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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

APPLIED PROFESSIONAL TRAINING,
INC., a California corporation,

Plaintiff,

vs.

MIRA COSTA COLLEGE, entity unknown,
et al.,

Defendants.

CASE NO. 10cv1372 DMS (POR)

**ORDER (1) CONSTRUING
MOTION TO DISMISS AS
MOTION FOR SUMMARY
JUDGMENT UNDER RULE 56
AND (2) DENYING PLAINTIFF'S
EX PARTE MOTION FOR LEAVE
TO CONDUCT DISCOVERY**

This matter comes before the Court on Plaintiff's *ex parte* motion for leave to conduct discovery to oppose the motion to dismiss filed by Defendants Teleskills, LLC, Burt Price, Thomas Cawley, Xavier Uribe, Mara Glenn and Janis Aydelott ("Teleskills Defendants"). The Teleskills Defendants filed an opposition to the motion. The motion came on for telephonic hearing on September 7, 2010. John Alessio appeared on behalf of Plaintiff, John Fuchs appeared on behalf of the Teleskills Defendants, and Randall Winet appeared on behalf of Defendant Mira Costa College. After reviewing the parties' briefs and hearing argument from counsel, IT IS HEREBY ORDERED:

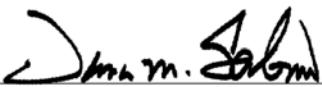
1. The Court will construe the Teleskills Defendants' motion to dismiss under Rule 12(b)(1) as a motion for summary judgment under Rule 56. *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (stating district court should have construed motion to dismiss on statute of limitations grounds as motion to dismiss for failure to state a claim rather than motion to dismiss

1 for lack of jurisdiction). Although the Teleskills Defendants contend that the Release raises standing
2 concerns, which are properly addressed under Rule 12(b)(1), they have failed to cite any authority to
3 support that contention. Rather, the issue of a release appears to be an affirmative defense that is
4 properly raised on a 12(b)(6) motion, or in the alternative, a motion for summary judgment pursuant
5 to Rule 56. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 205
6 (9th Cir. 1950). *See also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (addressing release under
7 12(b)(6)); *Aaron v. Yang*, No. C-08-05438 RMW, 2009 WL 1689707, at *4-8 (N.D. Cal. June 15,
8 2009) (same). Because the Teleskills Defendants have presented matters outside the pleadings, the
9 Court construes their motion as one for summary judgment under Rule 56. *See Fed. R. Civ. P. 12(d).*

10 2. In light of the Court's construction of the Teleskills Defendants' motion as arising under Rule
11 56 rather than Rule 12(b)(1), the Court denies Plaintiff's *ex parte* motion to take jurisdictional
12 discovery. Plaintiffs are free to file an affidavit pursuant to Rule 56(f) in conjunction with or in lieu
13 of their opposition to the pending motion.

14 3. If the Teleskills Defendants wish to raise additional arguments in light of the Court's
15 construction of their motion as one for summary judgment, they shall withdraw the pending motion,
16 and file a new motion that includes all arguments they wish to raise.

17 DATED: September 8, 2010

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20 HON. DANA M. SABRAW
21 United States District Judge
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