

**THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:19-CV-00403**

DAVID SILER,	)
DISTINCTIVE HUMAN RESOURCES, INC.	)
	)
Plaintiffs,	)
	)
v.	)
	)
ELGA LEJARZA AKA ELGA LEJARZA PENN	)
MICHAEL PENN, LEJARZA COMPLIANCE	)
TRAININGS, LLC and LEJARZA HR	)
CONSULTING, LLC	)
	)
Defendants.	)

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS  
PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
FACTS .....	1, 2
QUESTIONS PRESENTED.....	2
STANDARD OF REVIEW .....	2, 3
ARGUMENT .....	3
I.    PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT SHOULD BE DISMISSED AS IT IS PREEMPTED BY THE COPYRIGHT ACT.....	3
II.   ADDITIONALLY, PLAINTIFFS’ COMMON LAW COPYRIGHT INFRINGEMENT CLAIM FAILS AS IT IS EXPRESSLY PREEMPTED BY THE COPYRIGHT ACT.....	5
III.  PLAINTIFFS’ CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 SHOULD BE DISMISSED AS IT IS DUPLICATIVE OF PLAINTIFFS’ COPYRIGHT CLAIM.....	6
IV.  PLAINTIFFS’ UDTPA CLAIM FAILS AS TO ALL DEFENDANTS AS IT IS PRE- EMPTED BY THE COPYRIGHT ACT AND NOT PROPERLY PLED TO WITHSTAND A MOTION TO DISMISS.....	7
a.  Plaintiffs’ UDTPA Claims Should be Dismissed Because they are Copyright Claims in Disguise.....	7
b.  Even Intentional Breaches do not Rise to the Level of UDTPA Liability.....	8
V.   PLAINTIFFS HAVE NOT BROUGHT VEIL PIERCING CLAIMS AGAINST ELGA LEJARZA AND MIKE PENN AND ALL CAUSES OF ACTION AGAINST THEM PERSONALLY SHOULD BE DISMISSED.....	8
a.  The Complaint Fails to Allege Causes of Action against Ms. Lejarza.....	8
b.  Plaintiff Has Completely Failed to Allege any Cause of Action against Mike Penn.....	10
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Allied Distrib., Inc. v. Latrobe Brewing Co.</i> , 847 F.Supp. 376 (E.D.N.C.).....	8
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937 (2009).....	2, 3
<i>Bartolomeo v. S.B. Thomas, Inc.</i> , 889 F.2d 530 (4th Cir. 1989).....	8
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955 (2007).....	2, 3
<i>Bolier &amp; Co., LLC v. Decca Furniture (USA), Inc.</i> , 58 F.Supp. 3d 491 (W.D.N.C. 2014) .....	3
<i>Carson v. Dynegy, Inc.</i> , 344 F.3d 446 (5 <sup>th</sup> Cir 2003).....	3
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23, 34 (2001) .....	6
<i>Dewitt Truck Brothers, Inc. v. W. Ray Flemming Fruit Co.</i> , 540 F.2d 681 (4th Cir. 1976) .....	8-10
<i>McCleary-Evans v. Maryland Dep’t of Transp., State Highway Admin</i> , 780 F.3d 582 (4th Cir. 2015) .....	2
<i>Rosciszewski v. Arete Associates, Inc.</i> , 1 F.3d 225 (4th Cir. 1993) .....	3, 4, 7
<i>Rutlege v. High Point Reg’l Health Sys.</i> , 558 F. Supp. 2d 611 (M.D.N.C.).....	7
<i>Tire Eng’g and Distribution, LLC v. Shandon Linglong Rubber Co.</i> , 682 F.3d 292 (4th Cir. 2012) .....	3
<i>TrafFix Devices, Inc. v. Marketing Displays, Inc.</i> , 532 U.S. 23, 29, 121 S.Ct. 1255 (2001) .....	7
<i>U.S. ex rel. Berge v. Board of Trustees of the Univ. of Alabama</i> , 104 F.3d 1453 (4th Cir. 1997) .....	7
<b>Statutes</b>	
Copyright Act.....	2-9
Lanham Act.....	6
Chapter 75 of the North Carolina General Statutes .....	2, 7, 8
UDTPA .....	2, 7, 8

**Other Authorities**

Fed. R. Civ. P. 12(b)(6) .....1, 3, 7

NOW COMES Elga Lejarza a/k/a Elga Lejarza-Penn (“Ms. Lejarza”), Michael Penn (“Mr. Penn”), Lejarza Compliance Trainings, LLC (“Lejarza Compliance”) and Lejarza HR Consulting, LLC (“Lejarza”) (collectively the “Defendants”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully submitting this memorandum in support of their Motion to Dismiss (the “Motion”).

### **INTRODUCTION**

This lawsuit arises out of an alleged breach of contract (the “Contract”) for a yearly license (the “License”) to use certain of Plaintiffs’ allegedly copyrighted materials. The License was purchased in 2016 by Ms. Lejarza and renewed in early 2018. Despite paying the License fee, Ms. Lejarza’s License was revoked unilaterally in August of 2018. Plaintiffs contend that Ms. Lejarza exceeded her License by allowing third-parties to access Plaintiffs’ materials and that such actions constitute copyright infringement, common law copyright infringement, unfair and deceptive trade practices, unfair competition and breach of contract.

### **FACTS**

The Plaintiffs allege that Ms. Lejarza first purchased certain test-prep materials from Distinctive Human Resources, Inc. (“Distinctive HR”) on April 6, 2011. Compl. ¶ 62. Ms. Lejarza subsequently purchased additional test-prep materials and one-year online subscriptions for the test-prep materials on March 6, 2016, March 21, 2017, and March 19, 2018. Compl. ¶¶ 63-65. The thrust of Plaintiffs’ claims is that the Defendants did not “have a license, permission, or other authorization to use Plaintiffs’ Test Prep Materials in the manner”. More specifically (but not intending to be an exhaustive list of the allegations made by the Plaintiffs), the Plaintiffs’ contend that at times, some or all of the Defendants violated the License by improperly using, disseminating and/or allowing unauthorized access to Plaintiffs’ test-prep materials. *See* Compl. ¶¶ 80, 109, 111-114, 170-171.

Attached to the Complaint are thirty-two copyright registrations that are purportedly material to Plaintiffs' claims. Compl., Exhibit "A". On August 28, 2018, Mr. Siler terminated (the "Termination") the License for the alleged violations by Ms. Lejarza. Compl. ¶ 66. Of the thirty-two copyright registrations, only TX 8-188-249 and TX 8-188-298 were registered prior to the Termination. Compl., Exhibit "A".

### **QUESTIONS PRESENTED**

- I. WHETHER PLAINTIFFS' CLAIM FOR BREACH OF CONTRACT IS PREEMPTED BY THE COPYRIGHT ACT.
- II. WHETHER PLAINTIFFS' COMMON LAW COPYRIGHT INFRINGEMENT CLAIM IS EXPRESSLY PREEMPTED BY THE COPYRIGHT ACT.
- III. WHETHER PLAINTIFFS' CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 IS DUPLICATIVE OF PLAINTIFFS' COPYRIGHT CLAIM.
- IV. WHETHER PLAINTIFFS' UDTPA CLAIM FAILS AS TO ALL DEFENDANTS WHERE IT IS PRE-EMPTED BY THE COPYRIGHT ACT AND NOT PROPERLY PLED TO WITHSTAND A MOTION TO DISMISS.
- V. WHETHER PLAINTIFFS HAVE PROPERLY PLED VEIL PIERCING CLAIMS AGAINST ELGA LEJARZA AND MIKE PENN.

### **STANDARD OF REVIEW**

A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" and must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 557, 127 S.Ct. 1955; *see also Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (holding that "'naked assertion[s]' devoid of 'further factual enhancement' " does not "suffice" (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955)). A Complaint must contain facts that allow the court to draw reasonable inferences and establish a plausible basis for belief for each claim. *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). Bare

assertions that are “devoid of further factual enhancement” are not entitled to an assumption of truth. *Iqbal* at 680. More than conclusions are required to “unlock the doors of discovery for a plaintiff.” *Id.*

In *Iqbal* and *Twombly*, the United States Supreme Court demonstrated a two-step approach to assessing the sufficiency of a complaint: (1) the first step is to “identify[ ] the allegations in the complaint that are not entitled to the assumption of truth”; and (2) then “consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.” *Iqbal*, 556 U.S. at 680–81. In order to survive a Rule 12(b)(6) motion to dismiss, Plaintiffs’ claims must present non-conclusory factual allegations that support reasonable inferences that Plaintiffs’ are entitled to relief and that the Defendants’ committed the acts described. *Id.*

## ARGUMENT

### **I. PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT SHOULD BE DISMISSED AS IT IS PREEMPTED BY THE COPYRIGHT ACT.**

The preemption test under § 301(a) of the Copyright Act is a “two-part test ... looking at (1) whether the claim ‘falls within the subject matter of copyright’ and (2) whether the claim ‘protects rights that are equivalent to any of the exclusive rights of a federal copyright.’ ” *Tire Eng'g and Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 309 (4th Cir.2012) (quoting *Carson v. Dynegy, Inc.*, 344 F.3d 446, 456 (5th Cir.2003)). When both elements are met, the derivative claim should be preempted. *Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, 58 F. Supp. 3d 491, 494 (W.D.N.C. 2014).

Only where an additional element outside of “reproduction, performance, distribution or display” will allow a claim to escape the gravity of the Copyright Act’s celestial pull. *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 230 (4<sup>th</sup> Cir. 1993). This extra factual element must change

the nature of the action such that it is “qualitatively different from a copyright infringement claim.”  
*Id.*

In *Rosciszewski*, the Court held that the plaintiffs’ claims were preempted even when they did not contain any federal causes of action. *Id.* At 231. One issue before the Court was whether the “Copyright Act is one of those areas of federal law that so completely preempt state law that it converts claims purportedly based on state law into claims under the Copyright Act.” *Id.* The Fourth Circuit concluded by stating “Congress has clearly indicated that state-law claims which come within the subject matter of copyright law and which protect rights equivalent to any of the exclusive rights within the scope of federal copyright law . . . Should be litigated only as federal copyright claims.” *Id.* at 232.

In Plaintiffs’ second cause of action for breach of contract is against Ms. Lejarza, the alleged party to the Contract and purchaser of the License. Compl. ¶183. Plaintiffs contend the following actions by Ms. Lejarza constitute a breach of the Contract: (1) allowing more than one person to use the online course; (2) using the content from the online course without permission; (3) providing the login information to other persons/entities without permission; and (4) providing test-prep materials to other persons/entities without permission. Compl. ¶¶ 184-187.

Plaintiffs’ statutory and common law copyright claims both arise out of the same alleged conduct in the cause of action for breach of contract. In their first cause of action for statutory copyright infringement, Plaintiffs reference the thirty-two copyrights and then aver that the Defendants “used the Test Prep Materials in a manner inconsistent with the limited personal nontransferable license granted to Defendant Elga Lejarza.” Compl. ¶¶ 167-168. The Plaintiffs further claim that “Defendants Lejarza HR Consulting and Lejarza Compliance Trainings did not have any license, permission or other authorization to use or possess the Test Prep Materials in any way” and that all the Defendants used the test-prep materials in their workshops. Compl. ¶¶

169-170. Alternatively stated, the nexus of Plaintiffs' statutory copyright claim is the same as the breach of contract claim: the scope of the License was unlawfully exercised.

Plaintiffs' fourth cause of action for common law copyright infringement makes it even clearer that their claim for breach of contract is the same as their claim for copyright infringement. In that cause of action, the Plaintiffs specifically plead that they "have not granted Defendants a license to use the Test Prep Materials *in the manner in which Defendants are using them...*" Compl. ¶208 (emphasis added). The Plaintiffs then specifically allege the wrongful acts by the Defendants, which mirror the same allegations in the cause of action for breach of contract. Compl. ¶ 209, including all subparts.

The alleged harm caused by Ms. Lejarza's breach of contract is the same harm alleged in Plaintiffs' causes of action for copyright infringement. Further, the relief afforded under the Copyright Act meets, if not exceeds, the relief Plaintiff could obtain for breach of contract. As such, Plaintiffs' second cause of action is expressly preempted by the Copyright Act.

**II. ADDITIONALLY, PLAINTIFFS' COMMON LAW COPYRIGHT INFRINGEMENT CLAIM FAILS AS IT IS EXPRESSLY PREEMPTED BY THE COPYRIGHT ACT.**

As set forth above, the claims brought in this case under the fourth cause of action for common law copyright infringement mirror the claims in the first cause of action under the Copyright Act. Further supporting the Defendants' position is that the fourth cause of action is pled in the alternative to the first cause of action. It appears that the Plaintiffs are conceding that if the Plaintiffs' first cause of action survives the Defendants' Motion, then the fourth cause of action should be dismissed. Therefore, in addition to the second cause of action for breach of contract,

the fourth cause of action for common law copyright infringement should be dismissed.

**III. PLAINTIFFS' CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 SHOULD BE DISMISSED AS IT IS DUPLICATIVE OF PLAINTIFFS' COPYRIGHT CLAIM.**

Plaintiffs' claim for unfair competition is nothing more than a copyright claim in disguise, therefore it must be dismissed. As pled, the unfair competition claim is brought under 11 U.S.C. § 1125. While not styled as a trademark infringement claim, the incorporation of 11 U.S.C. § 1125 and the common law trademark allegations into the complaint suggests that it is a trademark violation claim. *See* Compl. ¶¶ 149-153. Regardless of whether it is styled as an unfair competition claim or a trademark infringement claim, it is duplicative of Plaintiffs' copyright claims and should be dismissed.

The allegations of the claim also amount to a breach of the Contract and License. *See* Compl. ¶¶ 194-199. There is nothing in the Complaint, and specifically under this cause of action, that suggests the relief sought and the acts alleged differ from the allegations and relief sought under their copyright claims (and as set forth above, the breach of contract claim).

Consequently, this claim is also preempted by federal statute and should be dismissed as Plaintiffs are merely trying to overreach by extending their copyright claim to trademark and/or unfair competition. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2001) ("Thus, in construing the Lanham Act, we have been 'careful to caution against misuse or over-extension' of trademark and related protections into areas traditionally occupied by patent or

copyright”, citing *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29, 121 S.Ct. 1255 (2001)).

**IV. PLAINTIFFS’ UDTPA CLAIM FAILS AS TO ALL DEFENDANTS AS IT IS PRE-EMPTED BY THE COPYRIGHT ACT AND NOT PROPERLY PLED TO WITHSTAND A MOTION TO DISMISS.**

**a. Plaintiffs’ UDTPA Claims Should be Dismissed Because they are Copyright Claims in Disguise.**

An unfair and deceptive trade practice (“UDTPA”) claim founded on allegations of infringement fails to be “qualitatively” different from a copyright infringement action. *Rutledge v. High Point Reg’l Health Sys.*, 558 F. Supp. 2d 611, 619-620 (M.D.N.C. 2008). Outside of a “free-standing cause of action”, claims for UDTPA are preempted by the Copyright Act. *Id.*

This Court in *Rutledge* dismissed plaintiffs UDTPA claims pursuant to a 12(b)(6) motion on the basis of Copyright Act preemption. *Id.* *Rutledge* relied on *Rosciszewski* and further explained that “the scope of section 301(a) is extensive, such that the “shadow actually cast by the [Copyright] Act’s preemption is notably broader than the wing of its protection.” *Rutledge* at 617; (Quoting *U.S. ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d at 1463.)

This Court applied *Rosciszewski*’s extra element test and found plaintiff’s UDTPA claim was preempted by the Copyright Act as the UDTPA does not require an element in addition to those necessary to constitute a prima facie claim of copyright infringement. *Id.* at 619. This Court went on to hold that even plaintiff’s misrepresentation claim rested on “nothing more than the natural consequences of a Copyright Act violation.” *Id.* at 621. Because the claims rested on the “reproduction, display and distribution of the allegedly protected materials” any relief or claimed confusion arose under typical Copyright infringement. *Id.*

Here, as in *Rutledge*, Plaintiffs’ claims do not set forth an extra element or other basis to shield its UDTPA claim from preemption. As alleged, the claims arise out of Defendants receiving

profits and other benefits from the alleged excessive use of Plaintiffs' copyrighted materials. There is nothing in the Complaint to suggest the relief sought by Plaintiffs under this cause of action differs from the relief it seeks under its copyright claim.

The acts upon which Plaintiffs predicate their UDTPA claim do not differ from those giving rise to the Copyright Act claim such that the UDTPA claim would be separate from the Copyright Act claim. Thus, Plaintiffs' UDTPA claim is preempted and should be dismissed.

**b. Even Intentional Breaches do not Rise to the Level of UDTPA Liability.**

Taken alone, the Defendant's purported breach of contract, even if intentional, would not trigger the UDTPA. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530 (4th Cir.1989). The Plaintiffs must show that egregious or aggravating circumstances place the Defendant's actions within the statute. *Allied Distrib., Inc. v. Latrobe Brewing Co.*, 847 F.Supp. 376 (E.D.N.C.1993).

The Complaint does not set forth substantial aggravating factors that rise to the level of unfair or deceptive trade practices. If the Court does not dismiss Plaintiffs' claim for breach of contract, the allegations giving rise to the breach are not of a nature to support a UDTPA claim. Therefore, the breach of contract claim does not provide an independent basis to support the UDTPA claim.

**V. PLAINTIFFS HAVE NOT BROUGHT VEIL PIERCING CLAIMS AGAINST ELGA LEJARZA AND MIKE PENN AND ALL CAUSES OF ACTION AGAINST THEM PERSONALLY SHOULD BE DISMISSED.**

**a. The Complaint Fails to Allege Causes of Action against Ms. Lejarza.**

Under North Carolina Law, the elements required to prove an alter ego claim are (1) complete domination of the company (using ten fact intensive factors to determine complete domination); (2) that the control defendant exerted was directly related to the violation of the plaintiff's legal rights and (3) that such control of the company was in violation of the plaintiff's

rights proximately causing injury to the plaintiff. *Dewitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4<sup>th</sup> Cir. 1976).

In *Dewitt*, the Fourth Circuit established the following factors to take into consideration before a veil-piercing claim can stand:

- (1) whether the corporation was grossly undercapitalized;
- (2) failure to observe corporate formalities;
- (3) non-payment of dividends;
- (4) insolvency of the debtor corporation at the time;
- (5) siphoning of funds of the corporation by the dominant stockholder;
- (6) non-functioning of other officers or directors;
- (7) absence of corporate records; and
- (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder.

*Id.* Plaintiffs' Complaint does not even attempt to address the numerous factors used by the Fourth Circuit to determine complete domination and control over the respective entities. *Id.* What it appears the Plaintiffs are trying to do is attach personal liability to Ms. Lejarza (and as set forth below, Mr. Penn) when the dispute is really between the Plaintiffs and the corporate Defendants.

The allegations in the Complaint support that position. The Plaintiffs allege that Ms. Lejarza owns Lejarza and Lejarza Compliance. Compl. ¶¶81-82. They allege that Lejarza Compliance is a competitor of Distinctive HR. Compl. ¶100. They further allege that Lejarza Compliance "offers training workshops, seminars, webinars, classes, or similar training, educational, or promotional events taught by Elga Lejarza on to prepare customers of hers for the PHR and SPHR exams". Compl. ¶ 91. In its causes of action, Plaintiffs seek to hold the corporate

defendants (in addition to the individual defendants) liable for copyright infringement, engaging in unfair competition and unfair and deceptive trade practices. Taken together, the Plaintiff is contending the corporate defendants are the channel by which copyrighted material is being unlawfully disseminated. Therefore, Plaintiffs dispute is with them, and since there are no allegations to suggest the corporate protection afforded by the corporate defendants should be pierced (thereby exposing Ms. Lejarza to personal liability), Ms. Lejarza should be dismissed from the suit in its entirety.

**b. Plaintiff Has Completely Failed to Allege any Cause of Action against Mike Penn.**

There is a dearth of allegations against Mr. Penn under a veil-piercing theory (or otherwise). Mr. Penn is listed in six factual allegations. Compl. ¶¶ 158-162, 164. The allegations, combined with Exhibit “E”, establish that Mr. Penn is an owner of the corporate defendants, “takes an active role in in the management and business” of the businesses he owns, and is Ms. Lejarza’s husband. There are simply no facts alleged that would suggest he could be personally liable for any claim in this lawsuit. Further, none of the *Dewitt* factors are pled against Mr. Penn. Accordingly Mr. Penn should be dismissed with prejudice.

**CONCLUSION**

For all the foregoing reasons, the Defendants respectfully request that the Court grant their Motion to Dismiss.

This the 25<sup>th</sup> day of June, 2019.

Respectfully submitted,

By: s/Joseph R. Pellington  
Joseph R. Pellington N.C. Bar 43127  
Redding & Jones, PLLC  
2907 Providence Rd., Ste. A303  
Charlotte, North Carolina 28211  
704-200-2056 (phone)  
704-200-2056 (fax)  
jpellington@reddingjones.com

**CERTIFICATE OF SERVICE**

The undersigned certifies the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** has been filed with the Clerk of Court for the United States District Court, Eastern District of North Carolina, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented to accept service by electronic means.

This the 25<sup>th</sup> day of June, 2019.

By: s/ Joseph R. Pellington  
Joseph R. Pellington – N.C. Bar 43127  
Redding & Jones, PLLC  
2907 Providence Rd., Ste. A303  
Charlotte, North Carolina 28211  
704-200-2056 (phone)  
704-200-2056 (fax)  
jpellington@reddingjones.com