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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 Hon. Vince Chhabria Courtroom: 4, 17th Floor Hearing Date: September 20, 2018 Hearing Time: 10:00 AM **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

Please take notice that on September 20, 2018 at 10:00 AM, or as soon thereafter as may be heard in Courtroom 4 of the United States District Court, Northern District of California, Defendant IXL Learning, Inc. ("Defendant'), will and hereby does, move this Court, pursuant to Federal Rule of Civil Procedure 56 and Local Rules 56.1, hereby submits its Motion for Summary Judgment and Memorandum of Law in Support of its Motion for Summary Judgment.

This motion is supported by the Memorandum of Law in Support of Motion for Summary Judgment filed concurrently herewith, and the pleadings, records and files of the within action, and upon such further evidence and argument as may be submitted at the time of hearing.

Respectfully submitted,

Dated: August 2, 2018

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Jeffrey D. Wilson*
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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 August 2, 2018, I served the foregoing document(s) described as **Defendant's Notice of Motion and Motion for Summary Judgment** 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):

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☐ **(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 August 2, 2018 at Troy, Michigan.

/s/ Jeffrey D. Wilson
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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 Hon. Vince Chhabria Courtroom: Hearing Date: Hearing Time: **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Table of Contents

I. INTRODUCTION....1
A. Summary Judgment....1
B. Alternate Relief....1
C. Response to Plaintiffs' Motion for Partial Summary Judgment regarding IXL's Affirmative Defenses....1

II. UNDISPUTED MATERIAL FACTS....1
A. Duane's Employment with IXL....2
i. Duane's Leave of Absence for Surgery and Return to Work....3
ii. Duane Planned To Quit IXL After Getting His Gender Confirmation Surgery And Began Looking For Other Jobs In Mid-December 2014....4
iii. Duane's Glassdoor.com Post on December 30, 2014....5
iv. IXL Managers Met with Duane in January 2015 over his Concerns....6
B. Procedural History....7
i. National Labor Relations Board Proceeding....7
ii. Equal Employment Opportunity Commission Proceeding....8
iii. Lawsuit Filed by Duane (the "Duane Action")....8

III. LEGAL STANDARD....9

IV. ARGUMENT....9
A. IXL Is Entitled To Summary Judgment Where Plaintiffs Cannot Demonstrate A Prima Facie Case of Retaliation....10
i. Duane's Post is a collection of false complaints and gripes, only two of which *arguably* can be considered "opposition activity."....11
ii. Duane did not have an objectively reasonable, good faith belief that IXL engaged in an unlawful employment practice....13
iii. Even if Duane reasonably believed that IXL engaged in unlawful employment activity, Duane's Post was not reasonable manner in which to allege discrimination....17
iv. Duane's generalized complaints about diversity do not constitute discrimination....18
B. Alternate Relief....20
i. Under an ADA retaliation claim, the EEOC and Duane can only seek equitable remedies....20
ii. IXL is entitled to summary judgment on Duane's FEHA Claim under res judicata principles and because the claim is time-barred....21
iii. Because the Duane Action was dismissed with prejudice, Res Judicata prohibits Duane's FEHA Claim....22
iv. Because Duane's right to sue expired when the EEOC filed this lawsuit, Duane's FEHA Claim is also Time-Barred....23

V. Response to Plaintiffs' Partial Motion for Summary Judgment....24

VI. CONCLUSION....25

TABLE OF AUTHORITIES

Cases **Page(s)**

Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin,
Case No.: 3:17-cv-0078-WHA 8

Allen v. McCurry,
449 U.S. 90 (1980).....22

Alvarado v. Cajun Operating Co.,
588 F.3d 1261 (9th Cir. 2009) 20

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....9, 19

Barber v. CSX Distribution Servs.,
68 F.3d 694 (3d Cir. 1995).....18

Blount v. Glickman,
No. 96 C 6295, 1998 WL 325235 (N.D. Ill. June 10, 1998), *aff'd sub nom. Blountt v. Glickman*, 175 F.3d 1019 (7th Cir. 1999).....12

T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.,
806 F.3d 451 (9th Cir. 2015) 10

Brooks v. City of San Mateo,
229 F.3d 917 (9th Cir. 2000) 10

Buchanan v. Genentech, Inc.,
No. 09-01454 CW, 2010 WL 3448583 (N.D. Cal. Aug. 31, 2010).....17

Burns v. Blackhawk Mgmt. Corp.,
494 F. Supp. 2d 427 (S.D. Miss. 2007).....17

Byers v. Dallas Morning News, Inc.,
209 F.3d 419 (5th Cir. 2000) 19

Castro-Ramirez v. Dependable Highway Express, Inc.,
2 Cal. App. 5th 1028, 1046 (Ct. App. 2016).....11

Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.,
450 F.3d 130 (3d Cir. 2006).....18

Danjaq LLC v. Sony Corp.,
263 F.3d 942 (9th Cir. 2001) 21

Denny v. Union Pac. R. Co.,
173 F. App'x 549 (9th Cir. 2006) 11

E.E.O.C. v. Crown Zellerbach Corp.,
720 F.2d 1008 (9th Cir. 1983) 11

E.E.O.C. v. Goodyear Aerospace Corp.,
813 F.2d 1539 (9th Cir. 1987) 22

E.E.O.C. v. PC Iron, Inc.,
2018 WL 2018103 (S.D. Cal. May 1, 2018) 23

Folkerson v. Circus Enterprises, Inc.,
107 F.3d 754 (9th Cir. 1997) 10

Harris v. City of Santa Monica,
56 Cal. 4th 203 (2013) 10

Hernandez v. City of Napa,
No. C-09-02782 EDL, 2010 WL 4010030 (N.D. Cal. Oct. 13, 2010) 9

Hood v. Pfizer, Inc.
322 Fed.Appx. 124 (3d Cir. 2009) 18

Husman v. Toyota Motor Credit Corp.,
12 Cal. App. 5th 1168 (2017) 18, 19

Lamb v. Household Credit Services,
956 F. Supp. 1511 (N.D. Cal. 1997) 9

Mattson v. Caterpillar, Inc.,
359 F.3d 885 (7th Cir. 2004) 4, 5, 17

Monteiro v. Poole Silver Co.,
615 F.2d 4 (1st Cir. 1980) 17

Moyo v. Gomez,
32 F.3d 1382 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994) 10

NLRB v. IXL Learning, Inc.,
Case 20-CA-153625 (2015) 7

O'Day v. McDonnell Douglas Helicopter Co.,
79 F.3d 756 (9th Cir. 1996) 11, 17

Payne v. McLemore's Wholesale & Retail Stores,
654 F.2d 1130 (5th Cir. 1981) 11

Pool v. VanRheen,
297 F.3d 899 (9th Cir. 2002) 13

Radobenko v. Automated Equip. Corp.,
520 F.2d 540 (9th Cir. 1975) 9

Ray v. Henderson,
217 F.3d 1234 (9th Cir. 2000) 10, 11

Sias v. City Demonstration Agency,
588 F.2d 692 (9th Cir. 1978) 24

Smith v. Int'l Paper Co.,
523 F.3d 845 (8th Cir. 2008) 19

Spadola v. New York City Transit Authority,
242 F. Supp. 2d 284 (SDNY 2003).....5, 17

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981).....18

Thorne v. City of El Segundo,
802 F.2d 1131 (9th Cir. 1986) 24

U.S. E.E.O.C. v. Dillard's Inc.,
No. 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012) 20

U.S. v. Perez,
116 F. 3d 840 (9th Cir. 1997) 22

Univ. of Texas Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013).....10, 12

Wrighten v. Metro. Hosps., Inc.,
726 F.2d 1346 (9th Cir. 1984) 11

Yanowitz v. L'Oreal USA, Inc.,
36 Cal. 4th 1028 (2005) 11

I. INTRODUCTION

Defendant IXL Learning, Inc. ("Defendant" or "IXL") seeks summary judgment in its favor and against Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") and Plaintiff-Intervenor Adrian Scott Duane ("Intervenor" or "Duane") (collectively, the "Plaintiffs").

A. Summary Judgment

Summary judgment as to Plaintiffs' claims should be granted in IXL's favor because Duane did not have an objectively reasonable, good faith believe that IXL engaged in unlawful employment practices.

B. Alternate Relief

Alternatively, this Court should grant summary judgment in favor of IXL on any ADA-related damages that are not equitable as equitable relief is the only remedy for an ADA retaliation claim.

This Court should also grant summary judgment in favor of IXL as to Duane's state law claims under California's FEHA. Res judicata bars Duane's state law claims when Duane voluntarily dismissed with prejudice his previous lawsuit against IXL. Additionally, Duane's FEHA claim is time barred.

C. Response to Plaintiffs' Motion for Partial Summary Judgment regarding IXL's Affirmative Defenses

As addressed throughout this brief, Plaintiffs should not be awarded summary judgment as to IXL's affirmative defenses.

II. UNDISPUTED MATERIAL FACTS

IXL is an educational technology company headquartered in San Mateo, California that develops and provides math and English practice software for K-12 students. Menezes Decl., Ex. A (Mishkin Dep. Tr.) at 32:6-22, 63:7-8. IXL places a high priority on recruiting in the competitive Silicon Valley tech environment. *Id*. at 189:1-8. A centerpiece of IXL's recruiting effort was its subscription to Glassdoor.com ("Glassdoor"), a popular website used by job candidates when considering prospective employers. Menezes Decl., Ex. B; Menezes Decl., Ex. A at 86:15-25). IXL encouraged employees and managers to post reviews on Glassdoor to increase its chances of attracting top recruits. Menezes Decl., Ex. C.

A. Duane's Employment with IXL

Duane started work with IXL in July 2013 as a product analyst. Menezes Decl., Ex. D at ¶ 15. Throughout 2014, Duane requested and was granted substantial time off pursuant to IXL's unlimited sick leave policy. IXL approved every single instance when Duane requested to work remotely, take time off (including partial days), leave early, or come in late. Menezes Decl., Ex. E (NLRB Hearing Tr.), at 95:24-96:7.[1]).

In about Spring 2014, Duane underwent medical treatments in preparation for a surgery later that year. He requested his supervisor, David Keyes, to allow him to work from home on the days of his treatments, and Keyes approved this with no restrictions and without requiring Duane provide any medical information. Menezes Decl., Ex. F (hereinafter "Duane Tr."), at 47:24-48:11. Duane's work productivity, however, decreased on those work at home days. *Id*. at 49:1-50:21. Keyes raised the issue with him, and Duane admits Keyes was not wrong. *Id*. In fact, on June 2, 2014, Keyes noted in an email: "I have felt recently that [Duane] may be slipping back into old habits of lower productivity, so I'm keeping an eye on the situation." Menezes Decl., Ex G. Keyes suggested that Duane take half sick days to give him the "space, the time to do those appointments" so that Duane did "not have to worry about it." Duane Tr. at 50:2-21. Duane was thankful Keyes gave him that option. *Id*.

Duane admits that throughout 2014, Keyes was "giving me everything I needed" when it came to flexible hours, leave, and working remotely due to medical issues. Duane Tr. at 61:21-62:8. In fact, he was allowed to work at home 25 to 30 days for medical or health reasons, and Keyes never imposed any restrictions or reporting requirements on those days. Duane Tr. at 35:1-8, 83:18-84:18. When asked whether anyone at IXL had more remote days, partial days, or sick days approved than Duane in 2014, Duane testified, "I honestly don't know." Duane Tr. at 145:24-146:4.

Duane admits that Keyes was flexible with scheduling so that Duane could attend LGBT activism events after work, admitting that he was happy that IXL provided him this flexibility. Duane Tr. at 50:22-51:16. Duane admits also that Keyes did not know he is transgender, and perceived him to be a mainstream gay male. Duane Tr. at 60:15-17.

[1] In his deposition, Duane testified that the testimony he gave under oath on November 5, 2015 before the National Labor Relations Board and Administrative Law Judge Gerald Etchingham was true. Duane Tr. at 13:5-7.

i. Duane's Leave of Absence for Surgery and Return to Work

In July 2014, Duane notified Keyes that he would need six to eight weeks of leave for a surgery in November. Menezes Decl., Ex. D at ¶ 19. Keyes approved the leave and did not request any information about the nature of the surgery. *Id*. Duane's began his leave of absence on October 30, with an expected return date of December 30, 2014. Menezes Decl., Ex. H.

On December 19, seven weeks into his leave of absence, Duane emailed Keyes confirming his December 30 return date. Menezes Decl., Ex. I. In what he characterized as a request for disability accommodation, Duane informed Keyes that a complication from surgery had appeared, that it was "not very serious," and stated **"I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks.** This would make the transition much easier for me, I think. Let me know what you think." *Id*. (emphasis added).

In his response on December 22, Keyes stated his preference that Duane work in the office given his prior productivity issues with remote working. Id. Duane contends that this was an "illegal" denial of accommodation by Keyes. Duane Tr. at 166:15-16, 119:23-120:14. However, Keyes's full response shows the opposite:

> Glad to hear your recovery is going pretty smoothly. As far as the plan goes for returning to work, **I would prefer that you be in the office for your hours when you come back since you are more productive here. Is there anything we can do to accommodate your situation so that you can work in the office? If you would need to extend your leave to aid in your recovery, that would be totally fine as well. Just let me know!**

Menezes Decl., Ex. I. (emphasis added). Duane does not deny that Keyes had a legitimate concern about Duane's productivity while working at home, and in fact stated the following in his reply: "I completely understand your concerns about remote work and productivity . . ." Id. Duane testified that he believed Keyes was trying to find a solution despite the prior issues with productivity while working remote. Menezes Decl., Ex. D at 119:5-10. Yet, in his email response to Keyes, Duane insisted that IXL was required by law to provide the accommodation he requested instead of any other arrangement. Menezes Decl., Ex. I. In recognition of IXL's productivity concerns, Duane proposed that "we find some metrics that we can put in place so that you [i.e. Keyes] can monitor my progress to your satisfaction." *Id*. Duane testified that, in this email exchange, he was "trying to engage in a negotiation with [Keyes] about how [his] accommodations were going to be satisfied." Duane Tr. at 118:4-6.

On December 24, Keyes approved the accommodation Duane requested in full. Menezes Decl., Ex. I. Keyes responded that he and Duane were "definitely on the same page here as far as goals are concerned" and that based on Duane's doctor's recommendation, "it sounds like reasonable accommodation in your case is to set up a part time remote working situation." *Id*. Keyes offered to come up with performance goals and a progress monitoring plan, and agree that having his office time in the morning "sounds great to me – thanks for that suggestion!" *Id*. Keyes suggested they talk specifics of the plan when Duane returned on December 30, 2014, and scheduled a meeting on Duane's first day back. *Id*.

On December 30, Keyes emailed Duane a one-page "Working Remotely Plan" that included the arrangement Duane requested with metrics and progress monitoring as Duane suggested. Menezes Decl., Ex. J. Keyes met with Duane on December 30, discussed the plan, and *Duane did not voice any complaints about the arrangement*. Menezes Decl., Ex. D at 212:15- 213:2.

ii. Duane Planned To Quit IXL After Getting His Gender Confirmation Surgery And Began Looking For Other Jobs In Mid-December 2014.

IXL has now learned that, during Duane's leave of absence in November and December 2014, Duane began looking for another job. Duane Tr. at 139:14-140:18. In fact, he told a few friends and co-workers that he was done with IXL as soon as he got his surgery paid for and his leave of absence was complete. *Id*. at 168:21-169:22. Although Duane attempted to deny it in his deposition, emails and text messages obtained in discovery reveal that he had started applying for other jobs and was committed to moving on from IXL in December, if not earlier. *Id*. at 153:6-154:18.

While at IXL, Duane was given extraordinary flexibility with scheduling and working remotely, unlimited sick days, and health insurance that covered expensive gender confirmation surgery that is "hard to get for trans people." Duane Tr. at 156:13-157:21. As soon as his surgery was done and paid for, however, Duane "knew that there was just a lot less for me to lose now that I accessed my medical care." *Id*. Duane was "so done with IXL as soon as possible" and ready to leave as soon as he could find another job.[2] *Id*. at 168:21-169:22. Duane returned to work on December 30, 2014, pursuant to the remote work accommodation he requested and IXL granted one week earlier.

[2] These facts are important in assessing whether Duane's alleged opposition activity was based on a *good faith* reasonable belief and carried out in a reasonable manner. Opposition activity motivated by bad faith is not protected. *See Mattson v.*

iii. Duane's Glassdoor.com Post on December 30, 2014

On the evening of December 30, Duane posted an anonymous negative review of IXL titled "Micromanaged and problematic" on Glassdoor.com (the "Post"), stating:

> I have been working at IXL Learning full-time (More than 3 years)
>
> **Pros**
>
> Easy, unchallenging work, good medical benefits, free drinks. Hours are not too crazy. The people are generally well-meaning and nice.
>
> The company isn't going anywhere right now. They play to the traditional classroom, which is good for profits. You won't have to worry about the company going under (but don't expect the profits to pass onto you, either).
>
> **Cons**
>
> Don't expect a challenge working here. This company sets the bar extremely high for who they hire, and then gives their smart, talented employees boring, menial work to fill the day. The CEO is overly involved in every product, every decision, every everything.
>
> There are no politics if you fit in. If you don't—that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball—then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.
>
> There is essentially no HR knowledge or staff at this company. Know your rights when you work here, because they don't, and they don't care to learn. Most management has no idea what the word "discrimination" means, nor do they seem to think it matters.
>
> **Advice to Management**
>
> Choose one: listen to the ideas of a group of smart, talented employees, or micromanage a group of mediocre employees. Don't pull the bait and switch on employees who can do way better.
>
> Build a culture that encourages respect for people of all walks of life.

Duane also checked the following: "Doesn't recommend," Neutral Outlook," and "Disapproves of CEO." Menezes Decl., Ex. K. Notably, his Post does not make any complaint of *disability discrimination*. Duane Tr. at 71:15-72:24.

Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004); *Spadola v. New York City Transit Authority*, 242 F. Supp. 2d 284, 292 (SDNY 2003).

iv. IXL Managers Met with Duane in January 2015 over his Concerns

After returning to work, Duane appeared unhappy and non-communicative, and Keyes arranged a meeting to discuss it on January 6, 2015. Menezes Decl., Ex. L at 91:15-18, 92:3-14. At that time, Keyes did not know about the Post. Menezes Decl., Ex. L at 173:13-16. In the meeting, Duane told him he was unhappy with some of his work assignments, that he felt like his ideas were not really listened to, and that there was not a lot of creative work to be done in the workplace. Menezes Decl., Ex. E at 61:10-15. Duane also said he felt Keyes had discriminated against him by not immediately approving his remote work suggestion in the December 19 email. *Id*. At 215:12-15. Keyes arranged for Duane to meet directly with IXL's CEO, Paul Mishkin, and Duane "appreciated how sincere [Keyes] was in that meeting," "appreciated" that Keyes took his complaints sincerely, and appreciated that Keyes escalated his complaints to Mishkin. Duane Tr. at 102:21-103:2, 134:25-135:5. Mishkin scheduled a meeting with Duane for January 8. Menezes Decl., Ex. M.

On January 7, IXL discovered Duane's Post on Glassdoor. Menezes Decl., Ex. N. Based on his writing style, IXL managers were certain Duane was the author. *Id*. When Mishkin read Duane's Post, he believe it was malicious, filled with false accusations, and specifically designed to hurt IXL's efforts to recruit the best candidates. Menezes Decl., Ex. A at 140:3-14. Mishkin decided to terminate the author of the Post (Duane) because the Post evidenced a deliberate attempt to harm IXL. Menezes Decl., Ex. A at 132-14-15. Mishkin's decision to terminate the author's employment was made before his scheduled meeting on January 8 with Duane. Menezes Decl., Ex. A at 224:11-16.

Mishkin and Duane met as scheduled on January 8. Menezes Decl., Ex. D at ¶ 35. Mishkin wanted to know more about Duane's complaints to Keyes on January 6. Menezes Decl., Ex. M. Duane explained his reasons for being upset, which included the fact that Keyes did not immediately agree with Duane's remote work suggestion. Menezes Decl., Ex. A at 145:23-146:19. Mishkin asked Duane: "Wasn't it true that you're less productive when you were working from home," and Duane agreed. Id. He asked Duane: "Wasn't it appropriate for [Keyes] to bring that up to you?" Duane agreed that it was. *Id*. Duane also alleged that other "illegal" things happened to him at IXL. During Duane's new hire orientation in 2013, the HR coordinator, in describing disability benefits to the group, allegedly said, "you look like healthy young guys, I can skip this section." Menezes Decl., Ex. A at 152:21-153:10. Duane also told Mishkin

that it was illegal when former HR Manager Brad Marshall made a mistake in answering a question about the number of weeks of short-term disability available to Duane. Menezes Decl., Ex. A at 154:5-156:18. Mishkin described how it was puzzling that Duane would make emphatic claims of illegal conduct based on a mistake by Marshall. *Id*. Duane also complained that a recruiting manager at IXL had discussed an employee's medical condition with him. Mishkin explained, however, that the employee was very open about her condition (lupus) and discussed it openly with other employees. Menezes Decl., Ex. A at 169:15-21. This fact is undisputed.

Mishkin then asked him about the Post, and Duane admitted he was the author. Menezes Decl., Ex. A at 169:24-170:20. Duane said that when he looks around at IXL, he sees mainly white or Asian, straight or mainstream gay people, and as a result of that, he has a hard time connecting with people. Mishkin asked him whether he was talking about *friendship at work or discrimination*. Menezes Decl., Ex. A at 170:23-172:4. Duane replied, "those two things blend together." *Id*. Duane told Mishkin that, "as a queer person" he felt that he did not "fit in." Id. Duane blamed the Post on him being angry, apologized to Mishkin, and offered to take it down. Menezes Decl., Ex. A at 172:16-173:7. Mishkin explained in his deposition that the Post was defamatory and intentionally posted in a manner that would target job seekers and dissuade them from working at IXL. Menezes Decl., Ex. A at 181:2-183:7.

Mishkin concluded the meeting by telling Duane that putting the Post on Glassdoor was unacceptable, showed extremely poor judgment, poor ethical values, that he couldn't trust him and thus could not continue to work with him. Menezes Decl., Ex. A at 223:4-224:2. At that point, Duane stood up and said, "You'll be hearing from my lawyer," and left Mishkin's office. Id.

B. Procedural History

i. National Labor Relations Board Proceeding

In a separate proceeding conducted by the National Labor Relations Board (NLRB), Duane alleged that he was fired for asserting group complaints about discrimination and working conditions in the Post, and the NLRB filed a complaint against IXL on July 29, 2015. Menezes Decl., Ex. O; *NLRB v. IXL Learning, Inc*., Case 20-CA-153625 (2015). The case was tried before Administrative Law Judge Gerald M. Etchingham (the "ALJ") in November 2015, and Duane, Mishkin, and Keyes testified in the trial. On April 28, 2016, the ALJ issued a 37-page opinion dismissing all allegations against IXL, holding that

Duane's accusations of discriminatory practices by IXL was "**maliciously untrue**" and made by him with "**reckless disregard of whether it was true or false**" as his real intention in his "angered state of mind was to hurt or damage" IXL's ability to recruit employees. Menezes Decl., Ex. P at 34:4-9 (emphasis added). The ALJ found that Duane's post was "childish ridicule" in the nature of a personal attack on IXL and that Duane's Post was "so disloyal and recklessly disparaging" of IXL to lose protection under the Act. *Id*. at 34:22-33. Specifically, the ALJ held:

> Instead, as stated above, Mishkin discharged Duane for his disparaging December 30 posting at a time when Duane was readying to resign from [IXL] after being satisfied with [IXL]'s flexibility in granting him 25-30 days of sporadic remote work and 2 months of disability leave and Duane was terminated because he made his angry, impulsive, and false claim of discrimination against [IXL] in his December 30 Glassdoor.com posting intended by Duane to harm [IXL]'s reputation and dissuade prospective employee recruits from coming to [IXL] for employment.

Menezes Decl., Ex. P at 37:5-11. The NLRB in Washington, D.C., on June 10, 2016, adopted the findings and conclusions of the ALJ, and no further appeals were taken. Menezes Decl., Ex. Q (NLRB Order Dismissing Complaint).

ii. Equal Employment Opportunity Commission Proceeding

On March 17, 2015, Duane filed a charge of discrimination with the EEOC alleging violations of Title VII and the ADA. Menezes Decl., Ex. R. Duane alleged that IXL discriminated and retaliated against Duane on the basis of his sex and disability. *Id*. The EEOC issued a letter of determination, dismissing Duane's Title VII and ADA claims of discrimination and finding reasonable cause on the sole claim of retaliation. Menezes Decl., Ex. S (EEOC Determination). The EEOC determined that IXL did not deny Duane a reasonable accommodation and that IXL did not discriminate against or discharge Duane because he is transgender. Id.

iii. Lawsuit Filed by Duane (the "Duane Action")

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 (the "Duane Action"). *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, Case No.: 3:17-cv-0078-WHA. The complaint in the Duane Action noted that Duane intended to assert additional claims under Title I, the ADA, Title VII, FEHA, and the

California Family Rights Act upon his receipt of his right-to-sue letter from the EEOC. Menezes Decl., Ex. T at fn. 1.

Following the initiation of this lawsuit by the EEOC, IXL and Duane stipulated, pursuant to Fed. R. Civ. Pro. 41(a), to the dismissal of all claims pending in the Duane Action with prejudice. Menezes Decl., Ex. U. Duane's lawsuit against IXL was dismissed on June 27, 2017. Menezes Decl., Ex. V.

III. LEGAL STANDARD

A party is entitled to summary judgment if a court determines from its examination of the record that there is "no genuine dispute as to any material facts and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 248. Duane cannot avoid summary judgment by creating inconsistencies between his deposition testimony and earlier sworn testimony and then claiming genuine issues of material fact exist. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540 (9th Cir. 1975); *see also Lamb v. Household Credit Services,* 956 F. Supp. 1511, 1518 (N.D. Cal. 1997) (holding that a plaintiff's later deposition testimony that contradicted her earlier sworn EEOC testimony failed to create a genuine issue of material fact for purposes of summary judgment); *Hernandez v. City of Napa,* No. C-09-02782 EDL, 2010 WL 4010030, at *8 (N.D. Cal. Oct. 13, 2010) ("[C]ourts have also precluded the use of a later deposition testimony to contradict prior sworn testimony.") (citing *Pacific Ins. Co. v. Kent,* 120 F.Supp.2d 1205, 1213 (C.D. Cal. 2000)).

IV. ARGUMENT

Plaintiffs cannot establish a prima facie case of Title VII retaliation, ADA retaliation, or FEHA. Only two statements in Duane's Post can arguably be considered "opposition activity," and Duane did not have an objectively reasonable, good faith belief that IXL engaged in an unlawful employment practice. Even if Duane reasonably believed that IXL engaged in unlawful employment activity, his Post on Glassdoor was not a reasonable manner in which to allege discrimination. Overall, Duane's generalized complaints about diversity does not constitute discrimination.

A. IXL Is Entitled To Summary Judgment Where Plaintiffs Cannot Demonstrate A Prima Facie Case of Retaliation.

Title VII, the ADA[3], and FEHA[4] prohibit an employer from discriminating or retaliating against an employee when the employee opposes an unlawful practice. 42 U.S.C. § 2000e-3(a); 42 U.S.C.A. § 12203(a); Cal. Gov't Code § 12940. To state a prima facie case of retaliation under Title VII, Plaintiffs must show that (1) Duane engaged in a statutorily protected activity (i.e., that he protested or otherwise opposed unlawful employment discrimination directed against employees protected by Title VII, the ADA, or FEHA), (2) Duane was disciplined or lost his job, and (3) a causal link exists between the protected activity and the adverse action. *Moyo v. Gomez,* 32 F.3d 1382, 1384 (9th Cir.), *amended,* 40 F.3d 982 (9th Cir. 1994); *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000). For Duane to succeed on his federal law retaliation claims, he must show that retaliation was the "but-for" cause of the adverse employment action, i.e. that the "unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 360 (2013). For Duane to succeed on a retaliation claim under FEHA, he must show that discrimination was a substantial motivating factor in IXL's employment decision. *Harris v. City of Santa Monica,* 56 Cal. 4th 203, 232 (2013).

To establish the first element of a prima face retaliation case, Plaintiffs must show that Duane's opposition to discrimination was based on a good-faith and reasonable belief that IXL engaged in an unlawful employment practice. *Moyo,* 32 F.3d at 1385 (citation omitted). The reasonableness of Duane's belief that an unlawful employment practice occurred "must be assessed according to an objective standard." *Id.* Further, "the opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual." *Folkerson v. Circus Enterprises, Inc.,* 107 F.3d 754, 755 (9th Cir. 1997) (citation omitted).

[3] The Ninth Circuit applies the Title VII retaliation framework for ADA retaliation claims. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.,* 806 F.3d 451, 472–73 (9th Cir. 2015).

[4] When a party alleges claims under both Title VII and FEHA, courts assess a party's claim under federal law because "Title VII and FEHA operate under the same guiding principles." *Brooks v. City of San Mateo,* 229 F.3d 917, 923 (9th Cir. 2000).

While an employee has a right to oppose an employer's unlawful employment practices, not all opposition activity is protected. For example, unless "the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner," there is no prima facie case. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1046-47 (2005) ("personal grievances or vague or conclusory remarks... will not suffice to establish protected conduct") (citations omitted). The employee's opposition must be based on a reasonable belief and carried out in a reasonable manner. That is, the opposition is protected only if it is reasonable in view of the employer's interest in maintaining a harmonious and efficient operation, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996), and not unjustifiably detrimental to the employer's interests. *See Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir. 1981); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983); *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984); *Denny v. Union Pac. R. Co.*, 173 F. App'x 549, 551 (9th Cir. 2006).

If Plaintiffs demonstrate a prima facie retaliation claim, the burden then shifts to IXL to articulate a legitimate nondiscriminatory reason for its decision. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). If IXL articulates such a reason, Plaintiffs bear the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive. *Id*. In this case, Plaintiffs cannot establish a prima facie case of retaliation and therefore summary judgment in favor of IXL should be granted.

i. Duane's Post is a collection of false complaints and gripes, only two of which *arguably* can be considered "opposition activity."

The large majority of Duane's Post consists of baseless complaints about his job, IXL as a company, and IXL's management, none of which constitutes opposition activity. Complaints about IXL's CEO, "boring, menial work," and a "bait and switch" are not employment practices made unlawful by the state or federal employment laws at issue. 42 U.S.C. § 2000e-3(a); 42 U.S.C.A. § 12203(a); Cal. Gov't Code § 12940. Duane concedes that his complaint about Mishkin's micromanagement "wasn't directly tied to the issues of diversity in the workplace." Duane Tr. at 54:24-55:2. Nearly all of the accusations in the Post are common workplace gripes that do not implicate Title VII, the ADA, or FEHA. *See Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028, 1046 (Ct. App. 2016) (complaints

about personal grievances or vague or conclusory remarks will not suffice to establish protected conduct).

Importantly, Duane does not state anywhere in the Post that *he was discriminated against*. He has admitted that his *reasons* for creating the Post ranged from being upset about the lack of creativity in his work to the CEO being too involved to being frustrated that his initial request for remote work was not immediately granted. For example:

- When Duane was interviewing with IXL, he was really excited, because management led him to believe that IXL encouraged diverse and creative thinking. Duane Tr. 38:11-15, 104:6-10.
- Duane was disappointed with how narrow his job was. *Id*. at 39:15-22.
- Duane was disappointed with how his creativity was not permitted. *Id*.
- Duane was upset and angry with how Keyes handled his sick leave accommodation request on December 19 to 22, 2014.[5] *Id*. at 105:8-14.
- Duane felt IXL was misleading potential employees about its culture, and he wanted potential employees to know this. Duane knew that, by posting on Glassdoor, he would be reaching potential employees to let them know of what Duane felt was a bait and switch. *Id*. at 40:10-18.
- Duane felt that he was trying to let potential employees know that if diversity was important to them, then they might want to look elsewhere. Duane Tr. at 25:24-26:4.
- Duane felt that the work that they were doing was not really the work that he thought they would be doing when he interviewed for his job at IXL. Duane Tr. at 28:24-29:2.
- Duane thought he would have more say in how they taught. Duane Tr. at 29:6-18.
- Duane was not happy that Mishkin canceled a video project that he did not work on but thought was a good direction for the company. Duane Tr. at 55:19-56:6, 58:3-13.

Only two of the complaints in the Post *arguably* can be considered opposition activity: (1) that employees who are not family-oriented white or Asian straight or mainstream gay receive disparate treatment when it comes to flexible hours, interesting projects, praise, promotions, and raises; and (2) that management does not think discrimination matters and has no idea what the word "discrimination" means. Menezes Decl., Ex. K. Plaintiffs have not and cannot show that Duane would not have been fired but for these two complaints.[6] *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 360. Rather, even without the two

[5] The EEOC determined that the "evidence in the record demonstrates that [IXL] did allow [Duane] to work from home for half of his work days upon his return from leave after surgery. . . . There is insufficient evidence that [IXL] failed to provide a reasonable accommodation." Menezes Decl., Ex. S, EEOC Determination Letter.

[6] The only basis Plaintiffs have for claiming this second statement is opposition activity is the presence of the word "discrimination." This facile argument crumbles upon even minimal scrutiny. Duane is not opposing an activity made unlawful by the relevant employment laws, but at most is implying that IXL management might discriminate at some point due to an alleged lack of interest and understanding about the term discrimination. A reference to "discrimination" is not remotely sufficient to constitute protected activity. *See, e.g., Blount v. Glickman*, No. 96 C 6295, 1998 WL 325235, at *6 (N.D. Ill. June 10, 1998), *aff'd sub nom. Blountt v. Glickman*, 175 F.3d 1019 (7th Cir. 1999) (plaintiff's requested medical leave for four reasons, one of which was "discrimination," she described her dissatisfaction with her workplace and supervisors but did not

complaints regarding disparate treatment and "discrimination" in the Post, IXL would have still fired Duane. Mishkin testified that he fired Duane because the Post was "so filled with false information, statements that no intelligent sensible person could – could believe – and it seemed very crafted too. I mean just very much designed to turn away . . . scare away applicants to the company." Menezes Decl., Ex. A at 140:3-14.

In *Pool v. VanRheen*, 297 F.3d 899, 910–11 (9th Cir. 2002), the plaintiff, an employee in the sheriff's office, wrote a public letter criticizing her employer's policies and operations, including allegations of a "good ole boy network," the importance of diversity and implying that the sheriff's office was "very much like a septic tank, the really big chunks always rise to the top." *Id*. Pool was demoted and her pay decreased because her supervisor had "lost confidence in her judgment" and her abilities to be an effective commander. The *Pool* court held that plaintiff's letter did not allege that the defendant unlawfully discriminated against anyone based on race or sex. The stated that "there appears to be an effort to re-establish the good ole boy network by ousting those in positions of authority who are not part of that thinking" and referred to her past "lack of promotion." The court noted that it may be possible to interpret some comments as opposing race and sex discrimination, those comments were a *negligible part of the letter*. *Id*. Moreover, the plaintiff did not prove a causal connection between *that portion of the letter* and her demotion. For those reasons, the court held the letter was not a protected activity. *Id*.

In this case, like *Pool*, Duane made many public accusations that IXL believed to be false and malicious and revealing a lack of judgment and ethics. Menezes Decl., Ex. A at 223:18-21. Only two unsupported accusations in the Post might arguably be considered opposition activity, but they are negligible parts of the Post and not objectively reasonable assertions. Like in *Pool*, Plaintiffs cannot show that Duane would not have been fired but for those two complaints.

ii. Duane did not have an objectively reasonable, good faith belief that IXL engaged in an unlawful employment practice.

In his Post, Duane alleged that employees who are not "white or Asian straight or mainstream gay" received disparate treatment. Duane was not able, however, to provide any objectively reasonable basis

allege discrimination based on her disability; plaintiff's reference to "discrimination" was too vague to constitute protected activity under Title VII or the ADA).

for making this accusation. First, he could not identify employees at IXL who were not "white or Asian straight or mainstream gay" who were treated differently as he alleged. The only employees he could describe are himself, Nemo Curiel (a male Latino colleague and friend who resigned from IXL nearly a year before Duane's termination), and a "couple others that [he] didn't know well" and whose names he did not know. Duane Tr. at 52:12-53:10. When asked to identify at IXL who was not "mainstream gay,"[7] he could identify only himself. Duane Tr. at 33:4-18 ("I haven't discussed all of the sexualities of all the people at IXL."). Thus, Duane's alleged opposition activity can only be based on his experiences and the experiences of Curiel. However, it is not seriously disputed that IXL management never knew Duane was transgender,[8] and the EEOC determined that IXL did not discriminate against Duane because he is transgender. EEOC Determination. Duane admits his colleagues perceived him to be a white, mainstream gay man. Duane Tr. at 60:16-17.

Duane had no objectively reasonable basis to believe that white or Asian, straight or mainstream gay employees received different treatment than other employees when it came to "flexible hours, interesting projects, praise, promotions, and a big yearly raise." Regarding flexible hours, not only does Duane have no objectively reasonable belief that he was subject to disparate treatment, but IXL was exceedingly generous with flexible hours and time off without ever imposing restrictions or questioning his need for flexible hours. Duane Tr. at 35:1-8, 83:18-84:18. Duane admitted that IXL gave him "everything [he] needed" when it came to flexible hours, leave, and working remotely due to medical issues. Duane Tr. at 61:21-62:8. When Duane needed flexible hours to attend LGBT events in the community, Keyes gave him all the flexibility he needed. Duane Tr. at 51:4-24. Duane was allowed to work at home 25 to 30 days for medical or health reasons in 2014 without any restrictions. Duane Tr. at 35:1-8, 83:18-84:18. In other words, *every time* he requested to work remotely or take time off (including leaving early, coming in late, or taking partial days), it was always approved. When Duane was asked whether there was *anyone* at IXL who was turned down or denied any leave, sick days, or a flexible

[7] Duane defined this term as being people who were gender variant, such as bisexuality and polyamorous. Duane Tr. at 32:12-33:2.

[8] See Menezes Decl., Ex. X (Milin Transcript) at 41:22-42:19 (Milin assumed Duane was a gay man and only became aware he is transgender after he was terminated). Importantly, Duane's manager, Keyes, also assumed Duane was a gay man when Duane was employed at IXL. Menezes Decl., Ex. L at 65:24-66:3, 155:17-19. Thus, IXL could not have engaged in any discriminatory practices based on the fact that Duane is transgender and not "mainstream gay" when IXL did not know that Duane was transgender.

schedule because they were not white, Asian, straight, or mainstream gay, Duane responded that he didn't "really know how to answer that. [He doesn't] know all of the sick time that people took or didn't take." Duane Tr. at 177:12-178:9; Duane Tr. at 145:24-146:4 (When asked whether any one at IXL, whether they had kids or not, had more remote and partial days and sick days in 2014 approved than he did, Duane admitted: "I honestly don't know.").

Duane's accusation that IXL discriminated against Curiel was revealed in discovery to be equally frivolous. In Curiel's deposition, he testified that he felt he had a flexible work schedule while employed at IXL. Menezes Decl., Ex. Y (Curiel Transcript) at 64:19-21. Curiel also testified that he does not recall any instance where anyone at IXL either denied or rejected his request for sick leave or to work from home. *Id*. at 49:23-50:4. When asked whether Curiel had any problem with taking a sick day at IXL, Curiel responded, "I suppose not from a specific instance." *Id*. at 45:19-23. When asked whether his supervisor ever denied him any time off when he requested it, Curiel likewise responded, "I don't recall . . . But I want to say no." *Id*. at 47:12-16.

When Duane was asked whether there were instances that he knew of where he and Curiel did not receive interesting projects, Duane testified:

> Well, things like managing an entire department, that was David Keyes's responsibility that he was given. Yeah, that's the – that's the example that comes to mind – right now. But I think there are other, but I'm not able to remember them right as I sit here now."

Duane Tr. at 182:1-12. While Duane has criticized Mishkin for canceling a video project, Duane has never indicated that this project was canceled because of the characteristics of the employees hired to do this video project, which included Curiel and Jessica Morse (white, straight female).

In search of an example to support his accusation, Duane testified that employee Isidora Milin (a white female) had a video project taken from her "without too much explanation and acknowledgment of the hard work that she had already done on it." Duane Tr. at 182:13-22. When pressed on how Milin supports his accusation, he asserted that she was a person of color because she is an immigrant in this country on a green card. Duane Tr. at 180:13-181:10. It is undisputed, however, that Milin is Caucasian. See e.g., Menezes Decl., Ex. Z. Duane's absurd characterization of Milin as a person of color demonstrates his desperation to now support his objectively unreasonable, false accusations. Moreover, Milin testified that she did not agree with Duane's statement about disparate treatment among employees who were not

family-oriented, white, or Asian. Menezes Decl., Ex. X at 60:9-24.

As to the allegedly disparate treatment of promotions, Duane's basis for his allegations was that Duane personally felt that Keyes should not have been promoted over Milin because Duane thought her work was good and she was smart. Duane Tr. at 179:22-180:12. Once again, Duane desperately tried to support this false accusation by questioning the decision to promote one white, straight employee over another white, straight employee. Duane's rationale is not objectively reasonable, is contrary to Milin's own belief about the promotion, and is entirely irrelevant to his false claim regarding white, Asian, straight, or mainstream gay employees.

Duane identified the pay disparity between Curiel and Jessica Morse as the basis for alleging disparate treatment regarding pay raises, claiming that "the male employee [Curiel, a Latino male] was making $10,000 more than the female employee [Morse, a white female] for the same job." Duane Tr. at 179:3-20. This assertion *defeats*, not supports, his allegation. IXL paying a non-white employee more than a white employee is the opposite of what he claimed in the Post. When confronted with this contradiction as his deposition, Duane tried to pivot and claim this was an example of gender discrimination. Duane Tr. at 181:22-25. The Post does not mention gender or sex, of course, and this is just further evidence that Duane had no reasonable belief supporting his false and injurious accusations.

There is a complete lack of any objectively reasonable basis for Duane's accusations of disparate treatment in the Post. Again, he either fails to identify instances that support his "belief" or identifies instances that *contradict* them. He claims he is opposing discrimination against non-mainstream gay employees while admitting he knew of no other non-mainstream gay employees and that IXL management thought he was a mainstream gay man. Duane's complaints are unsupported by the facts, and he has not identified any activity by IXL that any reasonable person would believe is unlawful under Title VII, the ADA, or FEHA. Accordingly, Duane had no objectively reasonable, good faith belief that IXL engaged in unlawful employment practices purportedly described in his Post.

In addition, Duane could provide no specific evidence to indicate that he had a reasonable belief about management not knowing what "discrimination" meant. Moreover, it is not even a complaint alleging a violation of Title VII, the ADA, or FEHA; it is not unlawful for managers to "not know", "care to learn" or "think it matters" about the meaning of the word "discrimination." Whether or not this

accusation is based on a reasonable belief, it simply does not constitute opposition activity.

iii. Even if Duane reasonably believed that IXL engaged in unlawful employment activity, Duane's Post was not reasonable manner in which to allege discrimination.

Even if Duane did engage in opposition activity, his activity was not reasonable in view of IXL's interest in maintaining a harmonious and efficient operation. *O'Day*, 79 F.3d at 763. In *Buchanan v. Genentech, Inc.*, No. 09-01454 CW, 2010 WL 3448583, at *4 (N.D. Cal. Aug. 31, 2010), the court rejected plaintiff's retaliation claim when plaintiff argued that an email he sent was protected activity. The court held that plaintiff's email, "with its sarcastic tone and inappropriate remarks," violated the company's policies prohibiting inappropriate and unacceptable communications in the workplace. See *Burns v. Blackhawk Mgmt. Corp.*, 494 F. Supp. 2d 427, 433-36 (S.D. Miss. 2007) (holding that plaintiff was fired, not because he complained of an alleged violation of law, but because going outside of the company and complaining to customers of an alleged violation was "unreasonable" and not "an appropriate channel in this particular employment setting"). Here, not only was Duane's anger-driven Post untrue and baseless, but his Post was specifically intended to harm IXL's business and its ability to recruit prospective employees. Menezes Decl., Ex. A at 140:3-14. Like the plaintiff in *Burns*, going outside of the company and complaining to prospective employees about Duane's unfounded discrimination suspicions was unreasonable and unjustified. *See Monteiro v. Poole Silver Co.*, 615 F.2d 4, 7-8 (1st Cir. 1980) (court rejected retaliation claim involving accusations that were "unfounded and insincerely raised").

The fact that Duane had already decided to quit his job at IXL when he made his Post is further evidence that it was done in bad faith and not in a reasonable manner. Duane Tr. at 139:14-140:18. Duane was trying to take a parting shot at IXL, its CEO, its HR department and the "boring, menial" work he clearly did not like. Motivation matters in retaliation cases, and a plaintiff's opposition activity must be subjectively and objectively reasonable. Opposition activity motivated by bad faith is not protected. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004); Spadola v. New York City Transit Authority, 242 F. Supp. 2d 284, 292 (SDNY 2003). Duane was angry, despite being given every accommodation he ever requested, and felt he had "nothing to lose" after getting his gender confirmation surgery covered by IXL-provided insurance. He lashed out not to oppose discrimination he experienced, but to harm IXL's recruiting as he was headed for the exit.

iv. Duane's generalized complaints about diversity do not constitute discrimination.

Duane has testified that he has also based his complaints on the fact that he is not happy with the diversity at IXL. Duane Tr. at 19:9-17; *Id.* at 180:8-12 ("[M]ost of management is white and I believe most of the higher-ups are male."); *Id.* At 53:15-16 ("[A]s far as I know diversity is a very common problem in tech companies."). Duane told a potential employee that IXL is not welcoming of people of color, testifying that his basis for this was that "[t]here were not many people of color working there." *Id.* at 69:10-11. Duane further explained that "the makeup of the workplace" was the "primary thing" showing that IXL was not welcoming to people of color, testifying that "I looked around and it was most[ly] white and East Asian folks." *Id.* at 69:25-70:24.

However, a lack of diversity does not constitute discrimination. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 259 (1981) ("Title VII, however, does not demand that an employer give preferential treatment to minorities or women. . . . It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired.") (citations omitted). In *Hood v. Pfizer*, Inc., 322 Fed. Appx. 124 (3d Cir. 2009), the court found that a statement expressing a generalized concern about the extent of defendant's marketing department's affirmative diversity efforts did not constitute protected activity. *See also Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 134-35 (3d Cir. 2006) (holding that "basic advocacy" against a practice does not constitute protected activity for retaliation claim); *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 702 (3d Cir. 1995) (holding that a letter written by a rejected job applicant that "complains about unfair treatment in general" is not protected). Here, Duane's general concerns about the lack of diversity at IXL are not the kind of particularized statements targeting discrete past events that constitute opposition activity.

In *Husman v. Toyota Motor Credit Corp.*, 12 Cal. App. 5th 1168 (2017), the plaintiff alleged he was terminated because of his sexual orientation and in retaliation for opposing his employer's commitment to diversity. The employer was granted summary judgment because the plaintiff failed to raise a triable issue of fact supporting retaliation. The plaintiff's alleged opposition activity consisted of complaining that Toyota did not include AIDS Walk LA on the list of charitable organizations eligible for automatic payroll deductions and complaining to Toyota's national Diversity Advisory Board about what

he perceived to be Toyota's lack of support for LGBT employees. The *Husman* court held that the plaintiff's complaint "falls short of communicating a particularized complaint about discriminatory treatment of LGBT employees and, instead, was likely understood as an exhortation common among diversity advocates to the effect that, while progress has been made, much work remains to be done." *Id*. at 1194, *citing Hood v. Pfizer, Inc*. 322 Fed.Appx. 124, 126, 131 (3d Cir. 2009) (employee's question at company-wide meeting "'why Pfizer wasn't doing more to promote diversity'" expressed "a generalized concern" about diversity, "worlds apart from the kind of particularized statement targeting discrete past events" necessary to survive summary judgment).

Duane testified that he felt certain people at IXL, such as himself, didn't "fit in." But he is talking about socializing with coworkers, not discrimination prohibited by Title VII, the ADA, or FEHA. When asked by Mishkin whether Duane was talking about friendship or discrimination, Duane said those blended together. Menezes Decl., Ex. A at 170:23-172:4. It is not objectively reasonable for Duane to believe that his alleged difficulty making friends at work amounts to unlawful discrimination by IXL. Again, Duane's Post does not contain any particularized complaint that he was discriminated against. Duane Tr. at 27:4-17. Further, the vague, generalized description that he "think[s] that there was quite a bit of implicit bias in the workplace" (Duane Tr. at 178:11-17) is not sufficient to establish that he reasonably believed the accusations of disparate treatment referenced in his Post. *See, e.g., Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (where plaintiff failed to provide evidence supporting complaint to employer that he and others were victims of discrimination, his beliefs were objectively unreasonable). Duane's *hunch* about "implicit bias" or his dissatisfaction with IXL's diversity further demonstrate that there are no specific facts showing that there is a genuine issue for trial. Duane Tr. 178:13-15; *Anderson,* 477 U.S. at 248.

Courts have likewise held that no reasonable person could believe that complaints about workplace civility and friendships are protected opposition activity. *Smith v. Int'l Paper Co.*, 523 F.3d 845, 849 (8th Cir. 2008) (complaints that a supervisor yelled, cussed, and hollered at plaintiff did not constitute protected conduct). Despite Duane's personal belief that friendship and discrimination are one and the same, it is objectively unreasonable to believe that personality differences among employees or a failure to foster friendships in the workplace constitutes discrimination.

Lastly, Duane now attempts to characterize his Post as being motivated by an "illegal" denial of his request for accommodation in the December 2014 email exchange with Keyes. Duane admits that prior to the email exchange, he was satisfied and that Keyes gave him "everything he needed." Duane Tr. at 61:21-62:8. Thus, his purported reasonable belief justifying his disparaging Post stems from Keyes's sole comment that he would "prefer" that Duane work in the office upon returning from leave or extend his leave of absence for as long as he needed. Menezes Decl., Ex. I.

Of course, Duane admits he had the productivity issues Keyes mentions. Id. What Duane wrongly characterizes as "illegal" is in fact precisely what the EEOC expects employers to do when given a request for accommodation by an employee with a disability: engage in an interactive process with the employee to arrive at a reasonable accommodation. After Duane responded asking for half-day remote work and a plan to monitor his productivity, IXL granted him exactly what he requested.[9] *Id*. No objectively reasonable person could have believed that IXL was engaged in illegal disability discrimination based on this routine interactive process. Most importantly, Duane's Post, which is the sole "opposition activity" in this case, does not even mention disability accommodation, discrimination, or sick leave. Plaintiffs' retaliation claim is frivolous, and IXL is entitled to summary judgment.

B. Alternate Relief

i. Under an ADA retaliation claim, the EEOC and Duane can only seek equitable remedies.

Both the EEOC and Duane seek compensatory and punitive damages based on a claim of ADA retaliation brought pursuant to 42 U.S.C. § 12203(a). Because equitable relief is the only remedy for an ADA retaliation claim, summary judgment as to any damages that are not equitable remedies must be granted in IXL's favor.

The Ninth Circuit has held that "ADA retaliation claims are redressable only by equitable relief." *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) (holding that punitive and compensatory damages were not available for ADA retaliation claims); *U.S. E.E.O.C. v. Dillard's Inc*., No. 08CV1780-IEG PCL, 2012 WL 440887, at *10, fn. 11 (S.D. Cal. Feb. 9, 2012) ("[T]he Ninth Circuit

[9] Duane reluctantly admitted at his deposition that he was satisfied with the accommodation IXL provided "but not the way we got there." Duane Tr. at 163.

has held that the damages provision of 42 U.S.C. § 1981a does not allow for compensatory and punitive damages for ADA claims of retaliation under § 12203. Therefore, the EEOC is limited to pursuit of injunctive relief with regard to Dillard's alleged retaliatory termination of Ms. Scott.) (citation omitted). The Ninth Circuit has further held that "no right to a jury exists for equitable claims" *Danjaq LLC v. Sony Corp., 263* F.3d 942, 962 (9th Cir. 2001) (internal citation omitted).

Here, the EEOC's Complaint alleges that Duane, as a result of IXL's violation of 42 U.S.C. § 12203(a), suffered actual damage, including, but not limited to losses in compensation and benefits. Menezes Decl., Ex. AA at ¶ 40. Similarly, Duane's Complaint alleges that Duane, as a result of IXL's retaliation in violation of the ADA, suffered actual damage (including compensation and emotional distress) and seeks an award of punitive damages. Menezes Decl., Ex. BB at ¶ 51-53. However, Plaintiffs are limited to only equitable remedies based on a claim of ADA retaliation; Plaintiffs are not entitled to any compensatory or punitive damage.

In Plaintiffs' Partial Motion for Summary Judgment, Plaintiffs argue that IXL cannot challenge the sufficiency of Plaintiffs' Complaints and thus seeks summary judgment as to IXL's Affirmative Defense No. 1 for the EEOC and Duane. However, as previously discussed, Plaintiffs fail to state a claim upon which relief can be granted because only equitable remedies can be granted for an ADA retaliation claim. While the EEOC does seek equitable relief as part of its prayer for relief, Duane does not request any equitable remedies in his Complaint, and thus, no relief can be granted on his ADA retaliation claim.

Therefore, for the ADA retaliation claim, summary judgment must be awarded in IXL's favor based on any damages that do not constitute equitable remedies.

ii. IXL is entitled to summary judgment on Duane's FEHA Claim under res judicata principles and because the claim is time-barred.

In Duane's Complaint in Intervention, Duane alleges Title VII retaliation, ADA retaliation, and violation of the California Fair Employment and Housing Act (FEHA). Menezes Decl., Ex. B. Duane has withdrawn his assertion from his federal and state claims that IXL retaliated because he reported discrimination to his manager, Keyes. Thus, Duane's claims are based on the same facts asserted by the EEOC.

On December 4, 2017, the Court permitted Duane to file his Complaint in Intervention. ECF 40. In its Opinion, the Court held that IXL would be permitted to pursue its res judicata defense against Duane at the "summary judgment stage of the case, with the likely result being that Duane will be precluded from asserting his state law claim." *Id*. at 2.

iii. Because the Duane Action was dismissed with prejudice, Res Judicata prohibits Duane's FEHA Claim.

On June 27, 2017, in the Duane Action, the Court entered a Stipulation for Dismissal with Prejudice whereby Duane and IXL stipulated, "pursuant to Fed. R. Civ. P. 41(a) to the dismissal of all claims pending in this action by Plaintiff against Defendants with prejudice, waiving all rights of appeal." ECF 51.

Because of the dismissal with prejudice in the Duane Action, res judicata prohibits Duane from alleging any claims or facts not already asserted by the EEOC. IXL does not dispute that Duane has a statutory and unconditional right to intervene in this instant action. 42 U.S.C. § 2000e-5(f)(1) ("The person . . . aggrieved shall have the right to intervene in a civil action brought by the [EEOC] . . ."); *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.") (citation omitted). The Court "must permit anyone to intervene who is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1).

However, the statutory right to intervene in this case does not provide Duane a right to bring other claims, such as the FEHA claim. Duane must have an independent basis for bringing claims not alleged by the EEOC. The FEHA claim is barred, under res judicata principles, by the dismissal with prejudice in the Duane Action. Because the Duane Action was dismissed with prejudice, Duane, from that point forward, was and is precluded from relitigating claims or issues that were or could have been raised in the Duane Action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This dismissal with prejudice precludes Duane from bringing the FEHA claim in this lawsuit; thus, summary judgment should be granted in IXL's favor as it relates to Duane's FEHA claim.

Because of this dismissal with prejudice, Duane has waived his right to bring state law claims, and thus, summary judgment should not be granted as to IXL's Affirmative Defense No. 6 for Duane. Specifically, Duane has intentionally relinquished a known right after knowledge of the fact. *U.S. v. Perez*,

116 F. 3d 840, 845 (9th Cir. 1997). Duane, in his Duane Action Complaint, stated that he intended to assert additional claims under FEHA. Thus, despite knowledge of a potential FEHA claim, Duane willingly, voluntarily, and intentionally waived this claim when he dismissed the Duane Action.

iv. Because Duane's right to sue expired when the EEOC filed this lawsuit, Duane's FEHA Claim is also Time-Barred.

Not only is Duane precluded under res judicata principles, but Duane is also time-barred from bringing a FEHA claim. Pursuant to Cal. Gov't Code § 12965(d)(2), Duane has a one year statute of limitations in which to file a claim, which "expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing [DFEH] . . . whichever is later."

First, the DFEH issued Duane a Right-to-Sue letter (the "RTS Letter") that stated that Duane's Charge of Discrimination with a filing date of May 13, 2015 was "being dual filed with" DFEH by the EEOC. ECF 26. The RTS Letter makes clear that Duane is now time-barred from asserting claims under FEHA. The RTS Letter states that Duane must bring a civil action within one year from the date of the RTS Letter but that this one-year period is tolled during the pendency of the EEOC's investigation of his complaint. Id. Thus, Duane had one year to file an action under FEHA following the conclusion of the EEOC's investigation. The EEOC issued its Determination on April 22, 2016, and found cause only on retaliation claims under Title VII and the ADA. Menezes Decl., Ex. S. Duane had one year after the issuance of this Determination to bring a FEHA claim (i.e., until April 22, 2017). Duane's FEHA claim is time-barred because he sought to file a FEHA claim in this action on August 21, 2017.

Second, Duane is also time-barred because the federal right-to-sue period expired when the EEOC filed its Complaint in this action on May 24, 2017. ECF No. 1. Under very similar circumstances, a court was presented with determining on what date the federal right-to-sue period to commence a civil action expires for a plaintiff-intervenor when the EEOC brings a civil action. *E.E.O.C. v. PC Iron, Inc.*, 2018 WL 2018103, at *6 (S.D. Cal. May 1, 2018). The court held that, under Cal. Gov't Code §12965(d)(2), "the federal right-to-sue period expired when the EEOC filed its complaint in th[e] action based on the Supreme Court's pronouncement that when 'the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit.'" *Id.* (citing

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 291 (2002)). The court held that the plaintiff-intervenor's state law claims were time-barred because the federal right-to-sue period expired when the EEOC filed its lawsuit. *Id*. When the EEOC filed its complaint, the plaintiff-intervenor "no longer had a right to commence a civil action on her Title VII claims. Thus, pursuant to section 12965(d)(2), her time for commencing a lawsuit on her FEHA claims, to the extent those claims were tolled pursuant to 12965(d)(1), expired on that date as well." *Id*. Here, the EEOC filed its complaint on May 24, 2017; on that date, Duane's federal right-to-sue period to commence a FEHA claim expired. Thus, Duane's FEHA claim is time-barred.

In addition, Plaintiffs should not be granted summary judgment on IXL's Affirmative Defense No. 5 for Duane ("Plaintiff-Intervenor's claims are barred, in whole or in part, by the applicable statute of limitations"). Rather, IXL should be granted summary as to Duane's FEHA claim because res judicata prohibits Duane from bringing this claim and because the claim is time-barred.

V. Response to Plaintiffs' Partial Motion for Summary Judgment

Where appropriate, IXL has responded to Plaintiffs' Partial Motion for Summary Judgment above. In addition, summary judgment should not be granted to IXL's affirmative defense regarding Duane's failure to mitigate his damages. For this defense, defendant should establish (1) that the damage suffered by Duane could have been avoided, i.e. that there were suitable positions available which Duane could have discovered and for which he was qualified; and (2) that Duane failed to use reasonable care and diligence in seeking such a position. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696–97 (9th Cir. 1978). Where a plaintiff voluntarily withdraws from the workforce, back and front pay are not warranted. *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986). Here, Duane voluntarily chose to change career paths and "transition into a more technically challenging position in the tech industry" in either software engineering or data science. Duane took classes online on data science "to see if it's something that – that interested [him] enough to – to pursue a career in it and seeing if it was something [he] would be good at." Duane Tr. at 185:9-186:7. Likewise, in order to change his career path, Duane did "App Academy bootcamp" because he chose to pursue software development, and he had "no skills in software development up to that point." Duane Tr. at 186:12-17. It is unreasonable for IXL to compensate Duane for his voluntarily and unwarranted transition into a new career path.

VI. CONCLUSION

Summary judgment as to Plaintiffs' claims of Title VII retaliation, ADA retaliation, and FEHA must be granted in favor of IXL when Duane has been unable to provide any objectively reasonable, good faith belief that IXL engaged in an unlawful employment practice. Alternatively, summary judgment must be awarded in IXL's favor based on any damages that are not equitable remedies, and IXL is entitled to summary judgment on Duane's FEHA claim under res judicata principles and because the FEHA claim is time-barred.

Respectfully submitted,

Dated: August 2, 2018

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 August 2, 2018, I served the foregoing document(s) described as **Defendant's Memorandum of Law in Support of Motion for Summary Judgment** 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 August 2, 2018 at Troy, Michigan.

/s/ Jeffrey D. Wilson
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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 Hon. Vince Chhabria Courtroom: 4, 17th Floor Hearing Date: September 20, 2018 Hearing Time: 10:00 AM **DECLARATION OF NATASHA R. MENEZES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, Natasha R. Menezes, declare as follows:

1. I am an associate attorney with the law firm of Young Basile Hanlon & MacFarlane, P.C., attorneys of record for Defendant IXL Learning, Inc. ("IXL" or "Defendant").

2. I submit this Declaration in support of Defendant's Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment.

3. I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify thereto. Nothing in this Declaration is intended to be a waiver of the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege.

4. A true and correct copy of the Paul Mishkin Deposition Transcript was attached as "Ex. A" to Defendant's Motion for Summary Judgment (the "Motion").

5. A true and correct copy of EEOC 001020-001022 was attached as "Ex. B" to the Motion.

6. A true and correct copy of IXL-1362-1363 was attached as "Ex. C" to the Motion.

7. A true and correct copy of IXL's Answer to the EEOC's Complaint (ECF No. 12) was attached as "Ex. D" to the Motion.

8. A true and correct copy of the NLRB Hearing Transcript was attached as "Ex. E" to the Motion.

9. A true and correct copy of the Adrian Scott Duane Deposition Transcript was attached as "Ex. F" to the Motion.

10. A true and correct copy of IXL-1950 was attached as "Ex. G" to the Motion.

11. A true and correct copy of IXL-1608 was attached as "Ex. H" to the Motion.

12. A true and correct copy of IXL-1644-1646 was attached as "Ex. I" to the Motion.

13. A true and correct copy of IXL-1649-1650 was attached as "Ex. J" to the Motion.

14. A true and correct copy of IXL-1666 was attached as "Ex. K" to the Motion.

15. A true and correct copy of the David Keyes Deposition Transcript was attached as "Ex. L" to the Motion.

16. A true and correct copy of IXL-1663 was attached as "Ex. M" to the Motion.

17. A true and correct copy of IXL-1685-1687 was attached as "Ex. N" to the Motion.

18. A true and correct copy of the NLRB Complaint and Notice of Hearing was attached as "Ex. O" to the Motion.

19. A true and correct copy of the Decision of the Administrative Law Judge before the National Labor Relations Board was attached as "Ex. P." to the Motion.

20. A true and correct copy of the National Labor Relations Board Order Dismissing the Complaint was attached as "Ex. Q" to the Motion.

21. A true and correct copy of the Charge filed by Adrian Scott Duane with the EEOC was attached as "Ex. R" to the Motion.

22. A true and correct copy of the EEOC's Determination was attached as "Ex. S" to the Motion.

23. A true and correct copy of the Complaint filed by Adrian Scott Duane in *Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, No. 3:17-CV-00078-WHA (N.D. Cal.) as "Ex. T" to the Motion.

24. A true and correct copy of the Stipulation for Dismissal as filed in *Adrian Scott Duane in Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, No. 3:17-CV-00078-WHA (N.D. Cal.) as "Ex. U" to the Motion.

25. A true and correct copy of the Order of Dismissal as filed in *Adrian Scott Duane in Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin*, No. 3:17-CV-00078-WHA (N.D. Cal.) as "Ex. V" to the Motion.

26. A true and correct copy of the Isidora Milin Deposition Transcript was attached as "Ex. X" to the Motion.

27. A true and correct copy of the Nemo Curiel Deposition Transcript was attached as "Ex. Y" to the Motion.

28. A true and correct copy of the image of Idisora Milin as taken from her Linkedin Account was attached as "Ex. Z" to the Motion.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and this Declaration was executed on August 2, 2018 in Troy, Michigan.

Dated: August 2, 2018

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Natasha R. Menezes*

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