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Attorneys for Defendants

IXL Learning, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY : Case No.: 3:17-cv-02979-VC

COMMISSION, : Hon. Vince Chhabria

Plaintiff, : Courtroom: 4, 17<sup>th</sup> Floor

and : Hearing Date: October 15, 2018

ADRIAN SCOTT DUANE, : Hearing Time: 10:00 AM

Plaintiff-Intervenor, : **DEFENDANT’S NOTICE OF MOTION**

v. : **AND MOTION IN LIMINE NO. 3 RE:**

IXL LEARNING, INC., : **NONDISCLOSED PRIVILEGED**

Defendant. : **COMMUNICATIONS**

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

2 Please take notice that on October 15, 2018 at 10:00 AM, or as soon thereafter as may be heard in  
3 Courtroom 4 of the United States District Court, Northern District of California, Defendant IXL Learning,  
4 Inc. (“Defendant”), will and hereby does, move this Court, pursuant to Federal Rule of Civil Procedure 37  
5 and Federal Rule of Evidence 403, hereby submits its Motion *in Limine* to exclude evidence of Plaintiff-  
6 Intervenor’s alleged conversations with various lawyer(s) to support his allegation that that he had a good-  
7 faith and reasonable belief that IXL engaged in an unlawful employment practice and Memorandum of Law  
8 in Support.

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

12  
13 Dated: September 26, 2018

Respectfully submitted,

**YOUNG BASILE HANLON & MACFARLANE, P.C.**

By:  /s/ Eddie D. Woodworth

**Jeffrey D. Wilson (Pro Hac Vice)**

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and : Hearing Date: October 15, 2018

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Plaintiff-Intervenor,

v.

IXL LEARNING, INC.,

Defendant.

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION IN LIMINE NO. 3  
RE: NONDISCLOSED PRIVILEGED  
COMMUNICATIONS**

1 **I. INTRODUCTION/BACKGROUND**

2 Pursuant to Federal Rule of Civil Procedure 37 and Federal Rule of Evidence 403, Defendant IXL  
3 Learning, Inc. (“IXL” or “Defendant”) hereby moves this Court for an Order *in limine* to preclude  
4 evidence at trial of Plaintiff-Intervenor Adrian Scott Duane’s alleged conversations with various lawyer(s)  
5 to claim he had an objectively reasonable good faith belief that IXL supporting his alleged opposition activity  
6 of posting his December 30, 2014 Glassdoor.com review (the “Post”). In support of this Motion, IXL states  
7 as follows:

8 The facts of this matter have been well documented throughout the record and will not be restated  
9 herein. Importantly for purposes of this Motion, on the evening of December 30, 2014, Duane posted an  
10 anonymous negative review of IXL. Plaintiffs allege IXL retaliated against him under Title VII and the  
11 ADA by firing due to the alleged opposition activity in the Post.

12 Throughout this case, IXL sought discovery into Duane’s good-faith and reasonable belief that IXL  
13 engaged in an unlawful employment practice to support the Post. IXL produced and received a number of  
14 documents wherein Duane references communications with his lawyer as a basis to believe IXL is breaking  
15 the law prior to his Post.

16

Date	Recipient	Content
12/23/14	David Keyes	“I went ahead and spoke with an employment attorney to check in about what is mean by ‘reasonable accommodation’, and she said with certainty that remote work qualifies here – after all, IXL employees frequently work remotely to take care of children, to wait for repair people, because they’re sick, or even just to extend vacations. This situation shouldn’t (and legally can’t) be treated any differently – that is, under the Americans with Disabilities Act, IXL has to provide me with this accommodation.” Duane later shared this email with a friend the same day.
12/23/14	Jess Morse	“David is breaking employment law, turns out . . . Lawyer says the case is textbook . . . Yes he does [have to let Duane work remote ½ days], as long as I can perform all essential job functions which of course I can.”
12/24/14	Nemo Curiel	“I wrote David a very diplomatic email telling him I’d spoken with a lawyer and she said they legally couldn’t deny me what I was asking for, and that I would like to return on the 30 <sup>th</sup> with the 50% remote accommodation.”

24

25 During Duane’s deposition, IXL sought testimony into the substance of Duane’s communications with  
26 his lawyer. DE 71-06 at 129 of 256 (Duane Tr. At 127). Counsel for the EEOC instructed Duane not to answer  
27 questions in his deposition about his communications with attorneys in December 2014. *Id.* On April 20, 2018,  
28 IXL raised a discovery dispute with Magistrate Illman as to Duane’s clear waiver and IXL’s entitlement to the

1 substance of these communications. ECF 61. At the hearing, this motion was denied without prejudice for  
2 IXL's right to bring this matter as a motion *in limine*. Ex. A.

### 3 **II. LEGAL STANDARD/ARGUMENT**

4 Plaintiffs cannot have their cake and eat it, too. With respect to Duane's claim for retaliation based  
5 on opposition activity, Title VII and the ADA prohibit an employer from discriminating or retaliating against  
6 an employee when the employee opposes an unlawful practice. 42 U.S.C. § 2000e-3(a); 42 U.S.C.A. §  
7 12203(a). To state a *prima facie* case of retaliation under Title VII, Plaintiffs must show that (1) Duane engaged  
8 in a statutorily protected activity (i.e., that he protested or otherwise opposed unlawful employment  
9 discrimination directed against employees protected by Title VII or the ADA), (2) Duane was disciplined or  
10 lost his job, and (3) a causal link exists between the protected activity and the adverse action. *Moyo v. Gomez*,  
11 32 F.3d 1382, 1384 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994); *Ray v. Henderson*, 217 F.3d 1234, 1240  
12 (9th Cir. 2000). Plaintiffs must prove that Duane's opposition activity was the "but-for" cause of his  
13 termination, i.e. that the "unlawful retaliation would not have occurred in the absence of the alleged wrongful  
14 action or actions of the employer." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

15 To establish the first element of a *prima facie* retaliation case, Plaintiffs must show that Duane's  
16 opposition to discrimination was based on a good-faith and reasonable belief that IXL engaged in an unlawful  
17 employment practice. *Moyo*, 32 F.3d at 1385 (citation omitted). The reasonableness of Duane's belief that an  
18 unlawful employment practice occurred "must be assessed according to an objective standard." *Id.* Further,  
19 "the opposition must be directed at an unlawful employment practice of an employer, not an act of  
20 discrimination by a private individual." *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754, 755 (9th Cir.  
21 1997) (citation omitted).

22 It is apparent, then, that that employees in a retaliation/opposition activity case must establish that  
23 they had a reasonable good faith belief that the employer engaged in an unlawful employment activity.  
24 Regarding matters of the law, statements made by a lawyer to a layperson as to what the law does and  
25 does not provide would obviously carry great weight. Here, Duane should not be permitted to use attorney-  
26 client privilege as both a sword and shield. Said differently, Duane is both relying on conversations that  
27 he had with his lawyer to establish that he had a good faith belief that IXL engaged in unlawful conduct  
28

1 in connection with his opposition activity, but protecting those conversations from disclosure under the  
2 guise of attorney-client privilege.

3 This is highly prejudicial to IXL. IXL has no way to challenge Duane’s alleged reasonable basis,  
4 and cannot even cross-examine Duane on his conversations with his lawyer. “The court may exclude  
5 relevant evidence if its probative value is substantially outweighed by a danger of one or more of the  
6 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or  
7 needlessly presenting cumulative evidence.” FRE 403. Duane thus should not be permitted to rely on his  
8 conversations with his attorneys to establish the essential element that he had a reasonable good faith  
9 belief that IXL engaged in an unlawful employment activity.<sup>1</sup>

10 **III. CONCLUSION**

11 Wherefore, Plaintiffs should not be permitted to present evidence or argue to the jury that Duane’s  
12 advice from an attorney demonstrates in any way the reasonableness of his belief supporting his alleged  
13 opposition activity.

14  
15 Dated: September 26, 2018

Respectfully submitted,

**YOUNG BASILE HANLON & MACFARLANE, P.C.**

By:  /s/ Eddie D. Woodworth  
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**Eddie D. Woodworth (Pro Hac Vice)**  
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20 -and-

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22 **R. Randy Wertz**  
23 rrwerts@itkc.com

24 Attorneys for Defendant  
25 IXL Learning, Inc.

26  
27  
28 <sup>1</sup> To the extent that any documents are admitted into evidence that reference these communications, the jury should be instructed that these documents cannot be used to establish that Duane had a reasonable good faith belief that IXL engaged in an unlawful employment activity.



# Exhibit

# A



**APPEARANCES (CONTINUED) :**

**FOR INTERVENOR**

THE MAREK LAW FIRM  
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PALO ALTO, CA 94301 FIRMS"FIRM}

**BY: DAVID M. MAREK, ESQUIRE**  
(TELEPHONICALLY)

**FOR DEFENDANT**

YOUNG, BASILE, HANLON & MACFARLANE, PC  
3001 W. BIG BEAVER ROAD, SUITE 624  
TROY, MICHIGAN 48084

**BY: NATASHA R. MENEZES, ESQUIRE**

1 COULD HAVE BEEN WRONG ABOUT THE LAW. I DON'T KNOW. THAT'S NOT  
2 THE POINT. RETALIATION EXTENDS TO PEOPLE EVEN WHEN THEY'RE  
3 WRONG ABOUT THE LAW, BECAUSE AS LONG AS THEY HAVE A REASONABLE  
4 GOOD FAITH BELIEF, EVEN IF THAT REASONABLE GOOD FAITH BELIEF IS  
5 INCORRECT, THEY STILL GET THE PROTECTION OF THE ANTI  
6 RETALIATION PROVISIONS UNDER TITLE VII AND THE ADA, YOUR HONOR.

7 **THE COURT:** THE FACT THAT HE STATES -- I MEAN, THE  
8 FACT THAT HE MAY TESTIFY THAT HE RELIED ON WHAT APPEARS TO HAVE  
9 BEEN A POSSIBLE DISCUSSION WITH AN ATTORNEY OVER THIS ISSUE,  
10 THAT GOES TO WHAT HE RELIED ON AS OPPOSED TO THE SUBSTANCE OF  
11 THE COMMUNICATIONS. I DON'T KNOW THAT THERE'S A SPECIFIC  
12 WAIVER TO THE SUBSTANCE OF THE COMMUNICATIONS FOR DEFENDANT  
13 IF -- I MEAN, YOU'VE RAISED IT. I'M GOING TO DENY IT. AND  
14 THEN YOU CAN BRING THAT UP WHEN YOUR MOTION IN LIMINE -- IN  
15 FRONT OF JUDGE CHHABRIA AS YOU GET CLOSER TO TRIAL.

16 I DON'T SEE WHAT IT IS THAT YOU WANT FROM THIS. SO I  
17 DON'T -- I DON'T FIND YOU'VE BEEN ABLE TO PIERCE THE  
18 ATTORNEY-CLIENT COMMUNICATION PRIVILEGE.

19 SO LET'S MOVE TO THE NEXT ISSUE, WHICH IS THE ISSUE  
20 RELATED TO HIS EMOTIONAL DISTRESS. SO LET'S TALK ABOUT THAT  
21 FOR A SECOND. I NOTE IN THE LETTER BRIEF -- AND I'M ON PAGE 3,  
22 THE SECOND PARAGRAPH THERE --

23 **MS. MENEZES:** YOUR HONOR?

24 **THE COURT:** YES.

25 **MS. MENEZES:** I HATE TO INTERRUPT, BUT I ACTUALLY --

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CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.



JOAN MARIE COLUMBINI

MAY 22, 2018

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 2 MARCIA L. MITCHELL, SBN 18122 (WA)  
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16 *Attorney for Plaintiff-Intervenor Duane*

17 UNITED STATES DISTRICT COURT  
 18 NORTHERN DISTRICT OF CALIFORNIA

19 U.S. EQUAL EMPLOYMENT  
 OPPORTUNITY COMMISSION,

20 Plaintiff,

21 and

22 ADRIAN SCOTT DUANE,

23 Plaintiff Intervenor,

24 vs.

25 IXL Learning, Inc.,

26 Defendant.  
 27

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

**PLAINTIFF EEOC'S OPPOSITION TO  
 DEFENDANT IXL'S MOTION *IN LIMINE*  
 NO. 3 RE: NONDISCLOSED  
 PRIVILEGED COMMUNICATIONS**

Pretrial Date: October 15, 2018  
 Time: 10:00 am  
 Courtroom: 4, 17<sup>th</sup> Floor  
 Judge: Hon. Vince Chhabria

Trial Date: October 22, 2018

1 **I. INTRODUCTION**

2 Plaintiff Equal Employment Opportunity Commission (EEOC) and Plaintiff-Intervenor  
3 Adrian Scott Duane (Duane) (collectively Plaintiffs) oppose Motion *in Limine* No. 3 (MIL No. 3)  
4 filed by Defendant IXL Learning, Inc. (IXL or Defendant) to prevent Plaintiffs from submitting  
5 evidence to the jury that Duane consulted an attorney before making his Glassdoor post because he  
6 believed IXL had engaged in unlawful activity. Duane's decision to consult an attorney on or  
7 around December 23, 2014, tends to show that he had an objectively reasonable good faith belief  
8 that he was opposing discrimination.

9 IXL seeks to preclude relevant and admissible evidence to overcome the factual hurdle that  
10 Mr. Duane consulted an employment attorney days before making his Glassdoor post. Evidence and  
11 testimony relating to Mr. Duane's consultation does not place the substance of these  
12 communications at issue, but rather establishes that Mr. Duane was sufficiently concerned about  
13 IXL's conduct to consult an attorney and that IXL was on notice of this fact when it terminated him  
14 because of the Post.

15 **II. RELEVANT FACTS**

16 After a two-month leave of absence for gender confirmation surgery and two weeks before  
17 returning to work, Mr. Duane emailed his manager, David Keyes, requesting to telecommute as a  
18 reasonable accommodation for a post-operative complication. Mr. Keyes responded that he  
19 preferred that Mr. Duane be in the office or extend his leave. Because Mr. Duane perceived the  
20 response as a denial of the requested accommodation, he informed Mr. Keyes that he had consulted  
21 an employment attorney about his reasonable accommodation request and that he believed he was  
22 entitled to this accommodation under the ADA.

23 IXL sought discovery regarding the advice Mr. Duane received from the attorney. Plaintiffs  
24 objected based on attorney-client privilege. IXL has been aware of Plaintiffs' assertion of attorney  
25 client privilege between Mr. Duane and attorneys from whom he sought legal counsel since as early  
26 as January 2018. Defendant entered into an agreement with the EEOC that communications  
27 between Mr. Duane and attorneys and staff of Liddle & Robinson, the firm that previously  
28 represented Mr. Duane, were "clearly privileged." [*See* Declaration of Ami Sanghvi, (Sanghvi

1 Decl), Exh. 1 (EEOC Response to IXL Request for Production of Documents), p. 5, fn.1.] In  
2 January 2018, when the EEOC produced the communications cited in Defendant’s motion *in limine*,  
3 the EEOC objected to production of other documents, citing attorney-client privilege. [*Id.*, at pp. 5-  
4 6.] Then, at Mr. Duane’s deposition on March 27, 2018, the EEOC instructed Mr. Duane not to  
5 answer one question.<sup>1</sup>

6 IXL’s counsel did not initiate a meet and confer on Plaintiffs’ assertions of privilege until  
7 6:01pm PDT on April 13, 2018, the day fact discovery closed. Defendant theorized that evidence of  
8 Mr. Duane’s communications with a lawyer prior to December 30, 2014, should be excluded at trial  
9 because Plaintiffs were withholding the evidence even though Mr. Duane waived the attorney-client  
10 privilege. The EEOC argued that Mr. Duane had not waived the privilege and moreover, the  
11 appropriate recourse during discovery would be to move to compel discovery, not to exclude it.  
12 Defendant said it would abandon its quest for discovery if the EEOC agreed to forfeit the argument  
13 in any subsequent motion *in limine* that Defendant should have sought to compel the discovery. The  
14 EEOC refused, so Defendant asked Magistrate Judge Illman to exclude the evidence at trial. In  
15 denying Defendant’s motion, Judge Illman found that IXL was unable to pierce the attorney-client  
16 communication privilege because Mr. Duane’s disclosure of a discussion with an attorney “goes to  
17 what he relied on as opposed to the substance of the communications.” [ECF No. 67, at 10:7-18.]

18 Defendant now attempts to preclude Plaintiffs from presenting evidence or testimony that  
19 Mr. Duane relied on conversations with his attorneys to establish that he had a reasonable good faith  
20 belief that IXL had violated Title VII and the ADA.

21  
22 ///

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25 <sup>1</sup> The EEOC instructed Mr. Duane not to answer when IXL counsel asked: “Did your employment  
26 attorney in December of 2014 tell you whether or not David [Keyes’s] comment about  
27 accommodating your situation so that you could work in the office might be a reasonable  
28 accommodation?” [Sanghvi Decl., Exh 2 (Duane Depo), at 126:22-25.] Mr. Duane answered IXL  
counsel’s next question: “Mr. Duane, did you disclose to any other individuals in this time frame of  
December 2014 and January 2015 what your attorneys told you about IXL accommodations and  
whether or not David [Keyes] was violating your rights?” Duane answered: “No, not that I  
remember.” [*Id.*, at 127:23-128:7.]

1 **III. ARGUMENT**

2 **A. The actual legal advice that Mr. Duane received in December 2014 is not at**  
3 **issue.**

4 Plaintiffs' retaliation claim does not rest on the actual advice of counsel and therefore  
5 Plaintiffs are not using privileged attorney-client communications as a sword and shield. *See e.g.,*  
6 *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (finding implied waiver of the  
7 privilege when a party raises a claim that requires disclosure of the protected material.) Here, the  
8 advice or the soundness of the advice Mr. Duane received is not critical to Plaintiffs' claim. The  
9 critical issue is whether Mr. Duane believed reasonably that IXL was violating Title VII and the  
10 ADA. The fact that Mr. Duane sought legal guidance before advocating for a reasonable  
11 accommodation is the relevant inquiry to determining his state of mind. Therefore, the content of  
12 legal advice Mr. Duane received is irrelevant.

13 Moreover, Mr. Duane did not waive his privilege. In the three examples Defendant  
14 highlights, Mr. Duane did not disclose details of his attorney's advice or analysis. "Courts have  
15 perceived a difference between an opaque reference to an attorney's advice and disclosure that  
16 illuminates the facts and analysis underlying that advice." *Libbey Glass, Inc. v. Onieda, Ltd.*, 197  
17 F.R.D. 342, 347 (N.D. Ohio 1999) In Mr. Duane's December 23, 2014 email to Mr. Keyes, he  
18 advocated for remote work as a reasonable accommodation by informing IXL that he had consulted  
19 an attorney. Disclosing that he spoke with an attorney who advised him on the ADA does not  
20 constitute a waiver of the privilege. *See e.g., Saltern v. Nor-Cal Federal Credit Union, et al.*, No.  
21 Civ.A. 02-7175, 2003 WL 21250578, \*1 (E.D.Pa. April 17, 2003). Similarly, the other two  
22 communications IXL highlights reveal only that Duane consulted an attorney and the general subject  
23 matter of the legal advice, but nothing specific, which also does not constitute waiver.

24 **B. IXL's failure to seek to compel the communications precludes any claim of**  
25 **prejudice it now asserts.**

26 IXL had many opportunities in discovery to challenge Plaintiffs' assertion of the attorney-  
27 client privilege relating to counsel sought prior to December 30, 2014. IXL did not move to compel  
28 responses to the requests for documents or answers at the deposition. Its failure to do so is fatal to

1 its quest to exclude the evidence at trial. Absent a prior attempt to compel discovery, a motion *in*  
 2 *limine* is procedurally improper. Defendant should not be permitted to disguise a request for an  
 3 evidentiary sanction under the cloak of a motion *in limine*. *See e.g., Boeing Co. v. KB Yuzhnoye*, No.  
 4 CV1300730ABAJWX, 2015 WL 12803452, at \*8 (C.D. Cal. Nov. 3, 2015)(refusing to exclude  
 5 evidence “on the eve of trial” where Defendants should have sought information through a motion to  
 6 compel); *Harbor Ins. Co. v. Cont'l Bank Corp.*, No. 85 C 7081, 1991 WL 222260, at \*3 n.3 (N.D.  
 7 Ill. Oct. 25, 1991) (holding that plaintiffs could not seek to exclude testimony after failing to move to  
 8 compel answers to deposition questions).

9 Curiously, IXL remained steadfast in its commitment not to try to compel discovery even  
 10 when it presented the implied waiver argument to Magistrate Illman. [*See* ECF No. 61.] Instead,  
 11 IXL pursued one course, exclusion of the evidence. It is disingenuous to now claim prejudice  
 12 because IXL “has no way to challenge Duane’s reasonable basis” and “cannot cross-examine Duane  
 13 on his conversations with his lawyer.” Simply put, this is a problem of Defendant’s own making.

#### 14 **IV. CONCLUSION**

15 For the reasons set forth herein, Plaintiff respectfully requests that the Court deny MIL No.3  
 16 and grant Plaintiff any and all other relief the Court deems appropriate.

17 Respectfully submitted,

18  
 19 Dated: October 3, 2018

EQUAL EMPLOYMENT  
 OPPORTUNITY COMMISSION

20  
 21 By: /s/ Ami Sanghvi  
 AMI SANGHVI, Senior Trial Attorney  
 Attorney for Plaintiff EEOC

22  
 23 Dated: October 3, 2018

THE MAREK LAW FIRM

24  
 25 By: /s/ David Marek  
 DAVID MAREK  
 Attorney for Plaintiff-Intervenor Duane

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**LOCAL RULE 5-1(i)(3) ATTESTATION**

I, Eddie Woodworth, am the ECF User whose ID and password are being used to file Plaintiffs' Opposition to Defendant's Motion *in limine* No. 3 in accordance with Judge Chhabria's Standing Order for Civil Trials. In compliance with Local Rule 5-1(i)(3), I hereby attest that Ami Sanghvi and David Marek concurred in Defendant filing this brief.

Dated: October 4, 2018

/s/ Eddie Woodworth  
EDDIE R. WOODWORTH, Attorney

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27 *Attorney for Plaintiff-Intervenor Duane*

28 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

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

**DECLARATION OF AMI SANGHVI IN  
SUPPORT OF PLAINTIFFS'  
OPPOSITION TO IXL'S MOTION IN  
LIMINE NO. 3 RE: NONDISCLOSED  
PRIVILEGED COMMUNICATIONS**

Pretrial Date: October 15, 2018  
Time: 10:00 Am  
Courtroom: 4, 17<sup>th</sup> Floor  
Judge: Hon. Vince Chhabria

Trial Date: October 22, 2018

1 I, Ami Sanghvi, declare as follows:

2 1. I am an attorney for the plaintiff in this action, the U.S. Equal Employment Opportunity  
3 Commission (EEOC). I am the lead attorney responsible for the litigation of the above-caption case.

4 1. Attached hereto and incorporated herein as **Exhibit 1** is a true and correct copy of  
5 EEOC'S First Set of Responses and Objections to Defendant's First Set of Requests of Documents to  
6 Plaintiff Equal Employment Opportunity Commission, dated January 29, 2018.

7 2. Attached hereto and incorporated herein as **Exhibit 2** is a true and correct copy of  
8 excerpts from the deposition transcript of A. Scott Duane, taken on March 27, 2018.

9  
10 I declare under penalty of perjury under the laws of the United States that the foregoing is  
11 true and correct and that this declaration was executed on October 3, 2018, in San Francisco,  
12 California.

13  
14 /s/ Ami Sanghvi  
15 AMI SANGHVI  
16 Senior Trial Attorney  
17 Equal Employment Opportunity Commission  
18 450 Golden Gate Avenue, 5th Fl. W., POB 36025  
19 San Francisco, CA 94102  
20 (415) 522-3071  
21  
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28

# **Exhibit 1**

1 ROBERTA L. STEELE, SBN 188198 (CA)  
2 MARCIA L. MITCHELL, SBN 18122 (WA)  
3 AMI SANGHVI, SBN 4407672 (NY)  
4 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
5 San Francisco District Office  
6 450 Golden Gate Ave., 5<sup>th</sup> Floor West  
7 P.O. Box 36025  
8 San Francisco, CA 94102  
9 Telephone No. (415) 522-3071  
10 [ami.sanghvi@eoc.gov](mailto:ami.sanghvi@eoc.gov)

11 *Attorneys for Plaintiff EEOC*

12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
15 COMMISSION,

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

16 Plaintiff,

**EEOC’S FIRST SET OF RESPONSES  
AND OBJECTIONS TO DEFENDANT’S  
FIRST SET OF REQUESTS OF  
DOCUMENTS TO PLAINTIFF EQUAL  
EMPLOYMENT OPPORTUNITY  
COMMISSION**

17 ADRIAN SCOTT DUANE,

18 Plaintiff-Intervenor,

19 vs.

20 IXL Learning, Inc.,

21 Defendant.

22 Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Equal Employment  
23 Opportunity Commission, by and through its undersigned counsel, objects and responds to  
24 Defendant IXL Learning, Inc.’s First Set of Requests for Documents. Plaintiff’s responses are based  
25 upon information currently available. Plaintiff will comply with Fed. R. Civ. P. 26(e) and  
26 supplement its discovery responses in a timely manner.  
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**GENERAL OBJECTIONS**

1. Plaintiff objects to Defendant’s requests to the extent that they purport to impose obligations beyond those imposed or permitted by the Federal Rules of Civil Procedure, the Local Rules of the Northern District of California, or applicable court orders.

2. Plaintiff objects to the requests to the extent that they seek disclosure of information protected by the attorney client privilege, the attorney work product doctrine, the governmental deliberative process privilege, or any other applicable privilege, immunity, statute, regulation, rule, or court order.

3. Plaintiff’s response to any request shall not be deemed to constitute an admission that any particular document exists, is relevant, or is admissible as evidence.

4. Plaintiff objects to the extent that the requests seek information previously produced by Plaintiff to Defendant in the context of this lawsuit as such requests are unduly burdensome and duplicative.

5. Plaintiff objects to the requests to the extent that they seek information already in the possession, custody, or control of Defendant, and to the extent they seek publicly available documents that are at least as readily available to Defendant as they are to Plaintiff.

6. Plaintiff objects to the requests to the extent that they seek the disclosure of private or confidential information.

7. Plaintiff objects to the requests to the extent that they are unlimited in temporal scope.

**REQUESTS FOR PRODUCTION OF DOCUMENTS**

**Document Request No. 1:** Produce all documents concerning any communications between you and IXL related to the allegations of the Complaint.

**RESPONSE:**

1  
2 Following a reasonable search, the EEOC has identified email communications from the pre-  
3 litigation file between investigator Malinda Tuazon and IXL counsel at EEOC\_000675 –  
4 EEOC\_000697. The EEOC also refers Defendant to the relevant, non-privileged portions of the  
5 EEOC’s investigative file previously produced on August 15, 2017, bearing Bates Nos.  
6 EEOC\_000001 – EEOC\_000203.

**Objections:**

7  
8  
9 The EEOC objects that the request is not proportional to the needs of the case because  
10 Defendant has equal access to the relevant information. Any communication between the EEOC  
11 and Defendant is necessarily already in Defendant’s position. Additionally, the EEOC objects to the  
12 extent that the request seeks disclosure of conciliation material deemed confidential pursuant to 42  
13 U.S.C. §2000e-5(b). (“[n]othing said or done during” conciliation may be “used as evidence in a  
14 subsequent proceeding without written consent of the persons concerned.”)

15  
16 **Document Request No. 2:** Produce all documents concerning any communications  
17 between you and Duane related to the allegations of the Complaint, not including any attorney-client  
18 privileged communications.

**RESPONSE:**

19  
20 Following a reasonable search, the EEOC has not identified any additional documents  
21 responsive to this request. The EEOC refers Defendant to documents in Defendant’s possession, the  
22 relevant, non-privileged portions of the EEOC’s investigative file previously produced on August  
23 15, 2017, bearing Bates Nos. EEOC\_000001 – EEOC\_000203.

**Objections:**

24  
25  
26 The request is overbroad and places no limitation on the relevant time frame. Communications  
27 between the EEOC after the issuance of the Commission’s Letter of Determination dated April 22,

1 2017 are protected by the attorney-client privilege, the attorney-work product privilege, and the  
2 common-interest privilege. Additionally, the EEOC objects to the extent that the request seeks  
3 disclosure of conciliation material deemed confidential pursuant to 42 U.S.C. §2000e-5(b).  
4 (“[n]othing said or done during” conciliation may be “used as evidence in a subsequent proceeding  
5 without written consent of the persons concerned.”)

6 **Document Request No. 3:** Produce all documents concerning any communications  
7 between IXL and Duane related to the allegations of the Complaint.  
8

9 **RESPONSE:**

10 Following a reasonable search, the EEOC produces the following email communications  
11 between IXL personnel and Duane. (EEOC\_000448; EEOC\_000453; EEOC\_000463 -  
12 EEOC\_000465; EEOC\_000468- EEOC\_000471; EEOC\_000529-37; EEOC\_000549-50;  
13 EEOC\_000597). The EEOC also refers Defendant to documents previously produced at  
14 EEOC\_000001 – EEOC\_000203.  
15

16 **Objections:**

17 This request is overbroad as it places no limitation on relevant time frame. The allegations of  
18 the Complaint refer to Mr. Duane’s employment and subsequent termination from IXL, spanning a  
19 date range of July 10, 2013 to January 8, 2015. The EEOC limited its search of materials from July  
20 10, 2013 - present. Any materials pertaining to Mr. Duane’s IXL interview process and pre-hiring  
21 communications with IXL are determined to be irrelevant. These earlier communications do not  
22 support Mr. Duane’s allegation of retaliatory termination and are not relevant to any party’s claim or  
23 defense.  
24

25 The EEOC also objects that the request is not proportional to the needs of the case to the extent  
26 that it seeks duplicative information that Defendant necessarily has in its possession, as a party to the  
27 communication.

1           **Document Request No. 4:**     Produce all documents identified or referenced in your answers  
2 to the Defendant's First Set of Interrogatories.

3           **RESPONSE:**

4           Following a reasonable search, the EEOC produces the documents produced at  
5 EEOC\_000204 – EEOC\_000723.

6           **Objections:**

7           The EEOC objects to this request to the extent that it seeks documents protected by the  
8 attorney-client privilege, the attorney-work product privilege, the common-interest privilege, and the  
9 government deliberative process privilege. The EEOC has withheld any documents that are  
10 privileged and where necessary will catalog these documents on a privilege log.<sup>1</sup> The request is  
11 overbroad in that it places no limitation on the relevant documents necessary for production and is  
12 not proportional to the needs of the case because some of the discovery sought will not assist in  
13 resolving the issues in the action and will not lead to discovery of admissible evidence. The EEOC  
14 further objects on the grounds of undue burden to the extent the request seeks duplicative documents  
15 previously produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.  
16

17           **Document Request No. 5:**     Produce all non-privileged documents that support, contradict,  
18 refer, relate, or pertain to the facts surrounding the allegations in your Complaint or to the defenses  
19 asserted by Defendant.  
20

21           **RESPONSE:**

22           Following a reasonable search, the EEOC produces the documents produced at  
23

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24 <sup>1</sup> The parties have agreed to forego the need for a privilege log detailing individual communications  
25 between: (a) IXL and attorneys and staff of Young Basile Hanlon & MacFarlane; (b) Adrian Scott  
26 Duane and attorneys and staff of Liddle & Robinson; (c) Adrian Scott Duane and David Marek of  
27 the Marek Law Firm; and (d) Adrian Scot Duane and the EEOC after the Complaint in this action  
was filed on May 24, 2017. Pursuant to a meet and confer on January 25, 2018, the parties disagree  
as to the applicable privilege between the EEOC and Adrian Scott Duane between the issuance of  
EEOC's April 22, 2016 Letter of Determination and the filing of this Complaint.

1 EEOC\_000204 – EEOC\_000723. The EEOC also refers Defendant to documents previously  
2 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

3 **Objections:**

4 The EEOC objects to this request to the extent that it is vague and unduly burdensome. This  
5 request is overbroad as it places no limitation on a relevant time frame despite the subject matter of  
6 this litigation occurring from July 10, 2013 through January 8, 2015. The EEOC limited its search to  
7 materials from July 10, 2013 to present, and using a reasonable list of search terms, custodians, and  
8 data locations. Materials that exceed the scope of that search are not proportional to the needs of the  
9 case because such discovery will not assist in resolving the issues in the action and the burden of an  
10 exhaustive search outweighs any likely benefit.  
11

12 **Document Request No. 6:** Produce all documents which constitute, reflect upon, or  
13 related to any statements from any person regarding any of the allegations within your Complaint,  
14 including drafts of such statements and any correspondence regarding such statements.  
15

16 **RESPONSE:**

17 Following a reasonable search, the EEOC produces the documents produced at  
18 EEOC\_000204 – EEOC\_000723. The EEOC also refers Defendant to documents previously  
19 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001 – IXL0779.  
20

21 **Objections:**

22 The EEOC objects to this request on grounds that it is vague and unduly burdensome.  
23 Defendant's request is unlimited in time and scope, and seeks irrelevant information. Moreover, it is  
24 unclear how this request differs in substance from Request No. 5. The request is not proportional to  
25 the needs of the case because the proposed discovery will not assist in resolving the issues in the  
26 action and the burden or expense of the proposed discovery outweighs its likely benefit.  
27

The EEOC further objects to the extent this request seeks documents protected by the attorney-

1 client privilege, the attorney-work product privilege, the common-interest privilege, and the  
2 government deliberative process privilege.

3 Finally, the request is cumulative and seeks duplicative information previously produced.

4 **Document Request No. 7:** Produce all documents evidencing any compensation Duane  
5 has received from any source since January 8, 2015.

6 **RESPONSE:**

7 Following a reasonable search, the EEOC produces the documents produced at  
8 EEOC\_000712.  
9

10 **Objections:**

11 The EEOC objects to this request to the extent that it seeks information beyond the scope  
12 permitted by Fed. R. Civ. P. 26(b). The timeframe request is overbroad because the EEOC is only  
13 seeking back pay damages for Mr. Duane for the period of January 8, 2015 through December 2015.  
14 The EEOC objects to Defendant seeking documents evidencing any compensation Mr. Duane  
15 received after January 2016 because it is not relevant to any claims or defenses at issue in this  
16 litigation.  
17

18 **Document Request No. 8:** As to each expert witness you intend to have testify at any  
19 hearing or trial of this Lawsuit, please produce:

- 20 a. Each expert witness's curriculum vitae;  
21 b. A written report giving all the finding, opinion, and basis of opinions of each expert  
22 witness;  
23 c. The complete file of each expert witness, including all matters received by such  
24 expert regarding this litigation; and  
25 d. Copies of all literature, reports, and publications relied upon by each expert witness in  
26 the formulation of his or her opinions in this matter.  
27

1 **RESPONSE:**

2 The EEOC does not possess any documents responsive to this request at this time.

3 **Objections:**

4 The EEOC objects to this request because it is unduly burdensome to comply with this  
5 premature request. The request exceeds the scope of discovery permitted by Fed. R. Civ. P.  
6 26(b)(4). The EEOC will comply with the Court's scheduling order as well as Fed. R. Civ. P. 26  
7 regarding the disclosure of expert witnesses and related documents.  
8

9 **Document Request No. 9:** Produce all documents, including medical files, related to all  
10 physicians, health care providers, mental health professionals, therapists, or any other medical  
11 practitioners who have treated or counseled Duane for mental anguish, depression, anxiety,  
12 emotional pain, suffering, inconvenience, loss of enjoyment of life, humiliation, or any other mental  
13 illness or emotional pain before, during, and after Duane's employment with IXL.

14 **RESPONSE:**

15 The EEOC objects to producing any documents responsive to this request.

16 **Objections:**

17 The EEOC objects that this request is beyond the scope of permissible discovery, overly  
18 broad, and unduly burdensome. The EEOC further objects that Defendant seeks information  
19 protected by the doctor-patient and psychotherapist-patient privilege. *See Jaffee v. Redmond*, 518  
20 U.S. 1 (1996) (statements to her physician or psychologist and doctor's records reflecting such  
21 statements are privileged unless a plaintiff places his medical or mental state at issue). The EEOC  
22 does not intend to put Mr. Duane's medical or mental state at issue and therefore objects to any  
23 attempt to seek privileged and irrelevant medical information. The EEOC further objects on grounds  
24 that the request improperly infringes on Mr. Duane's privacy and will harass and embarrass him.  
25  
26

27 **Document Request No. 10:** Produce all documents, including medical files, related to all

1 physicians, health care providers, or any other medical practitioners who have treated or counseled  
2 Duane for any and all physical symptoms before, during, and after Duane's employment with IXL.

3 **RESPONSE:**

4 The EEOC objects to producing any documents responsive to this request.

5 **Objections:**

6 The EEOC objects that this request is beyond the scope of permissible discovery, overly  
7 broad, and unduly burdensome. The EEOC further objects that Defendant seeks information  
8 protected by the doctor-patient and psychotherapist-patient privilege. *See Jaffee v. Redmond*, 518  
9 U.S. 1 (1996) (statements to her physician or psychologist and doctor's records reflecting such  
10 statements are privileged unless a plaintiff places his medical or mental state at issue). The EEOC  
11 does not intend to put Mr. Duane's medical or mental state at issue and therefore objects to any  
12 attempt to seek privileged and irrelevant medical information. The EEOC further objects on grounds  
13 that the request improperly infringes on Mr. Duane's privacy and will harass and embarrass him.

14 **Document Request No. 11:** Produce all non-privileged appointment books, calendars,  
15 diaries, journals, log books, notes, memos, emails, text messages (including but not limited to, any  
16 type of messaging via an app or Facebook postings, tweets, social media messages, or any other  
17 documents created by Duane during and after Duane's employment with IXL relating to, describing,  
18 or discussing any alleged denial of accommodation of his disability, discrimination, and/or  
19 retaliation by IXL or its employees.

20 **RESPONSE:**

21 Following a reasonable search, the EEOC produces the documents produced at  
22 EEOC\_000204 – EEOC\_000723. The EEOC also refers Defendant to documents previously  
23 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001 – IXL0779.  
24

25 **Objections:**

1 The EEOC objects that this request is vague, overbroad, and unduly burdensome. The  
2 discovery request is not proportional to the needs of the case considering the marginal importance of  
3 the materials to the claims and defenses in this litigation and the substantial cost to identify  
4 additional responsive materials balanced against the amount in controversy. The EEOC has limited  
5 its search based upon reasonable search terms, document custodians and data locations. Finally, the  
6 discovery request seeks information that infringes on Mr. Duane's privacy and will harass and  
7 embarrass him.

8  
9 **Document Request No. 12:** Produce all communication, correspondence, emails, letters,  
10 text messages (including, but not limited to, any type of messaging via an app or social media site,  
11 such as Facebook), instant messages (including but not limited to, "Gchat"), Facebook postings,  
12 tweets, any social media messages, or any notes between Duane and any third party which discuss,  
13 relate to, reflect upon, or contain information any of the allegations in the Complaint, not including  
14 any attorney-client privileged communications.

15  
16 **RESPONSE:**

17 Following a reasonable search, the EEOC produces the documents produced at  
18 EEOC\_000204 – EEOC\_000723. The EEOC also refers Defendant to documents previously  
19 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

20  
21 **Objections:**

22 The EEOC objects that this request is vague, overbroad, and unduly burdensome. The  
23 discovery request is not proportional to the needs of the case considering the marginal importance of  
24 the collecting communications with "any third party" to the claims and defenses in this litigation and  
25 the substantial cost to identify additional responsive materials balanced against the amount in  
26 controversy. The EEOC limited its search based upon reasonable search terms, document custodians  
27 and data locations. Finally, the discovery request seeks confidential information that infringes on

1 Mr. Duane's privacy and will harass and embarrass him.

2 **Document Request No. 13:** Produce all communication, correspondence, emails, letters,  
3 text messages (including, but not limited to, any type of messaging via an app or social media site,  
4 such as Facebook), instant messages (including but not limited to, "Gchat"), Facebook postings,  
5 tweets, any social media messages, or any notes between Duane and IXL or any of IXL's current or  
6 former employees related to the allegations in your Complaint.

7 **RESPONSE:**

8  
9 Following a reasonable search, the EEOC produces the documents produced at EEOC000204  
10 – EEOC\_000723. The EEOC also refers Defendant to documents previously produced by the  
11 parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

12 **Objections:**

13 The EEOC objects that this request is vague, overbroad, and unduly burdensome. The  
14 discovery request is not proportional to the needs of the case considering the marginal importance of  
15 the collecting all communications between Duane and IXL or any of IXL's current or former  
16 employees to the claims and defenses in this litigation and the substantial cost to identify additional  
17 responsive materials balanced against the amount in controversy. The request does not clarify what  
18 is specifically sought by seeking communications "related to the allegations in your Complaint."  
19 The EEOC has limited its search based upon reasonable search terms, document custodians and data  
20 locations.  
21

22 **Document Request No. 14:** Produce any and all documents that Duane has submitted to or  
23 filed with any administrative agency, including (but not limited to) any documents submitted to you,  
24 the National Labor Relations Board (the "NLRB"), and the California Departments of Fair  
25 Employment and Housing ("DFEH").  
26

27 **RESPONSE:**

1 Following a reasonable search, the EEOC produces the documents produced at  
2 EEOC\_000506-511; 000538; 000551. The EEOC also refers Defendant to documents previously  
3 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

4 **Objections:**

5 The EEOC objects that this request exceeds the scope of discovery permissible by Fed. R.  
6 Civ. P. 26(b). Information submitted to or filed with other governmental agencies, has limited to no  
7 relevance in this action and to the party's claims and defenses. The EEOC also objects that the  
8 request for documents "filed with any administrative agency" without any temporal or subject matter  
9 limitations is overbroad, unduly burdensome, and irrelevant to any party's claims or defenses. The  
10 request is not proportional to the needs of the case to the extent that it seeks information beyond that  
11 which has already been produced. As written the request covers any documents submitted to any  
12 governmental agency and for any purpose without any temporal limitation. The EEOC also objects  
13 to the extent that this request seeks documents protected by the attorney-client privilege, the  
14 attorney-work product privilege, and the common-interest privilege.

15  
16  
17 **Document Request No. 15:** Produce any and all documents that you or Duane have  
18 received from any administrative agency, including the NLRB and the DFEH.

19 **RESPONSE:**

20 Following a reasonable search, the EEOC produces the documents produced at  
21 EEOC\_000506-511; 000538; 000551; 000698 – EEOC\_000711. The EEOC also refers Defendant  
22 to documents previously produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-  
23 IXL0779.

24  
25 **Objections:**

26 The EEOC objects that this request far exceeds the scope of discovery permissible by Fed. R.  
27 Civ. P. 26(b). Documents the EEOC received from "any administrative agency" without temporal or

1 subject matter limitation has no relevance to any party's claims or defenses. Such a search of  
2 documents would be unduly burdensome and oppressive because it would include thousands and  
3 possibly millions of documents, correspondence, memoranda that the EEOC has received from any  
4 agency related to any matter in the Commission's history. The EEOC also objects to the extent that  
5 this request seeks documents protected by the attorney-client privilege, the attorney-work product  
6 privilege, the common-interest privilege, and the government deliberative privilege. Similarly, the  
7 EEOC objects to searching or producing any documents Mr. Duane received from any  
8 administrative agency without a temporal limitation as oppressive, unduly burdensome, cumulative,  
9 duplicative, and irrelevant to any party's claims or defenses.  
10

11 **Document Request No. 16:** Produce any and all documents that Duane sent to or received  
12 from any person or entity regarding his employment with IXL, including, but not limited to, any  
13 such documents sent to IXL or to any of IXL's employees.

14 **RESPONSE:**

15  
16 Following a reasonable search, the EEOC produces the documents produced at  
17 EEOC\_000204 – EEOC\_000723. The EEOC also refers Defendant to documents previously  
18 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

19 **Objections:**

20 The EEOC objects to this request to the extent that it overbroad, lacks a temporal scope, and  
21 seeks information beyond the scope of discovery permitted by Fed. R. Civ. P. 26(b). The request is  
22 not proportional to the needs of the case considering (1) the marginal importance of the materials to  
23 the claims and defenses in this litigation and (2) the substantial cost to identify additional responsive  
24 materials balanced against the minimal, if any, benefit of such materials. Materials received from or  
25 sent to "any person or entity" generally regarding his "employment with IXL" is overbroad and  
26 seeks information that is not relevant to any party's claim or defense. The request is also not  
27

1 proportional to the needs of the case in that it seeks information to which Defendant already has  
2 access. The EEOC limited its search based upon reasonable search terms, document custodians and  
3 data locations.

4 Finally, the EEOC also objects to the extent that this request seeks documents protected by the  
5 attorney-client privilege, the attorney-work product privilege, and the common-interest privilege.

6 **Document Request No. 17:** Produce any and all non-privileged documents in your  
7 possession which mention IXL or any of IXL's employees, including any posts on any websites  
8 and/or social media sites.

9  
10 **RESPONSE:**

11 Following a reasonable search, the EEOC produces the documents produced at  
12 EEOC\_000204 – EEOC000723. The EEOC also refers Defendant to documents previously  
13 produced by the parties at EEOC\_000001 – EEOC\_000203 and IXL0001-IXL0779.

14 **Objections:**

15 The EEOC objects to this request to the extent that it overbroad, lacks a temporal scope, and  
16 seeks information beyond the scope of discovery permitted by Fed. R. Civ. P. 26(b). The request is  
17 not proportional to the needs of the case considering (1) the marginal importance of the materials to  
18 the claims and defenses in this litigation and (2) the substantial cost to identify additional responsive  
19 materials balanced against the minimal, if any, benefit of such materials. Materials that merely  
20 mention IXL or any of IXL's employees are not necessarily relevant to any party's claim or defense.  
21 The EEOC limited its search based upon reasonable search terms, document custodians and data  
22 locations.  
23

24  
25 Finally, the EEOC also objects to the extent that this request seeks documents protected by the  
26 attorney-client privilege, the attorney-work product privilege, and the common-interest privilege.

27 **Document Request No. 18:** Produce any and all non-privileged documents in your

1 possession which mention IXL or any of IXL's employees, including any posts on any websites  
2 and/or social media sites.

3 **RESPONSE:**

4 The EEOC objects to the extent that this request is entirely duplicative of Request No. 17.  
5 Plaintiff refers Defendants to its responses and objections to Request No. 17.

6 **Document Request No. 19:** Produce any and all non-privileged documents that support,  
7 contradict, or may be utilized to calculate your or Duane's alleged damages in this case.

8 **RESPONSE:**

9  
10 Following a reasonable search, the EEOC produces the documents produced at  
11 EEOC\_000713.

12 **Objections:**

13 The EEOC objects on grounds that the request is vague and ambiguous in that the type of  
14 damages referenced is unclear. The request is not proportional to the needs of the case because some  
15 of the requested information is in Defendant's possession, custody, and control. The EEOC also  
16 objects to the extent that this request seeks documents protected by the attorney-client privilege, the  
17 attorney-work product privilege, the common-interest, and government deliberative privilege.  
18

19 **Document Request No. 20:** Produce any and all non-privileged documents that support,  
20 contradict, or may be utilized to determine Duane's nonpecuniary losses, including emotional pain,  
21 suffering, inconvenience, loss of enjoyment of life, and humiliation.

22 **RESPONSE:**

23 The EEOC does not possess any documents responsive to this request.

24 **Objections:**

25 The EEOC objects that this request is premature and speculative. The EEOC also objects to  
26 the extent that this request seeks documents protected by the attorney-client privilege, the attorney-  
27

1 work product privilege, the common-interest, and government deliberative privilege.

2 **Document Request No. 21:** Produce any and all non-privileged documents showing that  
3 you or Duane mitigated (or attempted to mitigate) any of your or his alleged damages in this case.

4 **RESPONSE:**

5 Following a reasonable search, the EEOC produces the documents produced at  
6 EEOC\_000397 – 000416; 000418 – 000447; 000449 – 000452; 000454 – 000462; 000472 – 000487;  
7 000494 – 000497; 000512 – 000528; 000539-000548; 000552-000596; 000598 – 000610; 000613 –  
8 000674.

9  
10 **Objections:**

11 The EEOC objects to the request on grounds that it seeks discovery beyond the scope  
12 permitted under Fed. R. Civ. P. 26(b) because the EEOC is under no obligation to mitigate damages.  
13 The discovery request is not proportional to the needs of the case considering the marginal  
14 importance of the collecting all documents showing mitigation and the substantial cost to identify  
15 additional responsive materials balanced against the amount in controversy. The EEOC limited its  
16 search based upon the relevant date range of January 8, 2015 through December 2015, reasonable  
17 search terms, document custodians and data locations.  
18

19 **Document Request No. 22:** Produce Duane’s state and federal income tax returns as filed  
20 for the years 2014, 2015, and 2016, including any amendments thereto.

21 **RESPONSE:**

22 Following a reasonable search, the EEOC produces the documents produced at  
23 EEOC\_000713.  
24

25 **Objections:**

26 The EEOC objects that this discovery request is overbroad and not relevant to claims or  
27 defenses at issue in this lawsuit. Mr. Duane’s claim for lost wages terminates when he secured

1 alternative employment that began in January 2016. As a result, Mr. Duane's 2016 wage  
2 information and tax returns are entirely irrelevant. Similarly, IXL fired Mr. Duane in January 2015,  
3 rendering his 2014 wage information and tax returns similarly irrelevant.

4 The EEOC objects because this request seeks information that can be obtained from some  
5 other source that is more convenient, less burdensome, and less intrusive. Mr. Duane's 2015 income  
6 information is available through the W-2 form provided. Courts are rightfully hesitant to demand  
7 disclosure of federal income tax returns (and their attachments) in litigation that does not waive the  
8 statutory policy against disclosure. *See Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C. 1977) (citing  
9 26 U.S.C. §§ 6103, 7213(a) (statutes protecting tax returns from unauthorized disclosure). Indeed,  
10 public policy favors nondisclosure of income tax returns since taxpayers will likely be discouraged  
11 from reporting all of their taxable income if they are not assured that all of their personal information  
12 contained in the tax return will be kept confidential. *Id.*; *see also Terwilliger v. York Int'l Corp.*, 176  
13 F.R.D. 214, 216 (W.D. Va. 1997). Additionally, the entire tax return is not relevant because lost  
14 wages are tied only to earned income. Any unearned income, if any, is irrelevant to any party's  
15 claims or defenses. Any calculation of total taxes owed is equally irrelevant to any party's claims or  
16 defenses.

17  
18  
19 **Document Request No. 23:** Produce all documents relating to Duane's efforts to obtain  
20 employment following his employment with IXL, including, but not limited to, all resumes used by  
21 him, all correspondence between him and prospective employers, all documents submitted by Duane  
22 to prospective employers or persons whose assistance Duane sought in connection with his efforts to  
23 obtain employment, and all documents provided to Duane by prospective employers.

24  
25 **RESPONSE:**

26 Following a reasonable search, the EEOC produces the documents produced at  
27 EEOC\_000397 – 000416; 000418 – 000447; 000449 – 000452; 000454 – 000462; 000472 – 000487;



**CERTIFICATE OF SERVICE**

I hereby certify that I am serving EEOC's Responses and Objections to Defendant's First Set of Requests for Documents on January 29, 2018 to Defendant, IXL Learning, Inc. by electronic mail to the following attorneys of record:

Jeffrey Wilson  
[wilson@youngbasile.com](mailto:wilson@youngbasile.com)

Natasha Menezes  
[menezes@youngbasile.com](mailto:menezes@youngbasile.com)

DATED: January 29, 2018

BY: /s/ Ami Sanghvi  
AMI SANGHVI, Senior Trial Attorney  
Equal Employment Opportunity Commission  
San Francisco District Office  
450 Golden Gate Avenue, 5<sup>th</sup> Fl. W., POB  
36025  
San Francisco, CA 94102

*Attorney for Plaintiff*

# **Exhibit 2**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

---oOo---

U.S. EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No. 3:17-cv-02979-VC
and	)	
	)	
ADRIAN SCOTT DUANE,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
IXL LEARNING, INC.,	)	
	)	
Defendant.	)	
_____	)	

DEPOSITION OF  
ADRIAN SCOTT CAMPE DUANE

March 27, 2018

10:05 a.m.

44 Montgomery Street, Suite 1100

San Francisco, California

Sarah J. Bingham, CSR #13720

1           A.    Well, I was pretty sure that he didn't know  
2 very much at all about the ADA based on my interactions  
3 with him, HR at the company.  And so it concerned me  
4 that I was asking for something and he was saying no to  
5 it without that basis of knowledge.

6           Q.    And you don't believe him asking you "Is there  
7 anything we can do to accommodate your situation so that  
8 you can work in the office?" to be a request for more  
9 information to consider an alternative accommodation?

10          A.    I did not believe that that was his  
11 motivation --

12          Q.    Okay.

13          A.    -- no.

14          Q.    Did I cut you off there?  If I cut you off, go  
15 ahead and finish.

16          A.    I did not believe that he -- he was -- I  
17 didn't believe he was aware of what the company's  
18 responsibilities were around disability for sure, and so  
19 I -- in my follow up e-mail, that's why I informed him  
20 of what I saw as their responsibilities to the best of  
21 my knowledge.

22          Q.    Did your employment attorney in December of 2014  
23 tell you whether or not David's comment about accommodating  
24 your situation so that you could work in the office might  
25 be a reasonable accommodation?

1 MS. SANGHVI: Objection on the basis  
2 attorney-client privilege and I would instruct the  
3 witness not to answer.

4 MR. WILSON: Well, he is disclosing what his  
5 attorney is advising him in this e-mail. Any privilege  
6 is waived.

7 MS. SANGHVI: We -- we do not take that  
8 position. Defendants are aware that we don't take that  
9 position.

10 MR. WILSON: Defendants are not aware of that.  
11 And I'm asking about what his attorney told him, which  
12 he describes about reasonable accommodation. I'm asking  
13 if he talked about what David offered as a different  
14 accommodation. How is that -- how is that privileged?

15 MS. SANGHVI: It's a -- you're asking about a  
16 privileged communication with his attorney at the time  
17 and therefore he's not going to answer that. The  
18 document says what it says, I don't dispute that, but  
19 asking anything further beyond the document is  
20 encroaching upon attorney-client privileged  
21 communications.

22 BY MR. WILSON:

23 Q. Mr. Duane, did you disclose to any other  
24 individuals in this time frame of December 2014 and  
25 January 2015 what your attorneys told you about IXL

1 accommodations and whether or not David was violating your  
2 rights?

3 MS. SANGHVI: Objection. Vague, compound, and  
4 form.

5 BY MR. WILSON:

6 Q. Go ahead.

7 A. Not that I remember, no.

8 Q. Do you remember in writing describing exactly  
9 what your attorneys told you to Nemo Curiel?

10 A. I -- I might have actually done that, yeah.  
11 I'm not sure.

12 Q. And at that point in time, in talking to Nemo  
13 about what your lawyers told you, in talking to Nina Wu  
14 about what your lawyers told you, did you understand that  
15 you were disclosing privileged communications?

16 MS. SANGHVI: Objection.

17 BY MR. WILSON:

18 Q. Go ahead.

19 MS. SANGHVI: Calls for legal speculation.

20 If you have a document you want to put in  
21 front of him, you're more than welcome to do that.

22 BY MR. WILSON:

23 Q. Can you answer the question, please?

24 A. So you're asking about the conversations that  
25 I had with them? I -- I -- I don't really know to be

C E R T I F I C A T I O N

I, SARAH J. BINGHAM, a Certified Shorthand Reporter, within and for the State of California, do hereby certify:

That ADRIAN SCOTT CAMPE DUANE, the witness whose examination is hereinbefore set forth, was first duly sworn by me and that this transcript of said testimony is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of March, 2018.

Sarah J. Bingham  
CSR #13720

