M. Christopher Moon USB# 14880
Jonathan M. Burt USB# 16794
JACKSON LEWIS PLLC
215 S. State Street, Suite 760
Salt Lake City, Utah 84111
Telephone: (801) 736-3199
Email: chris.moon@jacksonlewis.com
Email: jonathan.burt@jacksonlewis.com
Attorneys for Defendant

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ANHVU C. NGUYEN, an individual,

Plaintiff,

vs.

CORPORATION OF WESTERN GOVERNORS UNIVERSITY, a Utah Corporation,

Defendant.

Case No. 2:22-cv-00138-JNP-CMR

MOTION FOR PARTIAL DISMISSAL OF THE COMPLAINT

Judge Jill N. Parrish
Magistrate Judge Cecilia M. Romero

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Corporation of Western Governors University ("WGU") hereby moves to dismiss several claims brought by Plaintiff Anhvu C. Nguyen ("Nguyen"). In his Complaint, Nguyen expands his discrimination lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, into a convoluted twelve count lawsuit full of ancillary tort claims. Yet all of those extraneous claims are subject to dismissal because of pleading deficiencies or their statutory preemption. As discussed below, the Court should fully grant WGU's motion.

I. Statement of the Case[1]

A. The Parties

WGU supports Western Governors University, a private, online university headquartered in Salt Lake County, Utah.[2] Compl. ¶ 4, ECF No. 2. Nguyen is a former employee of WGU who was employed from on or around August 26, 2019, to March 29, 2021. *Id.* ¶¶ 14, 41. Nguyen is Vietnamese and Catholic. *Id.* ¶¶ 26, 56. Throughout his employment, Nguyen reported to his immediate supervisor, Senior Vice President Matt Sanders ("Sanders"). *Id.* ¶ 15.

[1] Although WGU denies the Complaint's allegations, it recognizes that the Court should "accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party" at the motion to dismiss stage. *Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006).

[2] While affiliated, WGU and Western Governors University are separate entities.

B. Nguyen's Allegations of Harassment, Discrimination, and Retaliation.

Nguyen claims race discrimination, religious discrimination, and unlawful retaliation. *Id.* ¶ 5. He claims that Sanders "had a cavalier attitude towards race and would publicly embrace derogatory racial stereotypes." *Id.* ¶ 25. In November 2019, Sanders asked Plaintiff why he was growing out his facial hair. Nguyen responded that he wanted to fit in for an upcoming business trip to Qatar, to which Sanders allegedly replied, "Don't worry. They have beards because they don't have balls." *Id.* ¶ 26.

Once during a team meeting, Nguyen suggested that Asians be included in a diversity discussion on Black Lives Matter. *Id.* ¶ 27. Sanders allegedly responded that the team would limit their discussion to Black Lives Matter and would not then talk about violence against Asian-Americans. *Id.* On another occasion in February 2020 shortly before the COVID-19 related lockdown, Sanders allegedly commented during a meeting that eating bats should be outlawed. *Id.* ¶ 28. Several months later, in November 2020, Sanders allegedly asked Nguyen why many Asians did not seem to get sick with COVID-19 and asked if Asians had some type of immunity to the virus. *Id.* ¶ 37.

As for religious discrimination, Nguyen alleges he was treated differently than co-workers who were members of the Church of Jesus Christ of Latter-day Saints (the "LDS Church"). *Id.* ¶ 30. He alleges that, during meetings, Sanders and others would discuss their religious beliefs, leaving him feeling isolated and left out. *Id.* ¶ 31. Nguyen does not, however, allege that WGU barred him from discussing his own faith during these discussions. *Id.* [3]

In August 2020, Nguyen allegedly complained to Sanders that he felt he was being treated differently than co-workers because of his race. *Id.* ¶ 32. Nguyen also alleges that he voiced complaints about differential treatment based on race and religion to WGU's Senior Manager of Human Resources Crystal McFarland ("McFarland"). *Id.* ¶ 34. More than eight months later, WGU terminated Nguyen's employment in March 2021, replacing him with a member of the LDS Church. *Id.* ¶¶ 41–42.

C. Nguyen's Allegations of Copyright Infringement.

Nguyen asserts that WGU has infringed his copyright in a Global Employment Ready Education ("GERE") program. *Id.* ¶ 2, 22. Nguyen claims to

[3] Utah law protects employees' rights to express religious or moral beliefs in the workplace, so merely discussing those beliefs would not suggest religious discrimination. *See* Utah Code Ann. § 34A-5-112(1).

have brought GERE to WGU, which he had started to develop before his hire. *Id.* ¶ 19. While employed at WGU, Nguyen continued to work on GERE, completing proof of concept in March 2020. *Id.* ¶ 20. WGU now continues to use and develop GERE under the name "ReadyTrack." *Id.* ¶¶ 22–23. Nguyen claims to have "pertinent exclusive rights" in GERE, but he does not allege that he has registered for or maintained a copyright from the U.S. Copyright office for the GERE program. *See id.* ¶ 110.

II. Argument

A. Standard for a Motion to Dismiss.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissing a cause of action that fails to state a claim upon which relief may be granted. To survive a motion to dismiss, a plaintiff must provide more than labels, conclusions, and a formulaic recitation of the elements of a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise the right to relief above the speculative level." *Id.* A plaintiff must offer specific factual allegations to support each claim—sufficient allegations to support a plausible claim that the defendant is liable. *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). This district, including this Court, routinely evaluates motions to dismiss claims arising from

employment relationships under this standard. *See, e.g.*, *Billy v. Edge Homes*, No. 2:29-cv-00058-JNP-EFJ, 2020 U.S. Dist. LEXIS 90504, at *8 (D. Utah May 21, 2020).

B. Nguyen's Third Cause of Action for Retaliation Must be Dismissed.

Nguyen's Third Cause of Action is for retaliation under Title VII. The Court may determine whether Nguyen has set forth a plausible claim by referring to "the elements of each alleged cause of action." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012). To state a prima facie case for retaliation under Title VII, Nguyen must show: (1) he engaged in protected opposition to discrimination, (2) he faced a materially adverse employment action, and (3) a causal connection existed between the protected activity and the materially adverse action. *Id.* at 1193.

Nguyen's retaliation claim fails because the only allegations related to this claim are that he made internal complaints in 2020, then WGU fired him over eight months later. This alone does not make his claim plausible, and there are no other background facts that bolster this claim. While true that a causal connection may be shown through "very close" temporal proximity between the protected activity and adverse action, that generally requires a connection of less than three months. *See IG v. Jefferson County Sch. Dist.*, 452 F. Supp. 3d 989, 1003 (D. Colo. 2020) ("Six weeks between the protected activity and the adverse action is sufficient, but three

months is insufficient." (citations omitted)); *see also Vigil v. Salt Lake City Corp.*, No. 2:20-CV-00344-DBB-DAO, 2020 U.S. Dist. LEXIS 238670, at *7 (D. Utah Dec. 17, 2020) (holding 10-month window could not establish causal connection at motion to dismiss stage); *Manning v. Wal-Mart Stores, Inc.*, No. 2:15CV537 DS, 2016 U.S. Dist. LEXIS 9720, at *8 (D. Utah Jan. 27, 2016) (granting motion to dismiss retaliation claim because the plaintiff "failed to allege sufficient facts to support an adequate causal connection based upon temporal proximity").

Nguyen fails to allege facts to make out a plausible causal connection between his alleged complaint to Sanders and McFarland in August 2020 and his termination 8 months later in March 2021. As in *Vigil*, this 8-month period "falls well outside the three-month window that the Tenth Circuit has already deemed excessive in inferring causality without additional evidence." 2020 U.S. Dist. LEXIS 238670, at *7. Nguyen must therefore allege more background facts to make his retaliation claim plausible. He has not. The Court should therefore dismiss his retaliation claim.

C. Nguyen's Fourth Cause of Action Must be Dismissed Because a Claim for Exemplary Damages is not a Separate Cause of Action.

Nguyen's Fourth Cause of Action for exemplary damages must be dismissed because exemplary damages are a remedy, not a separate cause of action. As pled,

Nguyen's exemplary damages claim is merely an extension of his Title VII claims for discrimination and retaliation. That means they are subject to dismissal. *Molina v. Wells Fargo Bank*, NO. 2:16-cv-207-DN, 2017 U.S. Dist. LEXIS 47023, at *11 (D. Utah March 29, 2017) (granting motion to dismiss claim for punitive damages, including in connection with Title VII claims, because such a claim is not a separate cause of action); *see also Silver v. Copart, Inc.*, 2:21-cv-00530-JCB, 2021 U.S. Dist. LEXIS 214794, at *3 n.18 (D. Utah Nov. 5, 2021) ("'Punitive damages' is not a separate cause of action but merely a type of remedy available after proving a cause of action that allows for punitive damages.")

D. Nguyen's Negligence Claims are Barred by the Exclusive Remedy Provisions of the Utah Workers' Compensation Act.

Nguyen's negligence claims (the Fifth and Seventh Causes of Action) are barred by the Utah Workers' Compensation Act ("UWCA"). This Court's opinion in *Billy v. Edge Homes*, No. 2:29-cv-00058-JNP-EFJ, 2020 U.S. Dist. LEXIS 90504 (D. Utah May 21, 2020), disposes of these claims.

The UWCA "relieves employers of any common law liability for injuries sustained by an employee 'on account of any accident or injury or death' that is 'contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment.'" *Id.* at *9–10 (quoting

Helf v. Chevron U.S.A., Inc., 2009 UT 11, 203 P.3d 962 ("*Helf I*")); *see also* Utah Code Ann. § 34A-2-105(1). Utah courts apply an "indispensable element" test to determine whether a claim is preempted by the UWCA. *Id.* at *10. Under that test, "if proof of physical or mental injury is an indispensable element of any claim for relief, that claim is barred by the exclusivity provision of the UWCA." *Id.* at *10–11 (quoting *Thomas v. Nat'l Semiconductor, Inc.*, 827 F. Supp. 1550, 1552 (D. Utah 1993)).

Courts have repeatedly recognized that claims for negligent supervision and retention are preempted by the UWCA. *See, e.g.*, *Hirase-Doi v. U.S. West Comms., Inc.*, 61 F.3d 777 (10th Cir. 1995) (affirming dismissal of negligent supervision and retention claim as "barred by the exclusivity provisions of the [UWCA]"), *overruled on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Niles v. Jones*, No. 2:03-CV-18 TS, 2004 U.S. Dist. LEXIS 30601, at *13 (D. Utah Feb. 24, 2004) ("It is well-established that the [UWCA] is the exclusive remedy for an employee's claims of negligence, including negligent supervision.").

So too are claims for negligent infliction of emotional distress barred by the UWCA. *See, e.g.*, *Billy*, 2020 U.S. Dist. LEXIS 90504, at *12 ("Plaintiff's negligence and [NIED] causes of action are preempted by the UWCA because they allege workplace injuries covered by the UWCA that do not fall with the *Helf I*

"intent to injure" exception."); *Molina*, 2017 U.S. Dist. LEXIS 47023, at *12 ("Here, mental injury is an indispensable element of Molina's NIED claim and thus, this claim is precluded by the [UWCA].").

Here, likewise, Nguyen's negligence-based claims in the Fifth and Seventh Causes of Action are likewise barred. Those claims depend on Nguyen suffering a "physical or mental injury." *Billy*, 2020 U.S. Dist. LEXIS 90504, at *10–11. For instance, Nguyen alleges in his Fifth Cause of Action that WGU's failure "to adequately supervise and/or retain Matt Sanders to prevent … harassment and discrimination" caused him to suffer "damages, including, but not limited to, termination, loss of future employment, loss of benefits, lost wages, medical expenses, severe emotional distress, pain and suffering, and humiliation." Compl. ¶¶ 69–70, ECF No. 2. And in his Seventh Cause of Action, Nguyen similarly alleges that WGU engaged in "harassing, discriminatory, and retaliatory behavior" and terminated his employment, causing him to suffer "severe emotional harm." *Id.* ¶¶ 79–80. Because physical or mental injury is an "indispensable element" of these claims, they are barred by the UWCA. *Billy*, 2020 U.S. Dist. LEXIS 90504, at *10–11.

The so-called "intent to injure" exception does not save Nguyen's preempted negligence claims. The Utah Supreme Court has recognized an "intent to injure"

exception to UWCA preemption. *Id.* at *11 (citing *Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶ 23, 361 P.3d 63 ("*Helf II*")). This exception applies, as its name suggests, only if the employee can prove that his injury was "'intentional,' as distinct from 'injuries that are accidental or the product of negligence.'" *Id.* (citing *Helf I*, 2009 UT 11, ¶ 50). Nguyen's negligence claims are "unintentional torts that do not call for [Nguyen] to prove [his] supervisors knew or expected [their conduct] would result in [his] injury" or "prompt any analysis of [WGU's or Sanders's] subjective intent." *Id.* at *14. The intent-to-injure exception simply "does not apply to 'negligent or accidental injuries.'" *Id.* (quoting *Helf I*, 2009 UT 11, ¶ 24).[4]

E. The Sixth Cause of Action for Intentional Infliction of Emotional Distress Fails to State a Claim.

1. The Sixth Cause of Action is Barred by The Exclusive Remedy Provisions of the Utah Antidiscrimination Act and the UWCA.

Nguyen's intentional infliction of emotional distress ("IIED") claim is barred by the exclusive remedy provision of the Utah Antidiscrimination Act ("UADA").

[4] Besides being barred by the UWCA, several courts have recognized that negligence-based claims based on discrimination and retaliation under the Utah Antidiscrimination Act ("UADA") are preempted by that law as well. *Giddings v. Utah Transit Auth.*, 107 F. Supp. 3d 1205, 1211–12 ("Ms. Giddings's pendent negligence claims against UTA are grounded on allegations and injuries of discrimination and harassment based on gender. As such, they are common law claims which are precluded under … *Gottling*."); *Molina*, 2017 U.S. Dist. LEXIS 47023, at *12 ("Molina's NIED claim is precluded by both the [UWCA] and the [UADA]."). Here, Nguyen's negligence claims likewise hinge on his allegations of racial and religious discrimination and retaliation. Those claims are thus doubly preempted by the UADA. *See also* Section E, *infra*.

That is because the discrimination and retaliation he allegedly suffered is an indispensable element of his IIED claim. As Nguyen cannot maintain his IIED claim without relying on his allegations of discrimination, the UADA preempts this claim.

The UADA makes clear that it is the "exclusive remedy under state law for employment discrimination based upon" several protected characteristics, including race, religion, and retaliation. Utah Code Ann. § 34A-5-107(15). As the Utah Supreme Court has confirmed, this exclusive remedy provision "unambiguously indicates that the UADA preempts 'common law causes of action' for employment discrimination based on the 'specific grounds' it lists." *Gottling v. P.R., Inc.*, 2002 UT 95, 61 P.3d 989, 993 (Utah 2002) (citing *Retherford v. AT&T Communications*, 844 P.2d 949, 961 (Utah 1992)). Moreover, claimants who wish to pursue UADA claims cannot even bring them in court. Rather, they go through an administrative process handled by the Utah Labor Commission. *See Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842, 852 (Utah 2004); *see also* Utah Code Ann. § 34A-5-107.

This Court has already analyzed the UADA's preemptive force in its decision in *Billy*. There, the Court explained that the Utah Supreme Court in *Retherford* laid out a two-part "indispensable element" test to determine whether the UADA preempts a state law claim in an employment discrimination case. *See Retherford*, 844 P.2d at 964-67. The Court first determines what injuries the UADA is designed

to address, which *Retherford* explained was "all manner of employment discrimination." *Id.* at 966. Second, the court must determine whether "employment discrimination … supplies an indispensable element of any of [the plaintiff's] causes of action." *Billy*, 2020 U.S. Dist. LEXIS 90504, at * 26 (citing *Retherford*, 844 P.2d at 966). Under this aspect of the *Retherford* test, state law tort or contract claims are exempt from UADA preemption if "discrimination is not an indispensable element of these claims," so that the plaintiff could "'maintain [her state law] claims without alleging retaliatory harassment' or other discriminatory injury covered by the UADA." *Billy*, 2020 U.S. Dist. LEXIS 90504, at *26-27 (citing *Retherford*, 844 P.2d at 966–67). In other words, a common law claim is preempted by the UADA if the plaintiff "would be unable to maintain the claim without alleging retaliatory harassment." *Id.* at *27 (citing *Tremelling v. Ogio Int'l, Inc.*, 919 F. Supp. 392, 395 (D. Utah 1996)); *see also Jensen v. Xlear, Inc.*, No. 2:19-cv-413, 2020 U.S. Dist. LEXIS 83794, at *27-28 (D. Utah May 11, 2020) (dismissing IIED claim based on allegations that employer discriminated against plaintiffs as "expressly preempted by the face of the UADA").

Nguyen's Complaint makes clear that he could not maintain his IIED claim without alleging discrimination and retaliation. As the basis for his IIED claim, Nguyen asserts that WGU "intentionally or recklessly engaged in, or permitted,

intolerable and outrageous *unlawful harassment, discrimination, and retaliation.*" ECF No. 2 at ¶ 72 (emphasis added). He then states that WGU "intentionally acted *to harass*" him by taking actions "*to harass, discriminate, and retaliate* against Plaintiff, and to terminate his employment." *Id.* at ¶ 73 (emphasis added). To be certain, IIED claims can be maintained outside the employment context in ways that have nothing to do with the UADA. Not so here though. Nguyen could not maintain his IIED claim without alleging harassment and discrimination that violates the UADA. That claim is therefore preempted. *See Ortega v. Squatters Rd. House Grill*, No. 2:14-cv-00370-TC, 2014 U.S. Dist. LEXIS 177873, at *11-12 (D. Utah Dec. 29, 2014) (finding that an IIED claim "based on alleged discrimination, retaliation, and harassment" by an employer was a "common law cause of action preempted by the Utah Supreme Court's broad holding in *Gottling*.").[5]

2. The Sixth Cause of Action is Deficient Because Nguyen Does Not Plausibly Allege Facts That Would Cause Someone Severe Emotional Distress.

Nguyen's IIED claim must also be dismissed because Nguyen does not plausibly allege facts that would cause someone to suffer severe emotional distress.

[5] The *Retherford* court found that an IIED claim was not preempted by the UADA. The facts of *Retherford* are distinguishable from this case. In particular, the plaintiff in that case brought the IIED claim solely against individual co-workers. The *Retherford* court thus found a distinct injury caused by *coworkers* unlike the retaliation caused by the *employer*.

To state an IIED claim, a plaintiff must allege that: (1) the defendant intentionally engaged in conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality; (2) it did so with the purpose of inflicting emotional distress or where any reasonable person would have known that distress would result; and (3) the plaintiff suffered severe emotional distress as a direct result of the defendant's conduct. *Russell v. Thomson Newspapers*, 842 P.2d 896, 905 (Utah 1992). Whether the alleged conduct is so extreme and outrageous as to permit recovery is a question of law for the court. *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 38, 56 P.3d 524.

Because these claims "are easy to assert and hard to defend against," the Utah Supreme Court has observed that "courts have historically been wary of dangers in opening the door to recovery." *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 59, 70 P.3d 17 (citing *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 25, 21 P.3d 198). And that court has also explained that "[c]onduct is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal." *Id.* ¶ 64. Outrageous conduct under this tort must instead evoke "outrage or revulsion; it must be more than unreasonable, unkind, or unfair." *Id.* (citing *Franco*, 2001 UT 25, ¶ 28). Courts have not hesitated to dismiss IIED claims under Rule

12(b)(6) under this standard. *See, e.g.*, *id.* ¶ 69; *Zoumadakis v. Uintah Basin Medical Ctr.*, 2005 UT App 325, ¶ 8, 122 P.3d 891 (holding IIED claim against employer failed because the alleged statement did "not constitute the kind of outrageous conduct required to support the cause of action"); *Zemaitiene v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, No. 2:16-cv-1271-RJS, 2018 U.S. Dist. LEXIS 53425, *9 (D. Utah Mar. 28, 2018) (holding plaintiff's allegations against employer fell "far short of alleging a plausible [IIED] claim" as the conduct could "only be characterized as innocuous or at most annoying").

Nguyen's allegations come nowhere near meeting this demanding standard. To support his IIED claim, Nguyen alleges:

- Sanders made a comment that Qataris "don't have balls." Compl. ¶ 26, ECF No. 2.
- Sanders declined to talk about violence against Asian-Americans during a diversity training on Black Lives Matter. *Id.* ¶ 27.
- Sanders stated shortly before the COVID-19 lockdown that eating bats should be outlawed. *Id.* ¶ 28.
- WGU failed to remedy or prevent Sanders's harassment and discrimination of Nguyen. *Id.* ¶ 29.
- Sanders and others would talk about their religion at work, leaving Nguyen feeling isolated and left out because he was not a member of the LDS Church. *Id.* ¶ 31.

- WGU did not adequately address Nguyen's complaints of discrimination and harassment. *Id.* ¶ 35.
- Nguyen was excluded from important meetings. *Id.* ¶ 36.
- Sanders asked Nguyen why Asians did not seem to be sick with COVID-19. *Id.* ¶ 37.
- Sanders did not meet with Nguyen to discuss budgets and did not give him access to a company card. *Id.* ¶¶ 38–39.
- Sanders required Nguyen to seek outside funding for GERE. *Id.* ¶ 40.
- WGU terminated Nguyen's employment. *Id.* ¶ 41.

None of the comments attributed to WGU employees satisfies the rigorous IIED standard, either alone or together. "[D]erogatory statements alone do not give rise to a claim of [IIED]." *Zoumadakis*, 2005 UT App 325, ¶ 8. And Utah courts have "repeatedly rejected plaintiffs' claims of [IIED] arising out of an alleged wrongful termination." *Id.* (citing *Larson v. SYSCO Corp.*, 767 P.2d 557, 561 (Utah 1989) ("While termination can be an emotionally distressing event in one's life, mere termination alone does not constitute the intentional infliction of emotional distress."). At most, Nguyen's allegations, if true, which they are not, relate to petty workplace annoyances and disagreements. *See Bennett*, 2003 UT 9, ¶ 64 ("The liability [for IIED] clearly does not extend to mere insults, indignities, threats,

annoyances, petty oppressions, or other trivialities." (citation omitted)). As a result, Nguyen's IIED claim must be dismissed.

F. The Eighth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing is Also Barred by the UADA's Exclusive Remedy Provisions.

Nguyen also alleges that WGU breached the "implied covenant of good faith and fair dealing" that he claims is part of "every employment relationship in Utah." ECF No. 2 at ¶ 83. Yet the conduct that Nguyen claims led to the breach of this implied covenant is the termination of his employment after he complained of "unwanted harassment and discrimination." ECF No. 2 at ¶ 84. In other words, Nguyen's good faith and fair dealing claim is merely a restatement of a claim for employment retaliation, as he claims to have been subjected to an adverse employment action after he complained of unlawful conduct under the UADA (and its federal equivalent, Title VII).

As this Court held in *Billy* analyzing the same claim, Nguyen cannot maintain his breach of good faith and fair dealing claim "without alleging" retaliation. *Billy*, 2020 U.S. Dist. LEXIS 90504, at *33 (citing *Retherford*, 844 P.2d at 966-67). The UADA thus preempts this cause of action because the UADA covers injuries that result from retaliation, and "such injuries constituted an indispensable element of that cause of action." *See Billy*, 2020 U.S. Dist. LEXIS 90504, at *34. The guiding

principle in this preemption analysis is that the UADA preempts "state law claims that cannot be maintained without proving discrimination" or retaliation. *Id.*; *see also id.* at n. 6 (collecting cases). Nguyen's breach of the implied covenant of good faith and fair dealing claim should be dismissed with prejudice.

G. The Ninth Cause of Action for Promissory Estoppel is Subject to Dismissal Because Nguyen Was an At-Will Employee.

In his Ninth Cause of Action, Nguyen alleges promissory estoppel based on his contention that he accepted employment and continued to work for WGU under the promise of "significant equity." ECF 2 at ¶¶ 87-88. Such allegations do not state a claim for relief under Utah law in the employment context. Under Utah law, the elements of promissory estoppel are: (1) the promisee acted with prudence and in reasonable reliance on a promise made by the promisor; (2) the promisor knew that the promisee had relied on the promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person; (3) the promisor was aware of all material facts; and (4) the promisee relied on the promise and the reliance caused a loss to the promisee. *J.R. Simplot Co. v. Sales King Int'l, Inc.*, 2000 UT 92, 17 P.3d 1100, 1107 (Utah 2000).

Nguyen could not have acted in reasonable reliance on any compensation or equity promises made to him because he has alleged no facts to counter the

presumption that he was an at-will employee. In Utah, an employee hired for an indefinite period "is presumed to be an employee at will who can be terminated for any reason whatsoever so long as the termination does not violate a state or federal statute." *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1000 (Utah 1991). That presumption means that it would be unreasonable for *any* at-will employee to assume that he would be compensated any specific amount at any point in the future because his employment could end at any time for any lawful reason. *See Davis v. Utah*, No. 2:18-CV-926 TS-PMW, 2019 U.S. Dist. LEXIS 113347, at *11 (D. Utah July 8, 2019) ("Plaintiff's claim fails because any reliance on an alleged promise would have been unreasonable in light of the terms of the employment contract, which clearly indicated that Plaintiff was an at-will employee."); *see also Kuhl v. Wells Fargo Bank, N.A.*, 2012 WY 85 , 281 P.3d 716 , 727 (Wyo. 2012) ("A valid at-will employment disclaimer, however, defeats an employee's promissory estoppel claim."). If Nguyen cannot allege facts sufficient to defeat the at-will presumption, then he could not have reasonably relied on purported promises of equity to be paid out at some indeterminate point in the future during his employment because that employment could have ended at any point without making any further payments to him.

H. The Tenth Cause of Action for Conversion is Subject to Dismissal.

1. Utah Law Does Not Allow Conversion Claims Based on the Conversion of Intellectual Property.

Nguyen's Tenth Cause of Action for Conversion must be dismissed because Nguyen does not allege conversion of tangible personal property. Conversion "is an act of willful interference *with a chattel*, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Soundvision Techs., LLC v. Templeton Grp. Ltd.*, 929 F. Supp. 2d 1174, 1197 (D. Utah 2013) (emphasis added) (citing *Fibro Tr., Inc. v. Brahman Fin., Inc.*, 974 P.2d 288, 295–96 (Utah 1999)). As a result, this District has observed that "Utah would not allow a conversion claim for intangible intellectual property." *Id.* (citing *Margae, Inc. v. Clear Link Techs., LLC*, 620 F. Supp. 2d 1284, 1287 (D. Utah 2009)).

As explained in *Margae*, "[a]n expansion of conversion liability to cover intangible property does not appear likely in a state that follows the Restatement (Second) of Torts for guidance." 620 F. Supp. 2d at 1287. The Restatement "generally limits conversion actions involving intangible property to intangible property that is 'customarily merged in a document.'" Restatement (Second) of Torts § 242(2).

In *Soundvision*, the plaintiff sued for conversion, alleging that the defendant "converted intellectual property that [the plaintiff] contributed to [the defendant's] products because [the plaintiff] was not compensated for the use of its designs and concepts." 929 F. Supp. 2d at 1197. Given this allegation, the court found that the "exact nature of the property interest asserted by [the plaintiff] [was] not clear." *Id.* But "[t]o the extent it [was] an assertion of a property interest in the ideas and concepts that were used to develop the products," the court reasoned, it was "a claim for conversion of intangible intellectual property, which is not allowed under Utah law." *Id.*

That same analysis applies here. Nguyen alleges that WGU converted his intellectual property, the GERE program, that he contributed to WGU while he was employed and that he has not been compensated for the use of his designs and concepts. Compl. ¶¶ 22, 94. Specifically, Nguyen alleges that WGU has deprived him "of the use and benefits of his intellectual property" and should "compensate [him] for his intellectual property." *Id.* ¶¶ 94, 96. Nguyen thus alleges an interest in intangible intellectual property for the ideas and concepts used in GERE. Utah law does not recognize this type of claim for conversion of intangible intellectual property. This claim must be dismissed.

2. The Copyright Act Preempts State Common Law Claims Concerning Intellectual Property Within the Scope of the Subject Matter of Copyright.

Besides the tort of conversion not applying to intangible intellectual property, Nguyen's conversion claim is preempted by federal law. Federal copyright law is designed to preempt state law on "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by" the Copyright Act. *See Ehat v. Tanner*, 780 F.2d 876, 877 (10th Cir. 1986); *see also* 17 U.S.C. § 301(a). Section 301 "is intended to prevent the States from protecting a work even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain." *Id.* (quotation simplified). Section 301 preempts state common or statutory law if: "(1) the work is within the scope of the 'subject matter of copyright' as specified in 17 U.S.C. § 102, 103; and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106." *Id.* at 878. Copyright law "preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law." *SCO Grp. Inc. v. Int'l Bus. Machs. Corp.*, 874 F.3d 1172, 1189 (10th Cir. 2017) (quoting *Harold Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1542–43 (10th Cir. 1996)). "Those

exclusive rights include the rights to reproduce the work, prepare derivative works, distribute copies, and perform or display the work publicly." *Id.* (citing 17 U.S.C. § 106 and *Harold Stores*, 82 F.3d at 1543).

A conversion claim seeking immediate possession of property is not necessarily preempted by § 301. In *Big Squid, Inc. v. Domo, Inc.*, No. 2:19-cv-193, 2019 U.S. Dist. LEXIS 131094 (D. Utah Aug. 5, 2019), for example, the court held that a company's conversion claim against a former business partner was not preempted because it concerned "the right to possess tangible materials" rather than the rights afforded under the Copyright Act. *Id.* at *37.

That is not this case. To begin with, Nguyen has alleged that his ideas and concepts in GERE fall under the subject matter of copyright. *See* Compl. ¶ 2, ECF No. 2; *see also* 17 U.S.C. § 102(a) (listing categories of copyrightable material). And Nguyen alleges in his Tenth Cause of Action that WGU has "deprived Plaintiff of the use and benefits of his intellectual property," not any tangible property. Compl. ¶ 94, ECF No. 2. Thus, rather than demand physical possession of his intellectual property (a contradiction in terms), Nguyen seeks "to recover for damage flowing from [GERE's] reproduction and distribution." *See Ehat*, 780 F.2d at 878. WGU's alleged reproduction of GERE as ReadyTrack allegedly "interferes with an

intangible … property right equivalent to copyright." *Id.* As a result, this claim is preempted.

I. The Eleventh Cause of Action for Unjust Enrichment is Barred.

1. Nguyen's Unjust Enrichment Claim Is Barred by Federal Copyright Law.

Nguyen's Unjust Enrichment claim is similarly preempted by federal copyright law. As explained, § 301 preempts state common law claims if: "(1) the work is within the scope of the 'subject matter of copyright'" and "(2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright." *Ehat*, 780 F.2d at 878.

The Tenth Circuit's opinion in *Ehat* is dispositive. There, the plaintiff asserted claims both for copyright infringement and unjust enrichment. After a bench trial, the court ruled for the plaintiff. The defendant appealed, arguing that the district court erred in awarding damages for unjust enrichment because the claim was "preempted by the federal copyright statutes." *Id.* at 877. The Tenth Circuit agreed. *Id.* It reasoned that copyright law gave exclusive rights to the copyright holder to, among other things, "reproduce the copyrighted work" and "distribute copies to the public by sale." *Id.* at 878. The court thus saw "no distinction" between the state-law rights asserted in the complaint "and those exclusive rights encompassed by the

federal copyright law." *Id.*; *see also R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1147 (10th Cir. 2009) (relying on *Ehat* to hold that common-law unjust enrichment claim was preempted by the Copyright Act).

Nguyen likewise brings claims both for copyright infringement and unjust enrichment. But neither of these claims can live while the other survives. Nguyen alleges that he "conferred a benefit upon [WGU] in the form of his labor and intellectual property" and that WGU "retained the benefits of [Nguyen's] services and intellectual property" without paying him. Compl. ¶¶ 103–05, ECF No. 2. He has thus alleged interference with the "exclusive rights encompassed by the federal copyright law." *Ehat*, 780 F.2d at 878. The unjust enrichment claim is thus preempted.

2. Nguyen's Unjust Enrichment Claim Is Barred Because Nguyen Was Compensated as an Employee and He Does Not Allege Any Other Agreement for Compensation

Even if not preempted, Nguyen has failed to plausibly allege unjust enrichment in the employment context. To establish a claim for unjust enrichment, a plaintiff must show: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

Chinitz v. Ally Bank, No. 2:19-cv-00059, 2020 U.S. Dist. LEXIS 61792, at *18 (D. Utah Apr. 7, 2020) (quoting *Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754). But "a prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue." *Butler v. EME, Inc.*, No. 2:17-cv-00140-EJF, 2018 U.S. Dist. LEXIS 84303, at * 37 (D. Utah May 18, 2018) (citing *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246).

An employee, moreover, cannot plausibly allege a "claim for unjust enrichment where the employee was compensated for his services unless the employee presents facts showing that his compensation was unreasonable or that the employer was unjustly enriched when it compensated the employee." *Kirk v. Rockwell Collins, Inc.*, No. 2:12-cv-1107-DB-PMW, 2015 U.S. Dist. LEXIS 20851, at *24 (D. Utah Feb. 3, 2015).

The court's opinion in *Kirk* is illustrative. There, the plaintiff-employee alleged that he provided "knowledge and services" to his employer, that he believed he would be employed until retirement, and that his employer was "unjustly enriched" by its termination of plaintiff's employment before his retirement. 2015 U.S. Dist. LEXIS 20851, at *22. The court held that the plaintiff's unjust enrichment claim failed "for at least two reasons." *Id.* at *23. First, it noted that the plaintiff

"was employed under an express at-will employment agreement." *Id.* "For that reason alone," the court held, the plaintiff could not "state an unjust enrichment claim." *Id.* Second, the court reasoned that the plaintiff did not allege that "he was unreasonably compensated while employed." *Id.*; *see also Lamb v. Money Transfer Sys., Inc.*, No. 12-CV-6584 CJS, 2013 U.S. Dist. LEXIS 132007, at *39 (W.D.N.Y. Sept. 16, 2013) (granting motion to dismiss because the plaintiff did not "plausibly allege that Plaintiff performed work that exceeded the scope of his duties" but showed that he "merely did exactly what he was hired to do, for which he was paid his salary").

Nguyen's unjust enrichment claims fails for the same reasons. Nguyen alleges he completed GERE while working for WGU, that he believed he would become CEO/GM of WGU, and that since his termination WGU continues to use GERE as "ReadyTrack." Compl. ¶¶ 16, 20, 23 ECF. No. 2. He also alleges that WGU "failed to pay for the benefits it received from [him] and his intellectual property." *Id.* ¶ 103. These allegations are deficient for two reasons.

First, as in *Kirk*, the presumption of at-will employment, which Nguyen has not pled does not apply here, alone defeats his unjust enrichment claim.

Second, Nguyen has not alleged that he was not paid a salary or that his salary was unreasonable. Nor does he allege he performed work that exceed the scope of

his duties; he "merely did exactly what he was hired to do." *Lamb*, 2013 U.S. Dist. LEXIS 132007, at *39. Nguyen admits that he completed GERE while employed with WGU and that WGU "requested [he] bring his intellectual property while providing services on [WGU's] behalf." Compl. ¶¶ 20, 99, ECF No. 2. Nguyen was compensated for this activity through a salary, and he alleges no facts to suggest that his salary was unreasonable or created a windfall to WGU. This claim must be dismissed with prejudice.

J. The Twelfth Cause of Action for Copyright Infringement is Deficient.

To state a claim for copyright infringement, Nguyen must allege "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Blehm v. Jacobs*, 702 F.3d 1193, 1199 (10th Cir. 2012). As the Supreme Court recently made clear, a valid copyright registration is a "prerequisite for bringing a 'civil action for infringement' of the copyrighted work." *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 211 L. Ed. 2d 586, 590, 142 S. Ct. 941 (Feb. 24, 2022) (citing 17 U.S.C. § 411(a)). "Additionally, a plaintiff in an infringement action normally cannot obtain an award of statutory damages or attorney's fees for infringement that occurred prior to registration." *Id.* (citing 17 U.S.C. § 412).

To state a claim for copyright infringement then, Nguyen must, at a minimum, plead that he has a valid copyright. This can be done through a plaintiff's presentation of a certificate of registration from the U.S. Copyright Office, as that document "usually constitutes prima facie evidence of a valid copyright and of the facts stated in the certificate." *Whitaker v. Stanwood Imports*, No. 2:10-CV-539 TS, 2010 U.S. Dist. LEXIS 128092, at *6 (D. Utah Dec. 2, 2010) (finding that certificate satisfied pleading requirements to show a valid copyright); *see also Big Squid, Inc. v. Domo, Inc.*, No. 2:19-cv-193, 2019 U.S. Dist. LEXIS 131094, at *27–28 & n.170 (D. Utah Aug. 5, 2019) (reference to copyright registration number satisfied the first element of a copyright infringement claim at the motion to dismiss stage).

Here, unlike this district's decisions in *Whitaker* and *Big Squid*, Nguyen has not referenced a specific copyright number that he possesses or claimed that he has obtained a certificate of copyright registration. Rather, he merely alleges that he is "the holder of pertinent exclusive rights infringed by Defendant." ECF No. 2 at ¶ 110. But that is not enough. To maintain an action for infringement, a copyright holder must take the next step of registering the copyright with the Copyright Office. Before pursuing an infringement claim in court, a copyright claimant must comply with §411(a)'s requirement that "registration of the copyright claim has been made." §411(a). As a result, although an owner's rights exist apart from registration, *see*

§408(a), "registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights," *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019).

Copyright registration is a prerequisite to an infringement claim. Nguyen simply has not alleged that such a registration has been obtained. The Court should therefore also dismiss the Twelfth Cause of Action.

III. Conclusion

Nguyen's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Causes of Action must be dismissed for failure to state a claim on which relief may be granted.

Respectfully submitted this 6th day of April 2022.

/s/ M. Christopher Moon

M. Christopher Moon USB# 14880
Jonathan M. Burt USB# 16794
JACKSON LEWIS PLLC
215 S. State Street, Suite 760
Salt Lake City, Utah 84111
Telephone: (801) 736-3199
chris.moon@jacksonlewis.com
jonathan.burt@jacksonlewis.com
Attorneys for Defendant

WORD COUNT CERTIFICATION

I, M. Christopher Moon, certify that this MOTION FOR PARTIAL DISMISSAL OF THE COMPLAINT contains 6,820 words and complies with DUCivR7-1(a)(4).