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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: April 18, 2019

ADRIAN SCOTT DUANE, : Hearing: 10:00 AM

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

v. : **AND MOTION TO RETAX COSTS**

IXL LEARNING, INC., : _____

Defendant. :

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

Please take notice that on April 18, 2019 at 10:00 AM, or as soon thereafter as may be heard in

Courtroom 4 of the United States District Court, Northern District of California, Defendant IXL Learning,

1 Inc. (“Defendant”), will and hereby does, move this Court, pursuant to Federal Rule of Civil Procedure
2 54(d)(1), hereby submits its Motion to Retax Costs (the “Motion”).

3 This Motion is supported by the pleadings, records, and files of the within action, and upon such
4 further evidence and argument as may e submitted at the time of hearing.

5

6 Respectfully submitted,

7 Dated: February 28, 2019 **YOUNG BASILE HANLON & MACFARLANE, P.C.**

8 By: /s/ Jeffrey D. Wilson

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

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

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11

12 -and-

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16 Attorneys for Defendant

17 IXL Learning, Inc.

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19 UNITED STATES DISTRICT COURT
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22 COMMISSION, : Hon. Vince Chhabria

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24 : Hearing Date: April 18, 2019

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ADRIAN SCOTT DUANE, :
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Plaintiff-Intervenor, :
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v. :
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IXL LEARNING, INC., :
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Defendant. :
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29 **DEFENDANT'S**
30 **MOTION TO RETAX COSTS**

1 **I. OVERVIEW**

2 Defendant IXL Learning, Inc. (“Defendant”), by and through its undersigned counsel and pursuant
3 to Fed. R. Civ. P. 54(d)(1), hereby submits its Motion to Retax Costs (the “Motion”). In support of the
4 Motion, Defendant states as follows:

- 5 • On October 29, 2018, this Court entertained a five-day jury trial.
- 6 • At the conclusion of the jury trial, the Jury returned a verdict in favor of Defendant on Plaintiff
7 U.S. Equal Employment Opportunity Commission’s and Plaintiff-Intervenor Adrian Scott
8 Duane’s (“Plaintiffs”) ADA and Title VII claims.
- 9 • On November 13, 2018, Defendant filed its Bill of Costs, seeking recovery for \$27,769.41 of
10 taxable costs. DE 155 (“Defendant’s Bill”).
- 11 • On November 28, 2018, Plaintiffs filed their Objections to Defendant’s Bill (“Plaintiff’s
12 Objections”), seeking a total reduction of \$13,897.38. DE 160.
- 13 • On February 12, 2019, this Court filed a Clerk’s Notice of Deficiency in Bill of Costs, requiring
14 supporting itemization and documentation associated with lodging and meal expenses for
15 Jeremy Murphy. DE 170. Defendant filed a Response to the Notice of Deficiency in Bill of
16 Costs on February 19, 2019. DE 172.
- 17 • On February 21, 2019, the Clerk taxed costs against Plaintiffs in the amount of \$14,280.78.
18 DE 173.

19 Defendant is entitled to costs denied by the clerk in the amount of \$6,635.70, including costs
20 associated with online discovery document management, trial exhibit fees, and witness fees.

21 **II. DEFENDANT IS ENTITLED TO COSTS DENIED BY THE CLERK**

22 **A. Cost of Online Discovery Document Management**

23 Defendant seeks costs disallowed by the Clerk in the amount of \$4,510.00, representing costs for
24 use of its electronic management system Logikcull. Such costs are taxable pursuant to Civil Local Rule
25 54-3(d)(2), which provides: “[t]he cost of reproducing disclosure or formal discovery documents when
26 used for any purpose in the case is allowable.” Further, this Court has previously awarded expenses for
27 electronic document management. *Bd. of Trustees v. Piedmont Lumber & Mill Co.*, No. 13-CV-03898-
28 HSG, 2016 WL 4446993, at *3 (N.D. Cal. Aug. 24, 2016) (Plaintiff sought recovery for litigation-related

1 expenses including “electronic document management for discovery database” and the Court found “that
2 the requested expenses [were] reasonable and recoverable.”)

3 The Clerk denied taxation of these costs, stating that supporting documentation does not
4 adequately support the amount claimed. DE 173. But, in support of the amount sought, Defendant
5 submitted a tabulation of monthly, flat rate payments made to Logik Systems, Inc. for use of its electronic
6 management system Logikcull. DE 155-3. Defendant also submitted an affidavit signed by attorney of
7 record for the Defendant, Jeffrey D. Wilson, attesting to the fact that the \$4,510.00 sought reflected the
8 amount actually billed to Defendant regarding the same. DE 155-1.

9 Defendant met its burden to recover these costs. *See Meier v. United States*, No. C 05-04404 WHA,
10 2009 WL 982129, at *2 (N.D. Cal. Apr. 13, 2009) (court taxed defendant’s copying costs without an
11 itemized invoice, holding that the costs “were specifically identified in defendant's declaration in support
12 of the bill of costs; this order declines to require defendant to provide copy-by-copy documentation of the
13 costs.”) (*citing Adidas America, Inc. v. Payless Shoesource, Inc.*, 2009 WL 302246, at *4 (D.Or.2009));
14 *see also Chellino v. Kaiser Found. Health Plan*, No. C 07-03019 CRB, 2010 WL 583970, at *6 (N.D. Cal.
15 Feb. 16, 2010) (court awarded copying costs where “Plaintiff supported her request for the printing costs
16 with an affidavit, but nothing more”). In its order taxing costs, the Clerk’s office does not identify which
17 aspect of Defendant’s filing was deficient with respect to this line item.¹ Accordingly, Defendant submits
18 that it is entitled to tax costs in the amount of \$4,510.00 for online discovery document management.

19 **B. Trial Exhibit Fees**

20 Defendant seeks costs disallowed by the Clerk in the amount of \$1,696.71 associated with
21 preparing exhibits for use at trial. These costs are taxable under 28 U.S.C. §1920(4), which provides for
22 taxation of “[f]ees for exemplification and the costs of making copies of any materials where the copies
23 are necessarily obtained for use in the case.” Civil Local Rule 54-3(d)(4) also provides that “[t]he cost of
24 reproducing trial exhibits is allowable to the extent that a Judge requires copies to be provided.”

25 The Clerk denied taxation of \$1,696.71 of Defendant’s trial exhibit costs, stating that the
26 disallowed amount is outside the ambit of Civil Local Rule 54-3. DE 173. In support of the amount sought,
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28 ¹ Indeed, the Clerk’s office is permitted to request supplemental documentation by Civil Local Rule 54-4(a). And in this case,
it did so with respect to another line item. DE 170.

1 Defendant submitted invoices from its exhibit vendors and a line item summary summarizing the same.
2 DE 155-3 and DE 155-2. Each invoice submitted by Defendant was incurred making copies of trial
3 exhibits for use by witnesses, the Judge, or the Clerk as required by the Judge during trial. These costs are
4 therefore taxable under Civil Local Rule 54-3(d)(4). *See Vectren Commc'ns Servs. v. City of Alameda*, No.
5 08-CV-3137-SI, 2014 WL 3612754, at *5-6 (N.D.Cal. July 22, 2014) (court found that Defendant was
6 entitled to recover the cost of preparing trial exhibits including the cost for copying four binder sets
7 required by the court). Tellingly, Plaintiff only sought a total reduction of Defendant's trial exhibit fees
8 by an amount of \$473.71 in its Objections. It is unclear why the Clerk disallowed an additional \$1,223.00.
9 Accordingly, Defendant submits that it is entitled to tax costs in the amount of \$1,696.71 for Defendant's
10 trial exhibit costs.

11 C. Witness Fees

12 Defendant seeks witness fees disallowed by the Clerk in the amount of \$428.99. These costs are
13 associated with travel expenses of witness Jeremy Murphy, a witness whose presence was requested by
14 both the Plaintiffs and Defendant.² These costs are taxable under Civil Local Rule 54(e), which provides
15 that “[p]er diem, subsistence and mileage payments for witnesses are allowable to the extent reasonably
16 necessary and provided for by 28 U.S.C. § 1821.”

17 The Clerk denied taxation of \$428.99 of Defendant's witness fees as an “excessive” expense under
18 28 U.S.C. § 1821(c)(1), which provides: “A witness who travels by common carrier shall be paid for the
19 actual expenses of travel on the basis of the means of transportation reasonably utilized . . . [the witness
20 must use] a common carrier at the most economical rate reasonably available. A receipt or other evidence
21 of actual cost shall be furnished.” In support of the travel expenses sought, Defendant submitted receipts
22 of Mr. Murphy's cab fares, flights, lodging, and meals. DE 155-3 and DE 172.

23 In its Objections, Plaintiff argued these expenses were excessive as (1) Mr. Murphy's air fare for
24 his flight from Raleigh/Durham, NC to San Francisco, CA was not for a “common carrier at the most
25 economical rate reasonably available” and (2) Mr. Murphy did not return to Raleigh/Durham on the day
26 he was excused from the trial.

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² Mr. Murphy's testimony was subpoenaed by Plaintiff. (see Exhibit A).

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R. Randy Wertz
rrwerts@itkc.com

Attorneys for Defendant
IXL Learning, Inc.

Exhibit A

AO 88 (Rev. 02/14) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

UNITED STATES DISTRICT COURT
for the
Northern District of California

<u>US EQUAL EMPLOYMENT OPPORTUNITY COMM</u>)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 3:17-cv-02979-VC
<u>IXL LEARNING, INC.</u>)	
<i>Defendant</i>)	

**SUBPOENA TO APPEAR AND TESTIFY
AT A HEARING OR TRIAL IN A CIVIL ACTION**

To: JEREMY MURPHY

(Name of person to whom this subpoena is directed)

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: United States District Court, Northern District of California 450 Golden Gate Avenue San Francisco, California, 94102	Courtroom No.: 4, 17th Floor Date and Time: 10/22/2018 8:00 am
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You must also bring with you the following documents, electronically stored information, or objects *(leave blank if not applicable)*:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/01/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Ami T. Sanghvi
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiff EEOC

_____, who issues or requests this subpoena, are:

AMI SANGHVI (415) 522-3071 ami.sanghvi@eoc.gov
US EEOC - San Francisco District Office
450 Golden Gate Ave., 5th Floor West, PO Box 36025, San Francisco, CA 94102

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	Hon. Vince Chhabria
	:	Courtroom: 4, 17 th Floor
Plaintiff,	:	Hearing Date: April 18, 2019
	:	Hearing: 10:00 AM

and

ADRIAN SCOTT DUANE,

Plaintiff-Intervenor,

v.

IXL LEARNING, INC.,

Defendant.

[PROPOSED] ORDER

1 Defendant's Motion to Retax Costs is hereby GRANTED. Costs shall be taxed against Plaintiffs
2 in the amount of \$20,916.48.

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4 Dated: _____, 2019

5 _____
6 Hon. Vince Chhabria
7 U.S. District Court Judge
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