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October 16, 2018

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

RE: U.S. EEOC and Adrian Scott Duane v. IXL Learning, Inc.
USDC – Northern District of California, Case No. 3:17-cv-02979
Defendant's Letter Brief Regarding the Use of Deposition Transcripts in Opening Statements

Your Honor:

At yesterday's pretrial conference, Plaintiffs objected to Defendant's mention of using deposition testimony of Plaintiff Scott Duane, pursuant to Fed. R. Civ. P. 32(a)(3), in Defendant's opening statement. Upon being made aware of Rule 32(a)(3), which plainly states that an "adverse party may use for any purpose the deposition of a party…" Plaintiffs still objected notwithstanding the existence of the rule. Plaintiffs' quarrel is not really with Defendant's so-called "untimely litigation tactics" (DE 112, Plaintiffs' Letter Brief, p. 3), but rather Defendant's reliance on a decades-old procedural rule.

It remains unclear whether Plaintiffs feel they will be prejudiced by the use of Mr. Duane's videotaped deposition testimony in Defendant's opening statement or by any mention of his deposition testimony at all. Plaintiffs first argue that use of his deposition testimony *at all* in Defendant's opening statement will be prejudicial, will potentially mislead the jury, and create "real danger of unfair repetition" causing the jury to overvalue Mr. Duane's comments. *Id*. pp. 1-2. Thus, Plaintiffs would have this Court strip Defendant of its right to rely on Rule 32(a)(3) because a jury might be unduly influenced by Mr. Duane's own testimony by hearing parts of it twice. Not surprisingly, Plaintiffs provide no case law requiring a wholesale denial of Rule 32(a)(3)'s procedure to a litigant in opening or closing statements. Additionally, in their effort to nullify this rule, Plaintiffs unfortunately cast gratuitous and unfair aspersions on the undersigned's candor with the Court and the jury. Plaintiffs describe their concern about potentially misleading use of the deposition testimony by Defendant's counsel, and characterize the prejudice they face "[o]nce Defense counsel has manufactured a misimpression of Mr. Duane for the jury…" *Id*. Defendant's

counsel takes his duty as an officer of the court seriously and submits there is no grounds for Plaintiffs to assail his character in their zeal to prevail on this dispute.[1] Regardless, any such concern could be remedied by allowing Plaintiffs to review in advance the portions to be used, as with all other demonstratives. Of course, Plaintiffs should be required to provide Defendant with the same courtesy.[2]

Courts routinely permit use of adverse party deposition testimony during opening statements, and in fact in the primary case on which Plaintiffs rely, *Hynix Semiconductor Inc. v. Rambus*, *Inc*., 2008 WL 190990, at *1 (N.D. Cal. 2008), Judge Whyte exercised his discretion to preclude playing of videotaped deposition excerpts in opening statements, but permitted the parties to read portions of depositions verbatim in opening statements. *Id*. Notably, the *Hynix* court acknowledged that playing video excerpts of deposition testimony in opening statements is recommended by "one respected treatise . . . as 'very effective' advocacy." *Id*. (referencing Jones, Rosen, Wegner, & Jones, *Rutter Group Practice Guide: Federal Civil Trials & Evidence* ¶¶ 6:272–6:275 (2007)). Cases that have condoned the use of transcripts, in addition to this Court in the *Hynix* case, include *MBI Acquisition Partners, L.P. v. Chronicle Pub. Co*., 2002 WL 32349903, at *1 (W.D. Wis. Oct. 2, 2002); *Carpenter v. Forest Meadows Owners Ass'n*, 2011 WL 3207778 (E.D. Cal. 2011); *Sadler v. Advanced Bionics*, *LLC*, 2013 WL 1340350 (W.D. Ky. April 1, 2013).

Second, Plaintiffs claim that Defendant violated some rule related to timely disclosure. It did not.[3] There is no rule or court order identified – or that exists – that would require an earlier notification to opposing counsel about the use of adverse party deposition testimony in opening statements. Plaintiffs' complaint of "untimely request" causing unfair prejudice is simply unfounded. Defendant is not responsible for informing Plaintiffs of all procedural rules that may apply at trial, and what Plaintiffs decry as untimely litigation tactics is merely "very effective advocacy" to quote the respected treatise cited above.

What remains is merely Plaintiffs' speculation about the potential that Defendant's opening statement might be unfair. Simply because a trial technique is very effective advocacy by one party does not mean it is *unfair* to the other. Rule 403 protects against *unfair* prejudice only. Plaintiffs have shown no reason this Court should upend established federal procedure, and therefore Defendant asks the Court to reject Plaintiffs' 11th hour request and that Defendant be

[1] A few observations for the record are in order. First, the fact Plaintiffs' counsel objected 71+ times during the cross-examination of Mr. Duane was not due to "inappropriate questions" as Plaintiffs content, but was improper obstruction that needlessly lengthened the deposition. Second, Plaintiffs' "cause for concern" is based on Defendant's accurate reference to the multiple admissions by Duane that management and coworkers perceived he was a gay male during his employment. Yet they claim *Defendant* is misrepresenting the record because Duane *speculates* about the *possibility* that, for example, David Keyes might have questioned his status but "I think that depends on whether he knew about my partner at the time or not and I just don't remember if he did or not." Duane Tr. At 60:6-25. Plaintiff cites Duane's testimony at 36:17 -37:19, which again does not withdraw his admission or seriously dispute whether Keyes knew he was transgender, but contains highly speculative *assumptions* that Keyes *might* have found out his surgery was gender confirmation surgery. This paper-thin example of so-called "misleading" use of Duane's testimony does not warrant an accusation that Defendant's counsel will mislead the jury.

[2] Plaintiffs suggest 48 hours advance notice. Defendant submits 24 hours would be in line with the Court's other disclosure deadlines, including demonstratives and witness disclosures.

[3] If anything, Plaintiffs' request is an untimely motion *in limine*. Had Plaintiffs wanted to preclude use of depositions under Rule 32(a)(3) it should have filed its motion *in limine* by the established court deadline.

permitted to use Duane's deposition testimony, by video and/or displaying verbatim portions, as Defendant deems appropriate in describing for the jury the defense it intends to present.

Very truly yours,

/s/ Jeffrey D. Wilson

Jeffrey D. Wilson