

**IMAI, TADLOCK, KEENEY & CORDERY, LLP**

**R. RANDY WERTZ**

rrwertz@itkc.com

220 Montgomery Street, Suite 301

San Francisco, California 94104

Telephone: (415) 675-7000

Facsimile: (415) 675-7008

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

**JEFFREY D. WILSON (PRO HAC VICE)**

wilson@youngbasile.com

**EDDIE D. WOODWORTH (PRO HAC VICE)**

woodworth@youngbasile.com

3001 W. Big Beaver Road, Suite 624

Troy, Michigan 48084

Telephone: (248) 649-3333

Facsimile: (248) 649-3338

Attorneys for Defendants

IXL Learning, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

		Case No.: 3:17-cv-02979-VC
U.S. EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
and	:	<b>DEFENDANT’S OPPOSITION TO</b>
	:	<b>PLAINTIFF’S <i>EX PARTE</i> MOTION</b>
ADRIAN SCOTT DUANE,	:	<b>FOR EXTENSION OF TIME TO FILE</b>
	:	<b>APPEAL</b>
Plaintiff-Intervenor,	:	
	:	
v.	:	
	:	
IXL LEARNING, INC.,	:	
	:	
Defendant.	:	
	:	

IXL Learning, Inc. (“IXL”) respectfully submits this Memorandum of Law in Opposition to Plaintiff’s *Ex Parte* Motion for Extension of Time to File Any Notice of Appeal (DE 167, the “Motion”).

1     **I. INTRODUCTION**

2           On October 29, 2018 (over three months ago), a jury comprised of eight (8) individuals deliberated  
3 for approximately two (2) hours and concluded in favor of IXL on Plaintiff, The United States Equal  
4 Employment Opportunity Commission’s (the “EEOC”) and Plaintiff-Intervenor, Adrian Scott Duane’s  
5 (“Duane”) (collectively, the “Plaintiffs”) claims that IXL retaliated against Duane for alleged  
6 discrimination complaints in a Glassdoor.com review. Now, over 90 days since that jury verdict, and  
7 nearly four years since Duane began raising discrimination charges with myriad government agencies, the  
8 EEOC would like another 30 days to decide whether to appeal and advice as to its current appeal deadline.  
9 IXL opposes: enough is enough.

10    **II. FACTS**

11           The factual and procedural history of this case are well known to this Court and will not be fully  
12 reproduced herein. The salient facts are as follows: from 2013-2015, IXL employed Duane as an analyst.  
13 In January 2015, Duane authored an incendiary Glassdoor.com post entitled “Micromanaged and  
14 Problematic” that was replete with baseless accusations against IXL intended to dissuade prospective  
15 recruits from joining the company. Duane admitted to making the post, and IXL admits that it fired Duane  
16 for the Glassdoor.com post.

17           Since then, Duane has launched a legal crusade against IXL, including discrimination charges and  
18 unfair labor practice complaints to the California Department of Fair Employment and Housing, the  
19 EEOC, and the National Labor Relations Board (the “NLRB”). For its part, the NLRB conducted a bench  
20 trial in November 2015, for which the Administrative Law Judge (“ALJ”) issued a scathing 37-page  
21 opinion dismissing all allegations against IXL, holding that Duane’s accusations of discriminatory  
22 practices by IXL was “*maliciously untrue*” and made by him with “*reckless disregard of whether it was*  
23 *true or false*” as his real intention in his “angered state of mind was to hurt or damage” IXL’s ability to  
24 recruit employees. The ALJ found that Duane’s Glassdoor.com post was “*childish ridicule*” in the nature  
25 of a personal attack on IXL and that Duane’s Post was “so disloyal and recklessly disparaging” of IXL as  
26 to lose protection.

27           Notwithstanding, the EEOC found cause for discrimination, and brought suit against IXL in May  
28 2017 on the extremely narrow issue of whether IXL retaliated against Duane for the portions of Duane’s

1 Glassdoor.com post that the EEOC claimed were complaints of discrimination. Duane intervened as a  
2 plaintiff. On October 23, 2018, this Court entertained a five-day jury trial, and after deliberating for  
3 approximately two hours, the jury found for IXL.

4 Thereafter, this Court delayed the entry of judgment in order to afford the Plaintiffs additional time  
5 to determine whether to file post-trial motions and appeal. At a status conference on December 4, 2018,  
6 Plaintiffs indicated that they still had not determined whether they wished to file post-trial motions/appeal  
7 the verdict. The Court set a deadline of December 20, 2018 for any post-trial motions.

8 On December 20, 2018, Plaintiffs indicated that they did not intend to file post-trial motions, and  
9 on December 21, this Court entered judgment for IXL. DE 162; 163. The United States government  
10 (including the EEOC) subsequently entered into a partial shutdown on December 21, 2018. On December  
11 27, 2018, this Court stayed proceedings in this matter until the EEOC's funding was restored:

12 **IT IS HEREBY ORDERED** that due to a lapse in appropriations for the EEOC at  
13 midnight on December 21, 2018, the litigation of this matter shall be **STAYED** until  
14 the EEOC's funding is restored and all pending deadlines in this matter will be  
extended for the same number of days as the EEOC's lapse in funding.

15 DE 166 (the "Stay Order") (emphasis in original). On January 28, 2018, the partial shutdown ended.

### 16 **III. ARGUMENT**

17 Initially, Defendant notes that no order of the Court is needed to lift the stay in this matter, as the  
18 terms of the Stay Order are self-executing. Said differently, the stay, by its terms, lasted only "until the  
19 EEOC's funding [was] restored." Conditions precedent have been satisfied, and the stay in this matter  
20 automatically lifted.

21 Next, Plaintiff appears to be requesting an advisory opinion as to its deadline to timely notice an  
22 appeal, considering the prior stay. Federal courts are, of course, not permitted to issue advisory opinions.  
23 *Aids Healthcare Found., Inc. v. City & Cty. of San Francisco*, 208 F. Supp. 3d 1095, 1098-99 (N.D. Cal.  
24 2016) ("The role of the federal courts "is neither to issue advisory opinions nor to declare rights in  
25 hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the  
26 judiciary in Article III of the Constitution."). Defendant's limited research has returned very little authority  
27 on the issue of when the United States Court of Appeals for the Ninth Circuit may deem any appeal from  
28

1 the Plaintiffs as timely in light of the stay, or whether this Court even has authority to enter a stay impacting  
2 jurisdictional deadlines imposed by the Federal Rules of Appellate Procedure and by statute.

3 It is clear, however, that an appeal noticed on or before February 19, 2019 (over two weeks from  
4 the date of this filing) would be timely under any interpretation of the scenario. Per Federal Rule of  
5 Appellate Procedure 4(a)(1)(B), a notice of appeal may be timely filed within 60 days after the entry of  
6 judgment, when one of the parties is a United States Agency. This deadline may be extended by 30 days  
7 by the district court upon motion of a party upon a showing of excusable neglect or *good cause*. FRAP  
8 4(a)(5). “The good cause standard applies in situations in which there is no fault—excusable or otherwise.  
9 In such situations, the need for an extension is usually occasioned by something that is not within the  
10 control of the movant.” *Arias-Maldonado v. Sisto*, 2012 WL 219190, at \*2 (E.D. Cal. 2012).

11 But here, the EEOC does not meet its burden of proof—it does not establish good cause. Presently,  
12 the deadline to notice any appeal is still over two weeks away – February 19, 2019. And the government  
13 reopened over three weeks before this deadline. Further, over 90 days have elapsed since the jury rendered  
14 its verdict. The EEOC does not explain why the amount of time it has remaining is insufficient to file a  
15 notice of appeal. After nearly four years of litigation across multiple venues and untold legal fees, IXL  
16 deserves finality.

#### 17 **IV. CONCLUSION**

18 For the foregoing reasons, Defendant IXL requests that this Court deny Plaintiff’s Ex Parte Motion  
19 for Extension of Time to File Appeal.

20  
21 Respectfully submitted,

22 Dated: February 4, 2019

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

23 By:  /s/ Jeffrey D. Wilson

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

wilson@youngbasile.com

**Eddie D. Woodworth (Pro Hac Vice)**

woodworth@youngbasile.com

26  
27 -and-  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

Attorneys for Defendant  
IXL Learning, Inc.

