context: evidentiary and  
4 exceptions-based. *Danjaq*, 263 F.3d at 955. “Evidentiary prejudice includes such things as lost,  
5 stale, or degraded evidence, or witnesses whose memories have faded or who have died.” *Id.*  
6 Expectations-based prejudice results from defendant taking actions or suffering consequences that it  
7 *would not have, had the plaintiff brought suit promptly.* *Id.* (citations omitted) (emphasis added).  
8 IXL asserts both types of prejudice but can support neither with facts. [Sanghvi Decl. Exh. 8 (IXL  
9 Resp. to EEOC First Rogs) at No. 7, pp.6-7.]

10 IXL suggests evidentiary prejudice because of the “possibility that fact witnesses may be  
11 more difficult to find and/or have forgotten important factual details.” [*Id.*] First, speculative harm  
12 does not satisfy the defense. *See In re Beaty*, 306 F.3d 914, 928 (9th Cir. 2002) (“generic claims of  
13 prejudice do not suffice for a laches defense”) (citations omitted). Second, IXL has not adduced any  
14 facts demonstrating actual harm. The main decisionmakers involved in Duane’s employment and  
15 IXL’s decision to terminate Duane are still available, including many who have been deposed. Paul  
16 Mishkin, the CEO and ultimate decisionmaker, is still integrally involved in the company, was  
17 deposed, and remains available to testify at trial. [Sanghvi Decl. Exh. 12 (IXL Disclosures).]  
18 Similarly, Duane’s managers, Kate Mattison and David Keyes were also deposed, remain IXL  
19 employees, and are presumably available to testify at trial. [*Id.*] Moreover, rather than seek to  
20 preserve the testimony of any of the individuals that may be hard to find or have fading memories,  
21 IXL only affirmatively deposed three of the 27 individuals listed on the EEOC’s Second  
22 Supplemental Initial Disclosures: Duane, his ex-girlfriend, and one of his former co-workers.  
23 [Sanghvi Decl. Exh. 13 (EEOC Disclosures).]

24 IXL also asserts prejudice because Duane’s pursuit of his rights in different forums required  
25 the expenditure of “time and resources.” [Sanghvi Decl. Exh. 8 (IXL Resp. to EEOC First Rogs) at  
26 No. 7, p.7.] This distorts the record and ignores Duane’s right to pursue administrative remedies  
27 through both the NLRB and the EEOC. The Supreme Court observed long ago that “the legislative  
28 history of Title VII manifests a congressional intent to allow an individual to pursue independently

1 his rights under both Title VII and other applicable state and federal statutes,” including the NLRA.  
 2 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48, n. 9 (1974). IXL’s need to defend against  
 3 different claims that Duane was entitled to bring in different forums does not prove prejudice.

4 Moreover, IXL cannot show it would not have expended time and resources litigating  
 5 retaliation claims had Duane immediately sought a Notice of Right Sue from the EEOC and filed  
 6 suit sooner. In fact, given the allegations in Duane’s EEOC charge, Duane may have pursued  
 7 additional discrimination claims, thereby expanding the time and resources IXL would have  
 8 expended defending the action. Additionally, IXL refused Duane’s request to stay the Duane Action  
 9 before Judge Alsup while the EEOC proceedings concluded. [*See* Marek Decl., ECF No. 038-1 at  
 10 ¶8] Finally, Duane agreed, in the interest of efficiency, to narrow the scope of his claims by  
 11 withdrawing his FMLA and state law tort claims in exchange for pursuing federal and state  
 12 retaliation claims in one forum alongside the EEOC. [*See id.* at ¶15] While Duane’s vigorous  
 13 advocacy to assert his civil rights may be an inconvenience to IXL, it is not evidence of prejudice.

14 **E. IXL Cannot Challenge the Sufficiency of Plaintiffs’ Pleadings**  
 15 **(Affirmative Defense No. 1 for the EEOC and Duane)**

16 Defendant asserts “Plaintiff’s [and Plaintiff-Intervenor’s] Complaint [and Complaint in  
 17 Intervention], in whole or in part, fails to state a claim upon against Defendant upon which relief can  
 18 be granted.” [Def. Answer EEOC Compl., ECF No. 012 at Defense No. 1, pp. 10-11; Def. Answer  
 19 Pl. Interv. Compl., ECF No. 042 at Defense No. 1, p.14.] Prior to the April 13, 2018 close of  
 20 discovery, IXL did not move to dismiss either the EEOC’s or Duane’s Complaints. Nonetheless,  
 21 IXL has refused to withdraw the defense. [Sanghvi Decl. Exh. 15 (Sanghvi Letter to Menezes); Exh.  
 22 16 (Sanghvi/Menezes Email).] No facts exist to support any eleventh-hour challenges to the  
 23 sufficiency of the EEOC or Duane’s pleadings.

24 IXL’s affirmative defense is an unsustainable pleading challenge. Both the EEOC and  
 25 Duane complaints plead enough facts to permit this Court to infer more than the mere possibility of  
 26 misconduct and thus state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556  
 27 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also* Fed. R.  
 28 Civ. P. 8(a)(2). The three elements necessary to prove retaliation are: (1) Duane engaged in

1 protected activity; (2) IXL fired Duane; (3) because of his protected activity. *See University of*  
 2 *Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013); *Texas Dep't of Comm. Affairs v.*  
 3 *Burdine*, 450 U.S. 248, 252-53 (1981); *see also Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028,  
 4 1042 (2005) (applying same elements to a FEHA retaliation claim). Here, the Complaints assert and  
 5 IXL admits that (1) Duane posted discrimination complaints on Glassdoor.com on December 30,  
 6 2014; (2) IXL discovered the post on January 7, 2015; and, (3) IXL fired Duane on January 8, 2015,  
 7 *because of his Glassdoor.com post.* [Def. Answer to EEOC Compl., ECF No. 012 at ¶¶ 30, 33, 37;  
 8 Sanghvi Decl. Exh. 11 (IXL Resp. to EEOC RFA) at No. 37, pp.8-9.] There is simply no basis for  
 9 this defense.

10 **F. Duane's State Law Claims are Not Time-Barred**  
 11 **(Affirmative Defense No. 5 for Duane)**

12 Duane's state law claims are not barred by the statute of limitation as a matter of law.<sup>6</sup> As  
 13 previously briefed, the one-year statute of limitation applicable to Duane's FEHA claim remains  
 14 tolled because the requirements of FEHA §12965(d)(1) have been met: (1) he filed timely charges  
 15 concurrently with the EEOC and the DFEH; (2) DFEH deferred its investigation of the charge to the  
 16 EEOC pending the EEOC's investigation; and, (3) DFEH issued a right to sue notice to Duane upon  
 17 deferral of the charge to the EEOC. [Sanghvi Decl. Exh. 3 (SFDO Letter); Exh. 4 (NYDO transfer  
 18 notice).] Since Duane satisfied these conditions, he needed to commence a state law action before  
 19 expiration of the federal right to sue period, or one year from the date of DFEH's right to sue letter,  
 20 *whichever is later.* Cal. Govt. Code §12965(d)(2). Because the EEOC does not issue a federal right  
 21 to sue notice when it files suit, Duane's federal right to sue period had not expired by the time he  
 22 filed his motion to intervene and later the Intervenor Complaint. This Court has already noted that  
 23 the argument that the state law claim is time-barred is weak. [Order Granting Mot. Intervene, ECF  
 24

25 <sup>6</sup> IXL's boilerplate defense does not specify whether the defense also applies to Duane's federal  
 26 claims. IXL refused to substantively respond to the EEOC's efforts to clarify the scope of this  
 27 defense against Duane. However, given IXL's concession is about Duane's statutory right to  
 28 intervene in the EEOC action, it seems hard to imagine that the limitations defense applies to the  
 federal claims that mirror the EEOC's. Nonetheless, out of an abundance of caution, Duane seeks  
 summary judgment on this defense as to both Duane's federal and state claims.

1 No. 040 at n.2] IXL has not offered any additional facts that change this record. IXL cannot sustain  
 2 its statute of limitations defense against Duane’s federal or state claims.

3 **G. The EEOC and Duane Have Not Waived Federal or State Retaliation Claims**  
 4 **(Affirmative Defense No. 5 for the EEOC)**  
 5 **(Affirmative Defense No. 6 for Duane)**

6 Neither the EEOC nor Duane have waived the ability to pursue federal retaliation claims  
 7 under Title VII and the ADA. To establish a waiver defense, IXL must show facts that either the  
 8 EEOC or Duane engaged in conduct that constituted “intentional relinquishment of a known right  
 9 after knowledge of the fact.” *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997); *see also*  
 10 *EEOC v. Global Horizons, Inc.*, 11-cv-00257 LEK, 2014 U.S. Dist. LEXIS 26342, \*24-25 (D. Haw.  
 11 Feb. 28, 2014) (finding that waiver is a fact-specific equitable defense). IXL cannot cite to any facts  
 12 that either the EEOC or Duane intentionally relinquished a right to file suit against IXL alleging  
 13 violations of Title VII and ADA retaliation provisions. In fact, when asked in Interrogatories for the  
 14 facts supporting IXL’s contentions that the EEOC’s claims for damages are barred by the doctrine of  
 15 waiver, IXL referred to the timing and circumstances surrounding *Duane’s* assertion of his  
 16 intervenor claims.<sup>7</sup> [*See e.g.*, Sanghvi Decl. Exh. 8 (IXL Resp. to EEOC First Rogs) at No. 9, pp.7-  
 17 8.] Defendant provided no facts supporting this defense against the EEOC. [*Id.*] Moreover, IXL  
 18 admitted to the Court that it does not seek to preclude the EEOC’s federal claims, nor does it seek to  
 19 preclude Duane’s statutory right to intervene. [Tr. Oral Arg. Mot. Intervene, ECF No. 035 at 32:5-6;  
 20 33:9-11]

21 Similarly, Defendant cannot sustain its burden by arguing that Duane waived his state law  
 22 claims by dismissing his FMLA and tort action with prejudice. A waiver of claims for violations of  
 23 civil rights must be express, voluntary, deliberate and informed. *Nelson v. Cyprus Bagdad Copper*  
 24 *Corp.*, 119 F.3d 756, 762 (9th Cir. 1997). IXL agreed to Duane’s intervention in the EEOC action  
 25 when he dismissed the FMLA action. The parties, however, did not have a meeting of the minds as  
 26 to whether that dismissal and the concurrent agreement to the intervention constituted a waiver of

27 <sup>7</sup> It is worth noting that having had the benefit of discovery, Duane agreed to withdraw the assertion  
 28 that IXL fired him because of his complaint to Keyes. [*See* Pl. Intervenor Compl. ECF No. 041 at ¶  
 42, ¶ 50; ¶ 58.] Thus, Duane’s federal and state law retaliation claims now mirror the EEOC’s  
 retaliation claims.

1 Duane's state law claims. There are no facts demonstrating Duane's express, voluntary, deliberate  
2 and informed waiver of his state civil rights claims.

3 **H. No Facts Exist to Estop the EEOC or Duane from Asserting their Claims**  
4 **(Affirmative Defense No. 5 for the EEOC)**  
5 **(Affirmative Defense No. 6 for Duane)<sup>8</sup>**

6 Traditional estoppel requires the following:

7 (1) The party to be estopped must know the facts; (2) he must intend that his conduct  
8 shall be acted on or must so act that the party asserting the estoppel has a right to believe  
9 it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely  
10 on the former's conduct to his inquiry.

11 *Watkins v. United States Army*, 875 F.2d 699, 709 (9th Cir. 1989) (en banc) (citations omitted).

12 Additionally, asserting estoppel against the government requires that IXL establish that the  
13 government's 'affirmative misconduct' will cause a serious injustice and the public's interest will  
14 not suffer undue damage by imposition of the estoppel. *Watkins*, 875 F.2d at 707. Affirmative  
15 misconduct requires an affirmative misrepresentation or affirmative concealment of a material fact  
16 by the government. *Id.*; see also *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993) ("An  
17 essential element of any estoppel claim is that the party asserting the estoppel must rely to its  
18 detriment on the misrepresentation or concealment.").

19 IXL cannot prove the elements of traditional estoppel for Duane or the EEOC and have no  
20 facts to support the heightened requirement to estop the EEOC's claims. While it is difficult to  
21 ascertain the factual basis for IXL's defense, neither the EEOC nor Duane has engaged in any  
22 misconduct, misrepresentation or concealment. Indeed, when asked in Interrogatories for the facts  
23 supporting IXL's contentions that the claims are barred by estoppel, IXL did not offer any facts.  
24 [Sanghvi Decl. Exh. 8 (IXL Resp. to EEOC First Rogs) at No. 9, pp.7-8.] Similarly, Defendant  
25 refused to provide any indication about the basis of this defense during the EEOC's attempts to meet  
26 and confer about IXL's affirmative defenses. [Exh. 15 (Sanghvi Letter to Menezes); Exh. 16  
27 (Sanghvi/Menezes Email).]

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28 <sup>8</sup> Because of IXL's use of boilerplate affirmative defense language, the EEOC and Duane are forced  
to assume this reference to estoppel refers to equitable estoppel, while the references to preclusion  
refer to collateral estoppel.

1           **I.        Preclusion Does Not Limit the EEOC and Duane’s Claims**  
 2                   **(Affirmative Defense No. 5 for the EEOC)**  
 3                   **(Affirmative Defense No. 6 for Duane)**

4           Plaintiffs are perplexed by IXL’s refusal to withdraw its res judicata and preclusion defenses  
 5 as to the EEOC’s and Duane’s federal law claims. IXL counsel, Jeff Wilson, conceded that res  
 6 judicata does not apply to the EEOC and Duane’s federal law claims. Wilson represented to the  
 7 Court: (1) “I have never made any res judicata (sic) as to the EEOC bringing these claims”; and (2)  
 8 “[t]o the extent there’s a res judicata argument as to Duane’s intervention as a co-plaintiff on the  
 9 existing claims that are asserted by the EEOC, then I waive that.” [Tr. Oral Arg. Mot. Intervene,  
 10 ECF No. 035 at 32:5-6; 33:9-11] This Court then recognized that “[b]y agreeing to Duane’s  
 11 intervention, *IXL was agreeing* that Duane could engage in ‘claim-splitting,’ and *that a res judicata*  
 12 *defense would not apply to Duane’s participation as a party in the EEOC’s lawsuit.*” [Order  
 13 Granting Mot. Intervene, ECF No. 040 at p.1 (emphasis added)]

14           Similarly, issue preclusion/collateral estoppel does not apply to either the federal or state  
 15 retaliation claims. To foreclose litigation of an issue under collateral estoppel: “(1) the issue at stake  
 16 must be identical to the one alleged in the prior litigation; (2) the issue must have been actually  
 17 litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have  
 18 been a critical and necessary part of the judgment in the earlier action.” *Clark v. Bear Stearns &*  
 19 *Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992). The two prior relevant proceedings that arose out of the  
 20 same set of facts are the FMLA action before Judge Alsup and the NLRB proceeding. The EEOC  
 21 was not involved in either action. Moreover, the issue of retaliatory discharge in violation of Title  
 22 VII, the ADA, and FEHA was not raised, contested, submitted for determination by either court, nor  
 23 determined. *See* 18 Moore’s Federal Practice - Civil § 132.03 (2018) (citations omitted). In fact,  
 24 discovery and questioning related to the discrimination and retaliation claims raised to the EEOC  
 25 were affirmatively excluded from the NLRB proceeding. [Sanghvi Decl. Exh. 7 (Order Granting  
 26 Petition to Revoke Subpoena) Req No. 8 at IXL 00203 (limiting IXL’s overbroad subpoena seeking  
 27 “any alleged discriminatory or retaliatory conduct by IXL Learning” to only those documents Duane  
 28 contends support the [NLRB] complaint allegations), and Req. No. 16 at IXL 00204 (revoking  
 requested documents provided by Duane to the EEOC as “not reasonably relevant” and an

1 “unwarranted fishing expedition”); Exh. 7-1 (NLRB Tr.) at 229:20-230:11 (IXL counsel opposing  
 2 the inclusion of questions relating to the EEOC allegations as opposed to the NLRB allegations).]  
 3 Similarly, Judge Alsup, despite knowing about the existence of Duane’s pending EEOC charge,  
 4 compelled Duane and IXL to continue moving forward with litigating the FMLA and tort action.  
 5 [See Tr. Oral Arg. Mot. Dismiss in Duane Action, 17-CV-00078, ECF No. 053 at 21:16-22:4.] The  
 6 issues raised herein were simply not litigated in either of the previous actions.

7 IXL bears the burden of proving “with clarity and certainty what was determined by the prior  
 8 judgment.” *Clark v. Bear Stearns & Co.*, 966 F.2d at 1321. (citing *United States v. Lasky*, 600 F.2d  
 9 765, 769 (9th Cir. 1979)). It cannot do so here. IXL’s answers to the EEOC’s interrogatories failed  
 10 to identify any facts to support a finding that either the NLRB proceeding or the FMLA action  
 11 determined the issue of retaliatory discharge under Title VII or FEHA. [Sanghvi Decl. Exh. 8 (IXL  
 12 Resp. to EEOC First Rogs) at No. 9, pp.7-8.] Similarly, Defendant provided no clarity in response  
 13 to the EEOC’s attempt to meet and confer about affirmative defenses. [Exh. 15 (Sanghvi Letter to  
 14 Menezes); Exh. 16 (Sanghvi/Menezes Email).]

15 **J. Duane’s FEHA Claim is Not Preempted by the NLRA**  
 16 **(Affirmative Defense No. 7 for Duane)**

17 The only preemption argument that IXL can assert is that the NLRA preempts Duane from  
 18 asserting a FEHA claim because the FEHA claim is “arguably either protected or prohibited” by the  
 19 NLRA. *See San Diego Building Trades Council Local 2620 v. Garmon*, 359 U.S. 236 (1959).  
 20 However, Duane’s FEHA claim here – retaliatory discharge because of Duane’s Glassdoor.com post  
 21 – is not prohibited by or protected by Section 7 or 8 of the NLRA. Duane is not claiming that he  
 22 engaged in *concerted* activity, i.e., that he behaved in concert with others or for the purposes of  
 23 “mutual aid or protection.” *See* 29 U.S.C. §157. In contrast to the NLRA, FEHA protects  
 24 individuals when they act independently to oppose discrimination. *See Van Scoy v. New*  
 25 *Albertson’s, Inc.*, No. 2:08-cv-02237-MCE-KJM, 2010 U.S. Dist. LEXIS 126844, at \*17 (E.D. Cal.  
 26 Nov. 30, 2010) (“the primary issue here is not whether Plaintiffs engaged in protected activities  
 27 under the NLRA but instead whether they were harassed, discriminated and retaliated against by  
 28 [Defendant] in violation of FEHA”). It is a completely different legal standard implicating a

1 different right, and thus not preempted.

2 Notably, IXL unsuccessfully argued that the NLRA preempted Duane's claim under  
3 California Labor Code §232.5. In response, Judge Alsup took "judicial notice of the existence of the  
4 ALJ's determination," but refused to take judicial notice of the ALJ's finding about IXL's  
5 motivation behind the termination. *Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA, 2017 U.S.  
6 Dist. LEXIS 72993, \*10 (N.D. Cal. May 12, 2017)(citing *Lee v. City of Los Angeles*, 250 F.3d 668,  
7 690 (9th Cir. 2001) (overruled on other grounds) (finding district court may take judicial notice of  
8 another court's opinion, "for the existence of the opinion, which is not subject to reasonable dispute  
9 over its authenticity," but "not for the truth of the facts recited therein"); *Smith v. Ortiz*, 234 F.  
10 App'x 698, 698 (9th Cir. 2007) (finding that the district court did not abuse its discretion in refusing  
11 to take judicial notice of a finding of the Superior Court)). Judge Alsup then ruled that the NLRA  
12 did not preempt Duane's state law claim because Duane did not allege conduct that constituted  
13 *concerted* protected activity, but rather discrimination. The same analysis applies here and the  
14 defense should be dismissed.

15 Even *assuming arguendo* that preemption applies, the NLRB adopted the ALJ's  
16 determination that Duane's actions did not amount to protected concerted activity under the NLRA.  
17 Therefore, this Court is now free to entertain the FEHA litigation. *See Int'l Longshoremen's Ass'n.*  
18 *v. Davis*, 476 U.S. 380, 397 (1986) ("if there is [preemption], it must defer to the [NLRB], and only  
19 if the Board decides that the conduct is not protected or prohibited may the court entertain the  
20 litigation").

21 Finally, just as IXL did not and could not argue that the NLRA preempted the FMLA claim  
22 in the previous action, the NLRA does not preempt Duane's pursuit of his Title VII and ADA  
23 claims. *See Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 756 (9th Cir. 1997) ("where the  
24 'conflict' is between two federal statutes, *Garmon* preemption is inapplicable and a federal court  
25 may properly retain jurisdiction over non-NLRA federal claims."). Nonetheless, Defendant refused  
26 to withdraw the preemption defense against Duane. [Exh. 15 (Sanghvi Letter to Menezes); Exh. 16  
27 (Sanghvi/Menezes Email).]  
28

1 **V. CONCLUSION**

2 IXL has had the full course of factual and expert discovery to adduce facts in support of its  
3 defenses. Yet, no facts exist to support most of IXL’s affirmative defenses. The EEOC and Duane  
4 look forward to presenting an uncluttered set of claims and defenses to the jury. To that end, the  
5 EEOC and Duane respectfully seek summary judgment on the following unsupported boilerplate  
6 affirmative defenses: (1) failure to mitigate; (2) laches; (3) failure to state a claim upon which relief  
7 can be granted; (4) waiver; (5) estoppel; (6) res judicata/preclusion; (7) conditions precedent; (8)  
8 statute of limitations; and (9) NLRA preemption.

9 Respectfully submitted,

10  
11 Dated: July 19, 2018

/s/ Ami Sanghvi  
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26  
27 **LOCAL RULE 5-1(i)(3) ATTESTATION**

28 I, Ami Sanghvi, am the ECF User whose ID and password are being used to file the Motion  
for Partial Summary Judgment. In compliance with Local Rule 5-1(i)(3), I hereby attest that David  
Marek concurred in this filing

Dated: July 19, 2018

/s/ Ami Sanghvi  
AMI SANGHVI, Senior Trial Attorney