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October 15, 2018

The Honorable Vince Chhabria
United States District Court
Northern District of California
450 Golden Gate Avenue
17th Floor, Courtroom 4
San Francisco, CA 94102

Re: *EEOC and Adrian Scott Duane v. IXL Learning, Inc.*, 17-cv-02979-VC
Plaintiffs' Letter Brief Opposing the Use of Deposition Transcripts in Opening
Statements

Your Honor,

During the October 15, 2108 Pretrial Conference, Defendant's attorney requested that he be allowed to read portions of deposition transcripts and/or play videotaped testimony during Defendant's opening statement. Specifically, Defendant asked to introduce snippets from the videotaped deposition of Plaintiff-Intervenor Adrian Scott Duane who will also testify at trial. The Court should deny the request.

Rule 32 governs the use of depositions at trial. All or part of a deposition may be used against a party at trial if "it is used *to the extent it would be admissible* under the Federal Rules of Evidence if the deponent were present and testifying." Fed. R. Civ. P. 32(a)(1)(B)(emphasis added). Within this framework, an adverse party may use a deposition of a party, including high level corporate officials, for any purpose. Fed. R. Civ. P. 32(a)(3). However, if a party seeks to introduce evidence through a deposition, an adverse party may require the offeror to introduce other parts of the deposition that in fairness should be considered with the part introduced. Fed. R. Civ. P. (6). This has the potential of becoming unduly prejudicial and needlessly cumulative, and thus inadmissible under Rule 403. Fed. R. Evid. 403. Therefore, Defendant should be precluded from using Mr. Duane's deposition testimony in its opening statement.

The purpose of an opening statement is "to state what evidence will be presented, to make it easier for the jury to understand what is to follow, and to relate part of the evidence and testimony to the whole," not to introduce evidence. *Testa v. Village of Mundelein*, 89 F.3d 443, 446 (7th Cir. 1996), citing *United States v. Dinitz*, 424 U.S. 660, 612 (1976) (Burger, C.J., concurring). A litigant cannot call a live witness to testify during the open statement. Defendant should not be able to perpetrate the equivalent through deposition excerpts. Since the opening statement is a preview of the evidence, and not in of itself evidence, Defendant should be restricted to summarizing testimony as it must for other evidence it will introduce at trial.

Plaintiffs will be prejudiced if Defendant is permitted to present deposition excerpts during a proceeding where they will not have a meaningful opportunity to object to selective and

potentially misleading use of the testimony¹. Here, the risk of prejudice is particularly high since Mr. Duane's transcript is replete with inappropriate questions from Defense counsel and corresponding objections from Plaintiffs' counsel. A quick review shows Plaintiffs' counsel objected at least seventy-one times during Mr. Duane's deposition. The testimony should be barred absent a ruling on each of Plaintiffs' objections. Further, if presented at the beginning of the trial, Plaintiffs will not have an opportunity to rehabilitate Mr. Duane in real time to provide context for the testimony. Once Defense counsel has manufactured a misimpression of Mr. Duane for the jury, Plaintiffs' counsel cannot un-ring the metaphorical bell.

In addition, the presentation of deposition excerpts will unfairly prejudice Plaintiffs because the jury is likely to overvalue these statements based solely on their repetition. Live testimony does not carry the same risk since a live witness cannot appear twice. . . Allowing Defendant IXL to use Mr. Duane's deposition testimony starting with its opening statement creates a real danger of unfair repetition.

Moreover, courts are loathe to permit parties to introduce videotaped deposition excerpts during opening argument. A federal decision from this district described the issue:

Videotaped testimony may seem more believable or important to the lay jury because it can both see and hear the witness. During argument, Rambus submitted that it cannot 'preview' what its live witnesses will look like and testify to; it can only generally describe what it hopes to elicit. On the other hand, if unrestricted, a video deposition can be shown once in opening, again during trial (at least once), and in closing in the exact same form. Repeatedly showing the same few deposition segments seems to exalt the relevance of those videotaped shreds of evidence over live testimony. *Cf.* Federal Judicial Center, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 156 (2001).

Hynix Semiconductor Inc. v. Rambus, Inc., Nos. CV-00-20905 RMW, C-05-00334 RMW, C-06-00244 RMW, 2008 WL 190990, at *1 (N.D. Cal. 2008) (holding "[n]either side shall use any videotaped deposition testimony in its opening statement."). *See also Coachman v. Seattle Auto Management Inc.*, No. 17-187RSM, 2018 WL 4510067, at *1 (W.D. Wash. Sept. 20, 2018) ("The jury is not well-served hearing actual testimony in the opening statement out of context, and it is entirely within the Court's discretion to limit the use of this evidence."); *Doe v. City of San Diego*, No. 12CV689-MMA (DHB), 2014 WL 11997809, at *6 (S.D. Cal. July 25, 2014); *In re Ethicon, Inc.*, 2014 WL 505234, at *8 (S.D. W. Va. Feb. 5, 2014) ("[T]he use of video clips during opening statements is precluded as to all parties") (quoting *In re Bard, Inc.*, 2013 WL 3282926, at *8 (S.D. W. Va. June 27, 2013)); *Carpenter v. Forest Meadows Owners Ass'n*, 2011 WL 3207778, at *7 ("Video recordings of the deposition will not be permitted.") (emphasis omitted); *Chopourian v. Catholic Healthcare W.*, No. 09-2972 KJM, 2011 WL 6396500, at *7

¹ Defendant has given Plaintiffs cause for concern. Opposing counsel has repeatedly cited Mr. Duane's testimony to argue that Mr. Duane admitted that co-workers perceived him to be mainstream gay. The selective excerpt ignored Mr. Duane's repeated caveats that the misperception may have been true until people learned about his female partner. See Def. Mem. Of Law in Supp. Of Summ. J., at p. 14 [ECF No. 70-1]: 10-11; but see Duane Tr. at 36:12-37:19.

(E.D. Cal. Dec. 20, 2011) (“Plaintiff will not be allowed to use deposition testimony in any form during opening statement”) (citation omitted).

Defendant's untimely request to use deposition transcripts also causes Plaintiffs unfair prejudice. The trial in this case is scheduled to start a week from today's final prehearing conference. Defense counsel did not indicate to Plaintiffs at any time prior to October 15, 2018 that it was going to seek to use Mr. Duane's deposition testimony in any manner other than impeachment of his live testimony. This court should not allow Defendant to benefit from such untimely litigation tactics, especially when Mr. Duane will be a live witness at trial.

Alternatively, Defendants should be precluded from using deposition testimony, whether video or transcript, without first giving Plaintiffs an opportunity before opening statements to preview the proposed testimony, raise objections to its admissibility and/or move the court to require Defendant to introduce other excerpts that in fairness should be considered pursuant to Fed. R. Evid. 106. Plaintiffs request at least 48 hours of notice.

Respectfully submitted,

/s/ Ami Sanghvi

Ami Sanghvi for Plaintiff EEOC

/s/ Damien Lee

Damien Lee for Plaintiff EEOC