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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

**PLAINTIFFS' MOTION IN LIMINE NO. 2
RE: EXCLUSION OF EVIDENCE
PRODUCED LATE OR NOT AT ALL**

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

Trial Date: October 22, 2018

1 Plaintiff Equal Employment Opportunity Commission (EEOC) and Plaintiff-Intervenor
2 Adrian Scott Duane (Duane) hereby file this Motion *in Limine* No. 2 to exclude from the jury all
3 testimony, evidence, argument, questioning, and representations of evidence that Defendant could
4 have but failed to produce before discovery closed on April 13, 2018. Pursuant to Fed. R. Civ. P.
5 37(c)(1), Plaintiffs seek to preclude Defendant from relying on the following categories of
6 information: (1) exhibits relating to the use or purported misuse of sick leave by Duane's former
7 colleague, Nemo Curiel; (2) exhibits relating to Curiel's performance; and (3) suggestion or
8 argument that Duane was given more time off than anyone in the company.¹

9 **I. RELEVANT FACTS**

10 This Court ordered the parties to complete all discovery by April 13, 2018. (ECF No. 27,
11 Sept. 20, 2017 Order). The EEOC and IXL first exchanged initial disclosures pursuant to Fed. R.
12 Civ. P. 26(a) on August 15, 2017. The EEOC twice supplemented its disclosures, with a final
13 supplement dated April 13, 2018. IXL's last supplement to its Rule 26(a) disclosures is dated
14 February 21, 2018. The EEOC also served three sets of Requests for Documents, including the
15 following relevant, here:

- 16 - "All documents concerning agreements permitting employees to work remotely" for the
17 "relevant time period," which the EEOC defined as July 1, 2013 to January 8, 2015.
18 [EEOC's Request for Production No. 24, and Defendant's complete response (ECF No.
19 69-12 at pp. 23-24)]
20 - "All documents concerning Mr. Duane's employment dates, attendance, vacation, and/or
21 sick time records." [Sanghvi Decl., Exh. 1 (IXL Resp to EEOC's 3rd RFP)]

22 Defendant did not produce any documents in response to EEOC's Request for Production No. 24
23 before April 13, 2018, *e.g.*, IXL withheld all documents related to Curiel working remotely and did
24 not produce remote work arrangements for anyone other than Duane. Additionally, despite
25 including Curiel on its Rule 26(a)(1) disclosures, IXL did not supplement its initial disclosures to
26

27 _____
28 ¹ At the Oral argument on Summary Judgment, IXL counsel represented to this Court, without
citation, "In fact, it's undisputed, he was given more time off than anyone in the company ... during
the time that he was there." [Audio transcript at 6:40 – 6:48]

1 identify documents related to Curiel's use of sick leave or his performance as a category of
2 information that it may use to support its claims or defenses. Similarly, Defendant did not produce
3 any documents listing Duane's use of sick leave in Response to Request No. 49: it produced one
4 redacted ADP report which only reflects Duane's time off for vacation. [Sanghvi Decl., Exh. 2
5 (ADP Benefits Report) at IXL-3784.]

6 In late March 2018, the parties filed a discovery dispute involving *inter alia*, a document
7 subpoena to Curiel. [ECF No. 55.] On April 6, 2018, during the pendency of this dispute, IXL
8 subpoenaed Curiel for testimony. In light of the fast approaching close of discovery on April 13,
9 2018, Plaintiffs stipulated to extend fact discovery from April 13, 2018 to April 17, 2018 for the
10 narrow purpose of allowing Defendant to depose Curiel. [ECF No. 57.] Plaintiffs did not agree to
11 extend the deadline for any other discovery.

12 On April 16, 2018 at 9:16 pm PST, after the close of discovery, defense counsel produced 42
13 records, Bates numbered IXL-3790-3844 without any explanation for the untimely production. The
14 documents consist of emails and instant messages about Curiel's use of sick leave from Defendant's
15 internal network during the period November 2013 to May 2014, and a Performance Improvement
16 Plan for Curiel discussing frequent and sometimes unanticipated absences from work. [Sanghvi
17 Decl., Exh. 3 (Summary Chart).] Defense counsel used twelve of these previously withheld
18 documents at Curiel's deposition the next morning,² including a February 21, 2014 instant message
19 communication between Duane and Karen Penner, IXL Recruiting Director, about Curiel working
20 from home. [Sanghvi Decl., Exh. 4 (Duane/Penner gchat) at IXL-3807-8, Dep. Ex. 223.]

21 **II. ARGUMENT**

22 **Under Fed R. Civ. P. 37(c)(1), Defendant should be precluded from relying on** 23 **previously withheld and subsequently untimely discovery.**

24 Rule 26(e) requires each party to supplement or correct a prior disclosure or response "in a
25 timely manner if the party learns that in some material respect the disclosure or response is

26 ² To minimize disruption during opposing counsel's questioning, EEOC Counsel Ami Sanghvi
27 placed a standing objection on the record to the use of any documents in the Bates range IXL-3790-
28 IXL-3844 as late-produced discovery. (Declaration of Ami Sanghvi in Support of Plaintiffs' Motion
in Limine No. 2, (Sanghvi Decl., at ¶ 1, Exh. 5 (Excerpts from the Deposition of Nemo Curiel at 22:
5-7).

1 incomplete or incorrect, and if the additional or corrective information has not otherwise been made
2 known to the other parties during the discovery process” In addition, Rule 37 (c)(1) provides,
3 in part, “[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not
4 allowed to use that information . . . at trial, unless the failure was substantially justified or is
5 harmless.” According to the Ninth Circuit, a trial court is not required “to make a finding of
6 willfulness or bad faith” by the withholding party: Rule 37 is a “self-executing, automatic sanction to
7 provide a strong inducement for disclosure of material.” *Hoffman v. Constr. Prot. Sys.*, 541 F.3d
8 1175, (9th Cir. 2008) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th
9 Cir. 2001)).

10 Here, Defendant’s failure to disclose the documents produced on the eve of Curiel’s
11 deposition was neither substantially justified nor harmless. IXL has known for years that Duane’s
12 impression of the workplace included Curiel’s experiences with sick leave at IXL. [*See e.g.*, EEOC
13 Charge, ECF No. 69-1 at ¶ 50, p. 12-13.] Indeed, IXL identified Curiel as a person likely to have
14 discoverable information. Yet, Defendant did not seek to depose Curiel until the final two weeks of
15 discovery. Even if Defendant argues that Duane’s March 27, 2018 deposition was its first indication
16 of the need to depose Curiel, Defendant still had nearly three weeks to supplement its discovery
17 responses before the deadline. IXL inexplicably chose not to do so. Moreover, Defendant failed to
18 produce discovery related to Curiel’s use of sick leave even after the parties’ April 6, 2018
19 stipulation to extend discovery for Curiel’s deposition. Finally, Defendant did not have any
20 justification for withholding internal records, exclusively in its possession, until the eve of Curiel’s
21 deposition, when they were clearly responsive to Plaintiff’s discovery requests and/or covered by
22 Rule 26(a). These factors support exclusion of IXL_3790-3844 from the trial. Defendant cannot
23 carry its burden under Rule 37(c)(1) to show substantial justification for its failure to timely
24 supplement its discovery responses and disclosures.

25 Furthermore, the untimely production of documents responsive to EEOC Request for
26 Production No. 24 prevented Plaintiffs from appropriately preparing Curiel and from using the
27 exhibits during other depositions. In this regard, Plaintiffs have been prejudiced by Defendant’s late
28 production of documents by losing the opportunity to question Karen Penner and other relevant

1 witnesses on the contents of the communications. Defendant's failure to disclose was not harmless
2 and the documents should be excluded.

3 In addition, since Defendant did not disclose any information about Duane's sick leave
4 usage, it should be prevented from arguing or suggesting that Duane used more sick leave than any
5 other employee. Defendant may be relying on documents which it withheld to make the
6 comparison. Regardless, Plaintiffs are prejudiced by not having access to this data.

7 **III. CONCLUSION**

8 Therefore, Plaintiffs respectfully requests the following order: "Defendant shall be precluded
9 from offering, referring to, or eliciting any testimony, evidence, argument, questioning, and
10 representations of evidence that relate to IXL-3790-3844, documents that were responsive to
11 Plaintiff's discovery requests but which Defendant did not timely produce while discovery was still
12 open pursuant to Fed. R. Civ. P. 37(c)(1)." The EEOC further requests that the Court instruct
13 Defendant's counsel to instruct all witnesses of this preclusion of evidence.

14 Respectfully submitted,

15
16 Dated: September 26, 2018

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

17 By: /s/ Ami Sanghvi
18 AMI SANGHVI, Senior Trial Attorney
Attorney for Plaintiff EEOC

19 Dated: September 26, 2018

THE MAREK LAW FIRM

20 By: /s/ David Marek
21 DAVID MAREK
Attorney for Plaintiff-Intervenor Duane

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

23 I, Ami Sanghvi, am the ECF User whose ID and password are being used to file Motion in
24 limine No. 2. In compliance with Local Rule 5-1(i)(3), I hereby attest that David Marek concurred
25 in this filing

26 Dated: September 26, 2018

/s/ Ami Sanghvi
27 AMI SANGHVI, Senior Trial Attorney

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Attorney for Plaintiff-Intervenor Duane

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 U.S. EQUAL EMPLOYMENT
17 OPPORTUNITY COMMISSION,

18 Plaintiff,

19 and

20 ADRIAN SCOTT DUANE,

21 Plaintiff Intervenor,

22 vs.

23 IXL Learning, Inc.,

24 Defendant.

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

**DECLARATION OF AMI SANGHVI IN
SUPPORT OF PLAINTIFFS' MOTION IN
LIMINE NO. 2 RE:**

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

Trial Date: October 22, 2018

25
26 I, Ami Sanghvi, declare as follows:

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

Exhibit 1

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IXL Learning, Inc.

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

**DEFENDANT’S RESPONSE TO
PLAINTIFF’S THIRD SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

1 Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendant IXL Learning, Inc.
2 (“Defendant” or “IXL”), by and through its undersigned counsel, hereby responds to Plaintiff U.S. Equal
3 Employment Opportunity Commission’s (“EEOC”) First Set of Requests for Production of Documents as
4 follows:

5 **GENERAL OBJECTIONS**

6 1. Defendant objects to Plaintiff’s definition of “Defendant or IXL” and expressly responds
7 to the Requests subject to said objection. The definition of “Defendant or IXL” includes “anyone acting
8 on its behalf,” without regard to Defendant’s knowledge of said third party actions. Defendant cannot
9 respond to such Requests without objection because the definition incorrectly assumes that Defendant has
10 knowledge of and/or control over this third-party activity or information.

11 2. Defendant objects to Plaintiff’s definitions of “DOCUMENT,” “ESI,” and
12 “COMMUNICATION” to the extent that the definitions purport to impose obligations greater than those
13 set forth in the Federal Rules of Civil Procedure or that the definitions call for documents, ESI, and
14 communications protected from disclosure by the attorney-client privilege, attorney work product
15 privilege, or any other applicable privilege.

16 3. Defendant objects to the Requests to the extent they are not permitted under the Federal
17 Rules of Civil Procedure. Without waiving this objection, Defendant agrees to respond to these Requests
18 pursuant to Fed. R. Civ. P. 34 in order to facilitate discovery in this civil action.

19 4. Defendant objects to the extent that the Requests seek information immune from disclosure
20 under the attorney-client privilege, attorney work product doctrine, or any other applicable privilege or
21 doctrine.

22 5. Defendant further objects to the Requests to the extent that they are premature, overly
23 broad, unduly burdensome, would require undue expense to answer, or are beyond the scope of
24 permissible discovery.

25 6. Defendant’s responses to the Requests are without a waiver of, and with the expressed
26 reservation of:

- 27 a. All objections as to competency, relevancy, materiality, and admissibility of any
28 and all information contained in said responses; and

1 b. The right to object to the use of such information on any ground in any further
2 proceeding in this action (including trial of this action) or any other action.

3 7. Defendant further objects to the Requests to the extent they are vague, ambiguous, and/or
4 indefinite.

5 8. Defendant further objects to the Requests to the extent they seek confidential or trade secret
6 information before the entry of a protective order governing disclosure of same.

7 9. Defendant further objects to the Requests to the extent that any such Request, or any
8 definition or other introductory material associated with such Request, purports to impose a greater duty
9 of supplementation than that required by law.

10 **REQUESTS FOR PRODUCTION OF DOCUMENTS**

11 39. All records or documents concerning Mr. Duane’s post-employment activities and job
12 search from January 8, 2015 to present.

13 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
14 burdensome, and disproportional to the needs of this case. This Request is not sufficiently confined by
15 any temporal limitations and thus seeks information that has no relevance to the controversies at issue in
16 this case, especially when Mr. Duane allegedly found employment on or around January 2016. Defendant
17 further objects on the basis that this Request is not reasonably calculated to the discovery of admissible
18 evidence.

19 Defendant further objects on the basis that this Request is vague and ambiguous as to the meaning
20 of the terms “activities” and “job search,” and Defendant will not speculate at its peril.

21 Defendant objects that the Request is not proportional to the needs of the case, considering the
22 importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to
23 relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and
24 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks
25 any and all documents that relate to, refer to, or allude to Mr. Duane’s post-employment activities and job
26 search, however those terms are defined, from January 8, 2015 to the present, regardless of whether
27 Defendant was aware of or had knowledge of these activities or job searches. Searching for all potentially
28 responsive documents would be burdensome upon Defendant as it would impose severe financial hardship

1 and require tremendous amounts of labor to procure and review all potentially responsive information.
2 This heavy burden is disproportionate to Plaintiff's needs in this case. Any burden and expense of any
3 Request not directed to information specifically related to Plaintiff or Duane outweighs its likely benefit.

4 Defendant further objects to this Request to the extent that it calls for the production of documents
5 that are equally accessible to or in the possession of Plaintiff and/or Duane.

6 IXL is not aware of any responsive documents and thus no documents will be produced.

7 40. All records or documents concerning Mr. Duane's damages or loss of income since January
8 8, 2015 to present.

9 **RESPONSE:** Please see Response to Request No. 39.

10 41. All documents concerning IXL's job evaluation system(s) associated with Product
11 Analysts or Curriculum Designers from July 2013 to January 1, 2016.

12 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
13 burdensome, and disproportional to the needs of the case. Defendant objects on the basis that this Request
14 is not reasonably calculated to the discovery of admissible evidence and seeks information that has no
15 relevance to the controversies at issue in this case.

16 Defendant further objects that the Request is not proportional to the needs of the case, considering
17 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
18 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
19 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
20 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
21 to a "job evaluation system(s)" for all Product Analysts or Curriculum Designers since July 2013.
22 Producing all documents would be burdensome upon Defendant as it would impose severe financial
23 hardship and require tremendous amounts of labor to procure and review all potentially responsive
24 information. This heavy burden is disproportionate to Plaintiff's needs in this case in which Plaintiff
25 alleges retaliation based on a post made on Glassdoor.com by Duane, who worked for IXL between July
26 2013 and January 2015. Any burden and expense of any Request not directed to information specifically
27 related to Plaintiff or Duane outweighs its likely benefit.

1 Defendant further objects to this Request on the basis that the Request is vague and ambiguous as
2 to the breadth of the phrase “job evaluation system,” and Defendant will not speculate at its peril.

3 Defendant objects to this Request to the extent that this Request seeks the disclosure of private
4 information about third party individuals. Defendant is unable to disclose this private information
5 concerning third parties as it is protected from disclosure by fundamental privacy principles, privileges,
6 and laws, including, but not limited to, the First Amendment of the United States Constitution and Article
7 1 of the California Constitution.

8 Defendant objects to the extent that this Request seeks confidential trade secret and proprietary
9 business information. Defendant objects to this Request to the extent it seeks the production of information
10 protected by the attorney-client privilege, the attorney work product doctrine, and any other applicable
11 privilege or doctrine.

12 Defendant further objects to this Request to the extent it seeks documents previously requested
13 and produced. Defendant objects on the basis that this Request is needlessly duplicative in that it seeks
14 documents produced in previous litigations and/or administrative proceedings, including the proceeding
15 with the National Labor Relations Board (NLRB).

16 Please see documents previously produced. No additional documents will be produced.

17 42. All documents or payroll records concerning compensation levels for all IXL Product
18 Analysts or Curriculum Designers since July 2013. For each Product Analyst or Curriculum Designer,
19 provide documents demonstrating their base salary as well as any bonus compensation, the amount of any
20 salary increases, and the date any salary increases went into effect.

21 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
22 burdensome, and disproportional to the needs of the case. This Request is not sufficiently confined by any
23 temporal limitations and thus seeks information that has no relevance to the controversies at issue in this
24 case. Defendant objects on the basis that this Request is not reasonably calculated to the discovery of
25 admissible evidence.

26 Defendant further objects that the Request is not proportional to the needs of the case, considering
27 the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access
28 to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and

1 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
2 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
3 to compensation for all Product Analysts or Curriculum Designers since July 2013, regardless of the
4 employee's performance evaluations, the employee's responsibilities, or the length of time the employee
5 has worked at IXL. Producing all documents would be burdensome upon Defendant as it would impose
6 severe financial hardship and require tremendous amounts of labor to procure and review all potentially
7 responsive information. This heavy burden is disproportionate to Plaintiff's needs in this case in which
8 Plaintiff alleges retaliation based on a post made on Glassdoor.com by Duane, who worked for IXL
9 between July 2013 and January 2015. Any burden and expense of any Request not directed to information
10 specifically related to Plaintiff or Duane outweighs its likely benefit.

11 Defendant further objects to this Request on the basis that the Request is vague and ambiguous as
12 to the breadth of the phrase "compensation levels," and Defendant will not speculate at its peril.

13 Defendant objects to this Request to the extent that this Request seeks the disclosure of private
14 information about third party individuals. Defendant is unable to disclose this private information
15 concerning third parties as it is protected from disclosure by fundamental privacy principles, privileges,
16 and laws, including, but not limited to, the First Amendment of the United States Constitution and Article
17 1 of the California Constitution.

18 Defendant objects to the extent that this Request seeks confidential trade secret and proprietary
19 business information. Defendant further objects to this Request to the extent it seeks the production of
20 information protected by the attorney-client privilege, the attorney work product doctrine, and any other
21 applicable privilege or doctrine.

22 No documents will be produced.

23 43. All performance evaluations and salary recommendations for IXL Product Analysts or
24 Curriculum Designers from July 2013 to January 1, 2016.

25 **RESPONSE:** Please see Response to Request No. 42.

26 44. All plan documents and summary descriptions for all employee benefits available to
27 Product Analysts or Curriculum Designers.

28

1 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
2 burdensome, and disproportional to the needs of the case. This Request is not sufficiently confined by any
3 temporal limitations and thus seeks information that has no relevance to the controversies at issue in this
4 case. Defendant objects on the basis that this Request is not reasonably calculated to the discovery of
5 admissible evidence.

6 Defendant further objects that the Request is not proportional to the needs of the case, considering
7 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
8 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
9 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
10 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
11 to employee benefits for all Product Analysts or Curriculum Designers, regardless of when the employee
12 worked for IXL. Producing all documents would be burdensome upon Defendant as it would impose
13 severe financial hardship and require tremendous amounts of labor to procure and review all potentially
14 responsive information for a company founded twenty years ago. This heavy burden is disproportionate
15 to Plaintiff's needs in this case in which Plaintiff alleges retaliation based on a post made on
16 Glassdoor.com by Duane, who worked for IXL between July 2013 and January 2015. Any burden and
17 expense of any Request not directed to information specifically related to Plaintiff or Duane outweighs its
18 likely benefit.

19 Defendant further objects to this Request to the extent it seeks documents previously requested
20 and produced, including, but not limited to, in response to Plaintiff's Rule 30(b)(6) Deposition Notice.
21 Specifically, Defendant objects on the basis that this Request is needlessly duplicative in that it seeks
22 documents produced in previous litigations and/or administrative proceedings, including the proceeding
23 with the National Labor Relations Board (NLRB). Defendant objects to the extent that this Request seeks
24 confidential trade secret and proprietary business information. Defendant objects to this Request to the
25 extent it seeks the production of information protected by the attorney-client privilege, the attorney work
26 product doctrine, and any other applicable privilege or doctrine.

27 Please see documents previously produced and produced herein as they relate to Duane. No
28 additional documents will be produced.

1 45. All documents concerning IXL's medical plan/insurance policy/PPO or HMO descriptions
2 and any information provided to participants from July 2013 to January 1, 2016.

3 **RESPONSE:** Please see Response to No. 44.

4 46. Any documents concerning IXL's stock option agreements or plans with Mr. Duane,
5 including option grants and records of stock price. Documents should reflect the strike price, conditions,
6 vesting schedule, duration, termination date and/or market price of the stock.

7 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
8 burdensome, and disproportional to the needs of the case. Defendant objects on the basis that this Request
9 is not reasonably calculated to the discovery of admissible evidence and seeks information that has no
10 relevance to the controversies at issue in this case.

11 Defendant further objects that the Request is not proportional to the needs of the case, considering
12 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
13 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
14 that the burden and expense of the proposed discovery outweighs its likely benefit.

15 Defendant objects to the extent that this Request seeks confidential trade secret and proprietary
16 business information. Defendant objects to this Request to the extent it seeks the production of information
17 protected by the attorney-client privilege, the attorney work product doctrine, and any other applicable
18 privilege or doctrine.

19 Defendant further objects to this Request to the extent it seeks documents previously requested
20 and produced. Defendant objects on the basis that this Request is needlessly duplicative in that it seeks
21 documents produced in previous litigations and/or administrative proceedings, including the proceeding
22 with the National Labor Relations Board (NLRB). Defendant further objects to this Request to the extent
23 that it calls for the production of documents that are equally accessible to or in the possession of Plaintiff
24 and/or Duane.

25 IXL has performed a reasonable and proportional search for relevant documents. Please see
26 documents produced herein.

27 47. All documents concerning IXL's provision of life insurance, including policies, summary
28 plan descriptions, and records showing Mr. Duane's benefits as of January 8, 2015.

1 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
2 burdensome, and disproportional to the needs of the case. Defendant objects on the basis that this Request
3 is not reasonably calculated to the discovery of admissible evidence and seeks information that has no
4 relevance to the controversies at issue in this case.

5 Defendant further objects to this Request on the basis that the Request is vague and ambiguous as
6 to whether information related solely to Mr. Duane's life insurance (including policies, summary plan
7 descriptions, and records related to the life insurance) is sought or whether information related to Mr.
8 Duane's life insurance and general benefits are sought, and Defendant will not speculate at its peril.

9 Defendant further objects that the Request is not proportional to the needs of the case, considering
10 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
11 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
12 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
13 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
14 to life insurance benefits and/or general benefits. Producing all such documents would be burdensome
15 upon Defendant, and this heavy burden is disproportionate to Plaintiff's needs in this case in which
16 Plaintiff alleges retaliation based on a post made on Glassdoor.com by Duane. Any burden and expense
17 of any Request not directed to information specifically related to Plaintiff or Duane outweighs its likely
18 benefit.

19 Defendant further objects to this Request to the extent it seeks documents previously requested
20 and produced. Defendant objects on the basis that this Request is needlessly duplicative in that it seeks
21 documents produced in previous litigations and/or administrative proceedings, including the proceeding
22 with the National Labor Relations Board (NLRB). Defendant further objects to this Request to the extent
23 that it calls for the production of documents that are equally accessible to or in the possession of Plaintiff
24 and/or Duane.

25 Defendant objects to the extent that this Request seeks confidential trade secret and proprietary
26 business information. Defendant objects to this Request to the extent it seeks the production of information
27 protected by the attorney-client privilege, the attorney work product doctrine, and any other applicable
28 privilege or doctrine.

1 IXL has performed a reasonable and proportional search for relevant documents. Please see
2 documents produced herein.

3 48. All documents concerning IXL's vacation and personal time policies.

4 **RESPONSE:** Defendant objects to this Request on the basis that it is overbroad, oppressive, unduly
5 burdensome, and disproportional to the needs of the case. This Request is not sufficiently confined by any
6 temporal limitations and thus seeks information that has no relevance to the controversies at issue in this
7 case. Defendant objects on the basis that this Request is not reasonably calculated to the discovery of
8 admissible evidence.

9 Defendant further objects that the Request is not proportional to the needs of the case, considering
10 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
11 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
12 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
13 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
14 to vacation or personal time policies. Producing all documents would be burdensome upon Defendant as
15 it would impose severe financial hardship and require tremendous amounts of labor to procure and review
16 all potentially responsive information for a company founded twenty years ago. This heavy burden is
17 disproportionate to Plaintiff's needs in this case in which Plaintiff alleges retaliation based on a post made
18 on Glassdoor.com by Duane, who worked for IXL between July 2013 and January 2015. Any burden and
19 expense of any Request not directed to information specifically related to Plaintiff or Duane outweighs its
20 likely benefit.

21 Defendant further objects to this Request to the extent it seeks documents previously requested
22 and produced, including, but not limited to, in response to Plaintiff's Rule 30(b)(6) Deposition Notice.
23 Defendant objects on the basis that this Request is needlessly duplicative in that it seeks documents
24 produced in previous litigations and/or administrative proceedings, including the proceeding with the
25 National Labor Relations Board (NLRB). Defendant objects to the extent that this Request seeks
26 confidential trade secret and proprietary business information. Defendant objects to this Request to the
27 extent it seeks the production of information protected by the attorney-client privilege, the attorney work
28 product doctrine, and any other applicable privilege or doctrine.

1 Please see documents previously produced. No documents related to IXL's vacation and personal
2 time policies before July 2013 and after January 2015 will be produced.

3 49. All documents concerning Mr. Duane's employment dates, attendance, vacation, and/or
4 sick time records.

5 **RESPONSE:** Defendant objects that the Request is not proportional to the needs of the case, considering
6 the importance of the issues at stake in the action, the amount in controversy, the parties' relative access
7 to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and
8 that the burden and expense of the proposed discovery outweighs its likely benefit. This Request seeks all
9 documents, defined as all electronically stored information and all writings, that relate to, refer to, or allude
10 to Duane's attendance, vacation, and sick time. Producing all documents would be burdensome upon
11 Defendant as it would impose severe financial hardship and require tremendous amounts of labor to
12 procure and review all potentially responsive information, regardless of whether IXL has knowledge of
13 such documents. Any burden and expense of any Request not directed to information specifically related
14 to Plaintiff or Duane outweighs its likely benefit.

15 Defendant further objects to this Request to the extent it seeks documents previously requested
16 and produced. Defendant objects on the basis that this Request is needlessly duplicative in that it seeks
17 documents produced in previous litigations and/or administrative proceedings, including the proceeding
18 with the National Labor Relations Board (NLRB). Defendant further objects to this Request to the extent
19 that it calls for the production of documents that are equally accessible to or in the possession of Plaintiff
20 and/or Duane.

21 Defendant objects to the extent that this Request seeks confidential trade secret and proprietary
22 business information. Defendant objects to this Request to the extent it seeks the production of information
23 protected by the attorney-client privilege, the attorney work product doctrine, and any other applicable
24 privilege or doctrine.

25 IXL has performed a reasonable and proportional search for relevant documents. Please see
26 documents previously produced and produced herein. IXL used to have ADP as its online tracking system
27 for PTO and/or sick time, but that service was terminated in 2015. IXL can no longer access ADP in order
28 to see the historical PTO/sick time records of an individual employee.

1
2 Dated: April 9, 2018

Respectfully submitted,
Young Basile Hanlon & MacFarlane, P.C.

3 By: /s/ Natasha R. Menezes
4 **Jeffrey D. Wilson (Pro Hac Vice)**
wilson@youngbasile.com
5 **Natasha R. Menezes (Pro Hac Vice)**
menezes@youngbasile.com

6 -and-

7 **IMAI, RADLOCK, KEENEY & CORDERY, LLP**
8 **R. Randy Wertz**
rrwerts@itkc.com

9 Attorneys for Defendant
10 IXL Learning, Inc.

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Exhibit 2

HOME DEPT	S T	FILE NUMBER	EMPLOYEE NAME	DATE	MONTHS OF SERV	RESET YR #	DATA CTRL	ALLOWED VACATION	TAKEN VACATION	BALANCE VACATION	VACATION
				1			1				
310-20	A	000299	DUANE,ADRIAN SCOTT	07/10/2013	14	2014	1	118.00	104.00	14.00	551.92

MR



STANDARD BENEFIT ACCRUAL AUDIT REPORT
Autopay Management Report

DL LEARNING, INC.
 Company Code: OAP

Batch: P-5802 -030 Period Ending: 09/30/2014
 Report: E01 Pay Date: 09/30/2014

Week 39
Page 3

© 1997 Automatic Data Processing, Inc.

Exhibit 3

BEGDOC	ENDDOC	DEP EXH NO	DATE	TYPE	Description	FROM	TO	CC
IXL-3790	IXL-3790		11/1/2013	Email	Re: Curiel sick leave request	Nemo Curiel	Isidora Milin; jmorse@ixl.com	
IXL-3791	IXL-3791		11/15/2013	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3792	IXL-3792		11/22/2013	Email	Re: Curiel leave request	Nemo Curiel	Isidora Milin	
IXL-3793	IXL-3793		11/25/2013	Email	Re: Curiel leave request	Nemo Curiel	Isidora Milin	
IXL-3794	IXL-3794		12/6/2013	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3795	IXL-3795		12/16/2013	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3796	IXL-3796		12/19/2013	Email	Re: Curiel WAH request	Nemo Curiel	Isidora Milin	
IXL-3797	IXL-3797		12/30/2013	Email	Re: Curiel leave request	Isidora Milin	Nemo Curiel	
IXL-3798	IXL-3798		1/6/2014	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3799	IXL-3799		1/17/2014	Email	Re: Curiel WAH leave request	Nemo Curiel	Isidora Milin	
IXL-3800	IXL-3800		1/27/2014	Email	Re: Curiel leave request	Nemo Curiel	Isidora Milin	
IXL-3801	IXL-3801		1/30/2014	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3802	IXL-3802		2/6/2014	Email	Re: Curiel sick leave request	David Keyes	Isidora Milin	
IXL-3803	IXL-3803		2/12/2014	Email	Re: Curiel WAH leave request	Nemo Curiel	Isidora Milin	
IXL-3804	IXL-3804		2/14/2014	Email	Re: Curiel WAH request	Nemo Curiel	Isidora Milin	
IXL-3805	IXL-3805		2/21/2014	Email	Re: Curiel WAH	Gary Yee	Nemo Curiel	
IXL-3806	IXL-3806		2/21/2014	Email	Re: Curiel WAH leave request	Isidora Milin	Nemo Curiel	
IXL-3807	IXL-3808	223	2/21/2014	Email	Duane conversation with Penner Re Curiel	Karen Penner	Scott Duane	
IXL-3809	IXL-3809		2/28/2014	Email	Re: Curiel WAH request	Nemo Curiel	Isidora Milin	
IXL-3810	IXL-3810		3/7/2014	Email	Re: Curiel WAH request	Nemo Curiel	Isidora Milin	
IXL-3811	IXL-3811		3/10/2014	Email	Re: Curiel leave request	Nemo Curiel	Isidora Milin	
IXL-3812	IXL-3813	227	3/10/2014	Email	Duane discussion with Penner re: Curiel	Karen Penner	Scott Duane	
IXL-3814	IXL-3815	222	3/11/2014	Email	Duane discussion with Penner re: Curiel	Scott Duane	Karen Penner	
IXL-3816	IXL-3816	232	3/11/2014	Email	Re: Curiel sick leave request	David Keyes	Nemo Curiel	Isidora Milin
IXL-3817	IXL-3817		3/18/2014	Email	Re: Curiel sick leave request	Nemo Curiel	Isidora Milin	
IXL-3818	IXL-3818		3/18/2014	Email	Re: Curiel sick leave request & performance	Scott Duane	Nemo Curiel	David Keyes

IXL-3819	IXL-3819		3/18/2014	Email	Re: Curiel sick leave request	David Keyes	Nemo Curiel	Scott Duane
IXL-3820	IXL-3820	226	3/18/2014	Email	Duane discussion with Milin re Curiel performance	Isidora Milin	Scott Duane	
IXL-3821	IXL-3821		3/18/2014	Email	Re: Curiel sick leave request	Scott Duane	Isidora Milin	
IXL-3822	IXL-3822		3/19/2014	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3823	IXL-3823	220	3/21/2014	Email	Re: Curiel sick leave request & performance	Isidora Milin	Nemo Curiel; Scott Duane; David Keyes	
IXL-3824	IXL-3824		4/16/2014	Email	Duane to undisclosed recipient re: Curiel being a "no-show"	Scott Duane		
IXL-3825	IXL-3825		4/16/2014	Email	Re: Curiel sick leave request	Nemo Curiel	Isidora Milin	
IXL-3826	IXL-3826		4/16/2014	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3827	IXL-3827	221	4/18/2014	Email	Re: Curiel sick leave request	Nemo Curiel	Isidora Milin	
IXL-3828	IXL-3831	225	4/18/2014	Email	Duane discussion with Wu re: Curiel going home sick but having other plans after work	Scott Duane	Nina Wu	
IXL-3832	IXL-3832	230	4/18/2014	Email	Re: Curiel sick leave request	Isidora Milin	Nemo Curiel	
IXL-3833	IXL-3833	229	4/22/2014	Email	Re: Curiel leave request	Isidora Milin	Nemo Curiel	
IXL-3834	IXL-3834		5/1/2014	Email	Re: Curiel leave request	Isidora Milin	Nemo Curiel	
IXL-3835	IXL-3836		5/2/2014	Email	Discussion between Ritterhoff and Curiel unrelated to work	Nemo Curiel	Mark Ritterhoff	
IXL-3837	IXL-3838		5/7/2014	Email	Duane discussion with Wu unrelated to Curiel	Scott Duane	Nina Wu	
IXL-3839	IXL-3844	219	4/16/2018	Document	Curiel PIP			

Exhibit 4

From: Karen Penner [kpenner@ixl.com]
Sent: Friday, February 21, 2014 7:19 PM
To: Scott Duane
Subject:

Karen Penner, 2014-02-21 16:18:44

are you in the office today?

Scott Duane, 2014-02-21 16:18:53

yeah dude you walked right by me earlier

Karen Penner, 2014-02-21 16:18:58

hahaha

Karen Penner, 2014-02-21 16:19:00

i'm tired

Scott Duane, 2014-02-21 16:19:02

hahaha

Scott Duane, 2014-02-21 16:19:03

me toooo

Karen Penner, 2014-02-21 16:19:07

nemo ditched again?

Scott Duane, 2014-02-21 16:19:15

"working from home"

Karen Penner, 2014-02-21 16:19:22

who is approving this?

Scott Duane, 2014-02-21 16:19:25

i was supposed to give him a ride

Karen Penner, 2014-02-21 16:19:26

or is he just doing it?

Scott Duane, 2014-02-21 16:19:28

isidora?

Karen Penner, 2014-02-21 16:19:32

oy

Karen Penner, 2014-02-21 16:19:40

poor isidora

Scott Duane, 2014-02-21 16:19:49

i know

Karen Penner, 2014-02-21 16:19:49

i would NOT want to manage Nemo

Karen Penner, 2014-02-21 16:19:55

what a nightmare

Scott Duane, 2014-02-21 16:19:57

i think nemo would be tough to manage

Karen Penner, 2014-02-21 16:20:03

ha, ya think?

Scott Duane, 2014-02-21 16:20:05

he challenges everyting

Karen Penner, 2014-02-21 16:20:18

he prob still thinks that he gets the summer off

Karen Penner, 2014-02-21 16:20:19

LOL

Scott Duane, 2014-02-21 16:28:10

hahhaa

Exhibit 5

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

---oOo---

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

DEPOSITION OF

NEMO CUIEL

April 17, 2018

10:16 a.m.

44 Montgomery Street, Suite 1100

San Francisco, California

Sarah J. Bingham, CSR #13720

1 THE WITNESS: Mm-hm.

2 MR. WILSON: -- by saying it's not my intent
3 to embarrass you, I just need to ask you questions.
4 Okay.

5 MS. SANGHVI: I'm going to have a standing
6 objection for any documents referenced or put in front
7 of the witness today that are in between the Bates range
8 of IXL-3790 to 3844. For the record, these records were
9 produced after the close of fact discovery in this case.
10 These records were also produced 12-and-a-half hours
11 prior to the start of this deposition today, which is
12 under no circumstances a reasonable amount of time nor
13 is it courteous to the other side to dump over 140
14 documents on the eve of a deposition.

15 So we have a standing objection to the use of
16 any documents in this range.

17 MR. WILSON: Okay.

18 (Deposition Exhibit 2 was marked for
19 identification.)

20 BY MR. WILSON:

21 Q. So I'm going to ask you to take a look at what
22 I've marked as Exhibit 2. And this is a six-page document,
23 although there is a bunch of blank pages, I think, in
24 between.

25 But on the first page, it's from Isidora Milin to

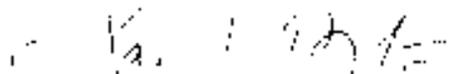
C E R T I F I C A T I O N

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

That NEMO CURIEL, 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 26th day of April, 2018.



Sarah J. Bingham
CSR #13720

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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, 17th Floor

and : Hearing Date: October 15, 2018

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

Plaintiff-Intervenor,

v.

IXL LEARNING, INC.,

Defendant.

**RESPONSE TO PLAINTIFF EEOC'S
MOTION *IN LIMINE* NO. 2 RE:
EXCLUSION OF EVIDENCE PRODUCED
LATE OR NOT AT ALL**

1 **I. INTRODUCTION/BACKGROUND**

2 Now comes Defendant, IXL Learning, Inc. (“IXL”), and for its Opposition to Plaintiffs’ Motion
3 *in Limine* Number 2 hereby states as follows:

4 Plaintiffs seek to prevent the introduction of relevant evidence due to the supposed untimeliness
5 of its production. Specifically, Plaintiffs seek to prevent IXL from using 55 pages of documents (the
6 “challenged documents”), relating mostly to another IXL employee’s use of sick leave. Plaintiffs assert
7 that the documents in question were produced late.

8 The salient facts are contained throughout the record and all need not be restated herein.
9 Importantly, Plaintiffs claim only that IXL retaliated against Duane in violation of Title VII and the ADA by
10 firing him for alleged opposition activity contained in his December 30, 2014 Glassdoor.com post (the “Post”).

11 Discovery in this matter closed on April 13, 2018. ECF No. 58. The discovery cutoff was extended
12 by agreement of counsel as to this employee’s deposition, and the documents were produced by IXL in
13 advance of that deposition. ECF No. 58. At no time did Plaintiffs make a discovery request seeking the
14 challenged documents.

15 **II. LEGAL STANDARD/ARGUMENT**

16 Initially, Plaintiffs’ motion should be denied as untimely. Although cloaked as an evidentiary
17 motion, Plaintiffs’ Motion is really a six-month late discovery motion. This Court has a well-established
18 procedure that litigants are required to utilize when a dispute over discovery arises. If Plaintiffs believed
19 that IXL’s initial disclosures or subsequent discovery responses were incomplete, it was required to bring
20 that dispute before the Court in a timely manner (and in no event, no more than seven days after the
21 discovery cutoff, which was almost six months ago).¹ Accordingly, Plaintiffs’ Motion should be denied
22 as untimely and formally improper.

23
24 _____
25 ¹ Plaintiffs cannot reasonably disagree with this assertion, because they took the same position earlier in this litigation and
26 demanded that Defendant press the issue via the Court’s discovery dispute procedure or waive its right to seek preclusion in a
27 motion *in limine* later. In April 2018, a dispute arose over Duane’s refusal to answer a deposition question on attorney-client
28 privilege grounds. Defendant asserted that counsel for the EEOC improperly instructed Duane not to answer a question based
on privilege because Duane waived the privilege by describing the advice to his supervisor. Defendant sought to preclude
evidence about that advice at trial, and therefore proposed that the parties agree to address it in a motion *in limine*. Plaintiffs’
counsel rejected the proposal, stating “[i]f IXL decides to forego raising this with the Court today and instead *later pursues a*
motion in limine, when we oppose that motion *the EEOC will absolutely argue that the appropriate recourse was to raise this*
during the discovery phase.” Email from Ami Sanghvi, April 20, 2018. Exhibit A (emphasis added). As a result, Defendant
followed the discovery procedure and brought the issue to the Magistrate Judge that day.

1 Alternatively, Plaintiffs' Motion should be denied on its merits. Implicit in the Motion is the
2 assumption that Defendant had a duty to produce the documents in question. It did not. Disclosure of the
3 information contained in the challenged documents was neither required by Rule 26(a), nor requested by
4 Plaintiffs. Plaintiffs cite the discovery requests they served on IXL, requesting documents related to
5 agreements by IXL allowing its employees to work remotely (so called "remote working agreements"),
6 and documents concerning Duane's attendance, vacation, or sick time.

7 The challenged documents, however, relate to another employee, Nemo Curiel's, use of sick leave,
8 and many of them were introduced at Curiel's deposition on April 17. The documents are communications
9 among IXL employees, many involving Curiel, which is why they were gathered by Defendant for his
10 deposition. Some of the documents involve Curiel advising IXL that he was sick or intending to take leave
11 time, but Plaintiffs never requested leave information for persons other than Duane. Plaintiffs now claim
12 that one document should have been produced because it related to an agreement by IXL to allow its
13 employees to work remotely. That document, however, is a text message discussion between Duane and
14 another IXL employee, in which Duane states that Curiel was "working at home" that day and speculated
15 that his supervisor approved it. To call this a document related to a remote work agreement is ludicrous.
16 Plaintiff's supervisor, David Keyes, testified extensively regarding IXL work at home agreements on
17 March 15, 2017, but still Plaintiff made no follow up request for additional documents that IXL allegedly
18 had not produced.

19 Plaintiffs argue that the challenged documents should have been produced earlier in the case,
20 despite never being requested, because Curiel was listed in Defendant's initial disclosures. But, Curiel's
21 sick leave records became significant only after Duane's testimony on March 25, 2017, where he claimed
22 that Curiel was pressured to not use sick leave, which Duane considered a form of denial of sick leave.
23 ECF Doc No. 71-6 at 96:13-97:16 (deposition page 94:13-95:16). Based on this (unfounded) claim,
24 Defendant determined that Curiel's deposition was necessary and scheduled it three weeks later. In
25 preparation, IXL gathered records of Curiel's sick leave and produced them to Plaintiffs before the
26 deposition.

27 And despite Plaintiffs' claims to the contrary, Defendant had previously produced more records of
28 Duane's sick and vacation leave than Plaintiffs claim in their Motion. (See e.g., IXL 1946-1948, entries

1 of sick and vacation hours used). Duane admits he had 25 to 30 days in 2014 where IXL allowed him to
2 work at home or partially at home. ECF Doc No. 71-6 at 37:1-4 (deposition page 35:1-4). This is in
3 addition to months of sick leave and/or time off for surgery in 2014. Duane admits he was never denied a
4 single request for leave ECF Doc No. 71-6 at 87-90 (deposition page 85-88). And, although Plaintiffs now
5 say they disputed whether Duane was given more days off and remote work days than anyone else at IXL,
6 Duane did not dispute it in his deposition. Instead, he answered that he did not know. ECF Doc No. 71-6
7 at 147-48 (deposition page 145-46). While IXL can prove he used sick and remote leave more than anyone
8 else in 2014 through witnesses at trial, what matters is whether Duane reasonably (or actually) believed
9 he was discriminated against with respect to sick and remote days. His testimony reveals he was given
10 every day he requested and does not know (thus cannot and does not dispute) whether he was given more
11 days than anyone else. As such, there is no conceivable basis to prohibit reference to these matters at trial.

12 Moreover, the exclusion of documents under Rule 37 can only be imposed where a party fails to
13 produce documents without a substantial justification, or where any failure is harmless.

14 Several factors to guide the determination of whether substantial justification and
15 harmless exist, including (1) prejudice or surprise to the party against whom the
16 evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of
17 disruption of trial; and (4) bad faith or willfulness in not timely disclosing the evidence.
18 See, e.g., *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993
19 (10th Cir. 1999); *Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed.Appx. 705, 713 (9th Cir. 2010)
20 (citing *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)). At bottom, this is an
equitable analysis entrusted to the Court's discretion. See, e.g., *Goodman v. Staples The
Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011) (exercising discretion to deny
exclusion sanction as a matter of “fairness” and to avoid an “unjust” result). If either
exception is established, the imposition of exclusion sanctions is not proper. See Fed. R.
Civ. P. 37(c)(1).

21 *Silvagni v. Walmart, Inc.*, 320 F.R.D. 237, 242 (D. Nevada).

22 Here, of course, IXL did not fail to produce documents – it produced them exactly when it was
23 supposed to – before Curiel’s deposition. Plaintiff suffered no conceivable prejudice. These documents
24 were produced in advance of the deposition of the independent witness in question (Mr. Curiel), and
25 months in advance of trial.² Thus each of the factors set forth above argues against an exclusionary
26

27 _____
28 ² Plaintiff also suggests that she was unable to prepare Curiel for deposition because of the allegedly late production. However, Curiel was an independent witness – not one offered by the EEOC. In fact, Curiel testified at deposition that he spoke with Plaintiff’s counsel only ten minutes prior to the deposition, thus undermining any credible claim of prejudice.

1 sanction, which are “generally limited to ‘extreme situations.’” *Silvagni, citing City and Town of San*
2 *Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 220-21 (N.D. Cal. 2003).

3 Accordingly, even if Plaintiffs have not waived this discovery dispute, IXL submits that it acted
4 reasonably after concluding the need for Curiel’s deposition and examination of the challenged
5 documents, producing them prior to Curiel’s deposition and months in advance of trial, and that Plaintiffs
6 could not have been prejudiced by any delay in their production. As such, exclusion of the documents in
7 question is unwarranted and Plaintiffs’ Motion *in Limine* Number 2 should be denied.

8 **III. CONCLUSION**

9 Wherefore, Plaintiffs’ Motion *in Limine* Number 2 should be denied.

10
11 Dated: October 3, 2018

Respectfully submitted,

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: /s/ Eddie D. Woodworth

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wilson@youngbasile.com

Eddie D. Woodworth (Pro Hac Vice)

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16 -and-

IMAI, RADLOCK, KEENEY & CORDERY, LLP

R. Randy Wertz

rrwerts@itkc.com

Attorneys for Defendant

IXL Learning, Inc.

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 October 3, 2018, I served the foregoing document(s) described as **Response to Plaintiff EEOC’s Motion in Limine No. 2 Re: Exclusion of Evidence Produced Late or Not At All** 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 SERVICE) I caused such document to be delivered via electronic mail.

(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 October 3, 2018 at Troy, Michigan.

 /s/ Eddie D. Woodworth
 Eddie D. Woodworth

Exhibit

A

From: AMI SANGHVI <AMI.SANGHVI@EEOC.GOV>
Sent: Friday, April 20, 2018 3:12 PM
To: Natasha Menezes; COLLEEN MCCARTNEY; MARCIA MITCHELL; David Marek (david@marekfirm.com)
Cc: Hind Samona; Jeffrey D. Wilson; Leah E. Plotkin; Eddie D. Woodworth
Subject: RE: EEOC v. IXL: Privilege Disc Dispute Letter

Natasha,

I disagree completely. A motion to compel evidence rather than moving to preclude evidence within the timeframe prescribed by the Court is absolutely the appropriate recourse for your claim of waiver. That means getting a discovery dispute letter to the Court today. Even though you raised this late and only got us the letter yesterday, I will work on getting you my section later today if that is the avenue you choose. If IXL decides to forego raising this with the Court today and instead later pursues a motion in limine, when we oppose that motion the EEOC will absolutely argue that the appropriate recourse was to raise this during the discovery phase. Please let me know immediately how you plan to proceed.

Ami

From: Natasha Menezes [mailto:menezes@youngbasile.com]
Sent: Friday, April 20, 2018 10:48 AM
To: AMI SANGHVI <AMI.SANGHVI@EEOC.GOV>; COLLEEN MCCARTNEY <COLLEEN.MCCARTNEY@EEOC.GOV>; MARCIA MITCHELL <MARCIA.MITCHELL@EEOC.GOV>; David Marek (david@marekfirm.com) <david@marekfirm.com>
Cc: Hind Samona <samona@youngbasile.com>; Jeffrey D. Wilson <wilson@youngbasile.com>; Leah E. Plotkin <plotkin@youngbasile.com>; Eddie D. Woodworth <woodworth@youngbasile.com>
Subject: RE: EEOC v. IXL: Privilege Disc Dispute Letter

To the extent that the relief we seek is now preclusion rather than compelling his deposition, we can, rather than filing this as a discovery dispute letter, raise this issue as a motion in limine. What we don't want is for the EEOC, when this issue is raised as a motion in limine where the remedy sought is preclusion and not compelling deposition/documents, to argue that this issue should have been raised in the discovery phase of the case. Assuming that understanding and the fact that we have waived no arguments to file such a motion in limine, it does make sense to raise this as a motion in limine given that we are not seeking to compel the production of documents or a dep.

From: AMI SANGHVI <AMI.SANGHVI@EEOC.GOV>
Sent: Thursday, April 19, 2018 8:32 PM
To: Natasha Menezes <menezes@youngbasile.com>; COLLEEN MCCARTNEY <COLLEEN.MCCARTNEY@EEOC.GOV>; MARCIA MITCHELL <MARCIA.MITCHELL@EEOC.GOV>; David Marek (david@marekfirm.com) <david@marekfirm.com>
Cc: Hind Samona <samona@youngbasile.com>; Jeffrey D. Wilson <wilson@youngbasile.com>; Leah E. Plotkin <plotkin@youngbasile.com>; Eddie D. Woodworth <woodworth@youngbasile.com>
Subject: RE: EEOC v. IXL: Privilege Disc Dispute Letter

Natasha,

You have indicated that you have altered the remedy IXL seeks, but I remain very confused about what that remedy even is. Here are my questions:

With regards to the attorney client privilege, what are you asking the Court to find? Yesterday you wanted to re-open Mr. Duane's deposition. Today, you wrote: "Plaintiffs should not be permitted to rely on evidence or testimony within the scope of the waiver of attorney-client privilege." This strikes me as a very premature motion *in limine* rather than a motion to compel anything. I want to be certain I understand the relief you seek so that I can tailor my response accordingly. It is also entirely unclear from your letter what you are arguing was waived and as to what time period. Yesterday we both agreed that any alleged waiver of A/C privilege only applies to the specific communication at issue. Given that – I want to understand what is the subject matter and temporal scope of the waiver that IXL is claiming here?

With regards to the emotional distress privilege claim, you write: "Plaintiffs should also not be permitted to rely on evidence or testimony into treatments when Plaintiffs prevented Duane from answering IXL's questions into such matters." Again, this seems like a premature motion *in limine* rather than a motion to compel something. Against, I want to be certain I understand the relief you seek so that I can tailor my response accordingly. To the extent that IXL is concerned that Mr. Duane will testify or otherwise submit documentary evidence about therapy treatment he received after he was terminated, why doesn't the EEOC's response to Interrogatory No. 11 suffice: "Mr. Duane was never diagnosed with any 'physical, physiological, mental, and/or emotional symptoms as a result of IXL's actions.'" Moreover, the EEOC has and continues to assure IXL that: The EEOC and Mr. Duane will not present any documentary evidence or testimony that Mr. Duane sought therapy because of his termination from IXL.

Please let me know your responses to the questions above and your anticipated plan for moving forward.

Ami

From: Natasha Menezes [<mailto:menezes@youngbasile.com>]

Sent: Thursday, April 19, 2018 2:59 PM

To: AMI SANGHVI <AMI.SANGHVI@EEOC.GOV>; COLLEEN MCCARTNEY <COLLEEN.MCCARTNEY@EEOC.GOV>; MARCIA MITCHELL <MARCIA.MITCHELL@EEOC.GOV>; David Marek (david@marekfirm.com) <david@marekfirm.com>

Cc: Hind Samona <samona@youngbasile.com>; Jeffrey D. Wilson <wilson@youngbasile.com>; Leah E. Plotkin <plotkin@youngbasile.com>; Eddie D. Woodworth <woodworth@youngbasile.com>

Subject: EEOC v. IXL: Privilege Disc Dispute Letter

Ami,

Please see the attached Discovery Dispute letter regarding our meet and confer yesterday. In light of the discussions raised in the meet and confer, we have altered the remedy we seek.

Thanks,
Natasha

YOUNG BASILE

Natasha R. Menezes

Attorney

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