

1 EXPEDITE

2 Hearing is set:

3 Date: May 10, 2013

4 Time: 9:00 a.m.

5 Judge/Calendar: Gary R. Tabor

6
7 SUPERIOR COURT OF THE STATE OF WASHINGTON
8 FOR THURSTON COUNTY

9 JZK, Inc., a Washington corporation

NO. 12-2-02241-8

10 Plaintiff,

PLAINTIFF'S OPPOSITION TO SPECIAL
MOTION TO STRIKE PURSUANT TO RCW
4.24.525 OF DAVID McCARTHY

11 v.

12 VIRGINIA COVERDALE; JOHN DOES 1-20 and
13 JANE DOES 1-20, also known as Enlighten
Me Free,

14 Defendants.

15 I. INTRODUCTION

16 This action is about whether or not JZK, Inc. has the legal right to use its 2006 and
17 2007 Conditions of Participation ("Conditions" or "CoP") to protect its property from use
18 by the individuals who signed those contracts. David McCarthy, a resident of New
19 Zealand, who is not a defendant in this lawsuit and who did not sign either version of the
20 Conditions at issue has brought a motion to strike a claim against him and other Does
21 that does not exist. McCarthy's motion should be denied.
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II. FACTUAL SUMMARY

A. Plaintiff JZK, Inc.

Ramtha's School of Enlightenment ("RSE"), operated by Plaintiff JZK, Inc. has instructed thousands of students since 1988.¹ Since 1999, RSE has instructed students in 20 countries.² More recently, RSE has hosted live internet streaming events, that must be registered for in advance and can be attended only by current students of the School—students who have necessarily signed the 2007³ version of the Conditions of Participation.⁴ At issue in this lawsuit is the unauthorized dissemination of two of the live streamed events: one from March 2011, and another from February 2012.

B. Defendant Virginia Coverdale and the Conditions of Participation at Issue

Defendant Virginia Coverdale attended the School, and signed the Conditions of Participation 2006 and 2007.⁵

The relevant portion of the 2007 Conditions of Participation provides as follows:

The information and techniques taught here are for your knowledge only. You are licensed to use this information and techniques for your personal use only. By signing these Conditions of Participation, you agree not to teach or otherwise disseminate through speeches, books, articles, media interviews, or other forms of mass or group distribution (collectively, to "Teach or Disseminate") any information that you learn or are taught at the School...nor will you assist or facilitate other persons in doing so without the prior written consent of the School.

* * *

¹ November 13, 2012 Declaration of John Michael Wright in Support of Preliminary Injunction at ¶ 5

² *Id.*

³ JZK, Inc. has successfully enforced its 2006 Conditions in Thurston County Superior Court. It has never brought suit in Washington to enforce any of the earlier versions of its Conditions. April 29, 2013 Declaration of John Michael Wright at ¶ 8.

⁴ *Id.* at ¶ 5

⁵ November 13, 2013 Wright Declaration at Exhibits C and D.

1 The materials provided to you at the School are subject to
2 the copyright laws. You are not authorized to copy,
3 reproduce, prepare adaptations, publicly distribute, publicly
4 perform, or publicly display any of those materials without
5 the prior written consent of the School. All School events are
6 routinely recorded on audiotapes and archived under the
7 registered trademark RAMTHA DIALOGUES®.⁶

8 The Conditions signed by Coverdale also include provisions for injunctive relief,
9 attorneys' fees and costs, and liquidated damages.⁷ Coverdale lives in Thurston County,
10 Washington, and Plaintiff has conducted discovery with regard to Coverdale in Thurston
11 County. In sworn deposition Coverdale has acknowledged initialing both the 2006 and the
12 2007 Conditions at every paragraph, acknowledged that she signed them and
13 acknowledged that she also authorized her young daughter's attendance at the School.⁸
14 She has acknowledged that she raised no questions or concerns with RSE staff regarding
15 the Conditions. Coverdale has also acknowledged in deposition that she has posted JZK,
16 Inc.'s materials online.

17 C. The Doe Defendants

18 In its Complaint, Plaintiff named as defendants individual "John and Jane Doe
19 Members of Enlighten Me Free" living in Thurston County, Washington.⁹ Enlighten Me
20 Free is also a term used to describe an online message board on which users post
21 comments about RSE, sometimes under their own names, but often under aliases.¹⁰
22 Enlighten Me Free has been an active publicly accessible website since 1997,¹¹ on which

23 ⁶ *Id.*, Ex. D.

24 ⁷ *Id.*

25 ⁸ *Id.*

26 ⁹ Complaint for Breach of Contract and Injunctive Relief at paragraph 2.1.

¹⁰ April 29, 2013 Wright Decl. at ¶ 2.

¹¹ McCarthy Decl. at ¶ 4.

1 individuals have been posting largely critical and often inflammatory comments about
2 RSE, JZK, Inc., and JZ Knight.¹² Posters on this group make no efforts to hide their
3 comments and RSE staff members are able to view these comments and have been
4 doing so since approximately 2008. ¹³ JZK, Inc. has never brought a lawsuit against
5 EnlightenMeFree or any of its individual posters based on their statements or
6 commentary and did not do so in this case.¹⁴
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8 At the time JZK, Inc. filed its Complaint, it was aware that the materials at issue
9 involved a 2011 and 2012 RSE internet streaming event, an event that could only have
10 been accessed by a current student who had signed the CoP.¹⁵ RSE was also aware that
11 YouTube posts of these materials were made by individuals calling themselves
12 EnlightenMeFree. This was because the caption under the posted videos stated that the
13 posts were “[b]rought to you by EnlightenMeFree.com.”¹⁶ In the “about” section of each
14 video under the heading “Who produced this video?” the posters state: “We are former
15 Students of Ramtha’s School of Enlightenment” EMF’s stated goal is to “expose”
16 RSE and it openly asserts that “RSE Needs to be Shut Down Now.”¹⁷
17

18 The RSE materials posted under the username EnlightenMeFree included video from
19 the 2011 and 2012 RSE private live streamed event. JZK, Inc. believed and still believes
20 that one or more individuals who had signed the 2007 Conditions and paid for the
21 privately streamed 2011 and 2012 events breached the Conditions by disseminating
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23 ¹² April 29 2013 Wright Decl. at ¶ 2.

24 ¹³ *Id.*

25 ¹⁴ *Id.* at ¶ 3.

26 ¹⁵ *Id.* at ¶ 5.

¹⁶ October 30, 2012 Decl. of John Michael Wright at Ex. C, D, E, F.

¹⁷ *Id.* at Ex. D

1 those events without the permission of RSE. JZK, Inc. named the Doe defendants in its
2 Complaint to include that individual or individuals. However, despite significant discovery
3 efforts, JZK, Inc. has not discovered those individuals. As a result, it has filed a
4 confirmation of joinder stating that all Defendants have been served¹⁸ and it has filed a
5 CR 41 mandatory dismissal to conclusively dismiss the Doe Defendants.¹⁹
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7 **D. David McCarthy**

8 David McCarthy is a New Zealand citizen and resident who last attended RSE in
9 1995.²⁰ In 1993, McCarthy signed an early version of RSE's Conditions of Participation.
10 The text of the document is a single paragraph, as follows:

11 RAMTHA SCHOOL OF ENLIGHTENMENT is pleased to admit all
12 persons who will enter into a solemn covenant to abide by
13 these conditions of participation. The information and
14 techniques taught here are for your knowledge only. You are
15 not authorized to teach what you learn here to others. It shall be
16 a condition on your admission to the School that you shall not,
17 directly or indirectly, teach others the information and/or
18 techniques that you learn here; nor shall you assist or facilitate
19 other persons in their teaching of these matters to others. It
20 shall be a further condition of your participation that you
21 acknowledge as a truth that complete mastery of the
22 knowledge and techniques that shall be demonstrated to you
23 here are uniquely RAMTHA's; and that you shall further
24 acknowledge as a truth that incomplete mastery of the same is
25 a dangerous basis from which to attempt to teach others of
26 these matters. RAMTHA DIALOGUES and the RAMTHA SCHOOL
OF ENLIGHTENMENT disclaim responsibility for any injury or
loss that you may cause to yourself or to others as a result of
your violation of these conditions of participation; and you agree
to indemnify and hold them harmless from any loss that they
incur arising out of your violation of these Conditions of

24 ¹⁸ See copy of Confirmation of Joinder and Amended Confirmation of Joinder filed attached to the
Declaration of Andrea McNeely ("McNeely Decl.") as Ex. A and B.

25 ¹⁹ See a copy of the filing attached as Ex. C to McNeely Decl.

26 ²⁰ Declaration of McCarthy in Support of Special Motion to Strike ("McCarthy Decl.") at ¶ 1.

1 Participation. If you are unable to agree to these Conditions of
2 Participation you have already paid an admission fee, the
3 RAMTHA SCHOOL of ENLIGHTENMENT will be pleased to offer
4 you a refund prior to commencement of your participation in the
5 School.²¹

6 The 1993 version has different terms than the 2006 and 2007 versions. By way
7 of one example, the 1993 version of the Conditions provides that the signer will
8 indemnify the School for any loss arising out of a violation of its terms. The 1993 version
9 does not include a space for the signer to initial each paragraph, it does not reference the
10 online rules of the school, it does not include a fee shifting provision, and it does not
11 include language addressing injunctive relief or liquidated damages.

12 In his Declaration in Support of his Motion, McCarthy does not conclusively admit
13 to signing the 1993 Conditions, although he states that he “apparently” did so.²² He
14 also appears to attempt to raise a number of contract defenses in his Declaration to the
15 1993 Conditions that are not at issue in this lawsuit. Plaintiff has searched its records
16 and does not have any record of McCarthy signing the 2006 or 2007 Conditions and
17 does not believe he did so because he was no longer attending RSE or signing up for any
18 events after 1995 or 1996.²³ Moreover, Plaintiff has no record of McCarthy signing up
19 for any of the RSE private live streaming events in 2011 or 2012.

20 II. ARGUMENT

21 Trial in this case is scheduled for July 15, 2013. In that trial, Plaintiff seeks only to
22 enforce the promise made by Coverdale in 2006 and 2007 made not to take what
23 belongs to JZK, Inc. Plaintiff has made difficult and costly discovery efforts in this case to

24 ²¹ Ex. A to McCarthy Decl.

25 ²² See McCarthy Decl., generally, and at ¶ 2

26 ²³ April 29, 2013 Wright Decl. at ¶ 7. See also McCarthy Decl. at ¶ 1.

1 try to determine if anyone other than Coverdale similarly violated the 2007 Conditions.
2 Plaintiff has uncovered no one, and accordingly, has filed its confirmation of joinder and a
3 mandatory dismissal of the Doe Defendants. David McCarthy is not and has never been
4 a Defendant in this lawsuit and his Motion Should Be Dismissed.

5
6 **A. McCarthy Lacks Standing to Pursue a Special Motion to Strike or Any Other Relief
this Thurston County Lawsuit.**

7 McCarthy argues vehemently that Plaintiff should not be able to sue him and other
8 unnamed Does for his speech or for breach of a 1993 version of the Conditions, but
9 ignores the most salient and obvious fact: Plaintiff did not do either. To the contrary, the
10 same language that McCarthy relies upon makes clear the scope and intent of Plaintiff's
11 suit: "Coverdale and individual Doe defendants are former students of RSE and signed
12 the agreement described."²⁴ The "agreement described" is the 2007 Conditions.²⁵ In
13 his reliance on this Order, McCarthy concedes that he does not fall within the scope of
14 the Doe Defendants listed in Plaintiff's Complaint, *i.e.*, individuals who signed the 2007
15 Conditions and reside in Thurston County.²⁶ As a result, McCarthy has no direct interest
16 in and does not stand to suffer from any effect of a judgment in favor of Plaintiff.
17

18 RCW 4.24.525(4)(a) provides that "[a] party may bring a special motion to strike."
19 McCarthy fails this threshold requirement. Moreover, the claims of even a party who
20 lacks standing cannot be resolved on the merits and must fail. *Ullery v. Fullerton*, 162
21 Wn. App. 596, 604-05, 256 P.3d 406 (2011). Whether a party has standing to sue is a
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24 ²⁴ McCarthy's Special Motion to Strike at 10:10-12.

25 ²⁵ See, e.g., November 1, 2012 Order Granting Motion for Temporary Restraining Order and Order to Show
Cause at p. 3, McCarthy Decl at Ex. K, p. 8 quoting the 2007 Conditions of Participation. See also Plaintiff's
Motion for Temporary Restraining Order and Plaintiff's Motion for Preliminary Injunction.

26 ²⁶ See Plaintiff's October 29, 2012 Complaint at ¶ 2.1, and generally.

1 question of law reviewed de novo. *Spokane Airports v. RMA, Inc.*, 149 Wn.App. 930, 939,
2 206 P.3d 364 (2009). Here, McCarthy did not sign the 2006 or 2007 Conditions at Issue
3 in this case. He is not a resident of Thurston County. Despite the fact that JZK, Inc. has
4 been aware of McCarthy and his conduct for some time, JZK, Inc. intentionally chose not
5 to name him as a defendant for these reasons. Instead, because the claims and
6 defenses involved in any suit against McCarthy would be very different than those at
7 issue here, and because discovery related to McCarthy would implicate additional
8 complication and expense due to his New Zealand citizenship and residence, JZK Inc.
9 chose to pursue those separate claims and issues against McCarthy in his country of
10 citizenship.²⁷

12 McCarthy is not a defendant, has not moved to intervene as a defendant in this
13 lawsuit, and simply lacks the ability to use the significant penalties associated with RCW
14 4.24.525 as a sword (rather than its intended use as a shield for public participation) to
15 assert the rights of non-parties including himself and intimidate Plaintiff from pursuing its
16 legitimate contract claims. McCarthy's lack of standing to pursue his motion is fatal.

17 In *Ullery*, a defendant in a breach of contract case lacked standing to pursue
18 counterclaims based on a purported future assignment of contract rights. 162 Wn. App.
19 at 600. In reviewing a subsequent case involving the same parties, the court analyzed
20 the dismissal based on lack of standing as follows:
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22 Where, as here, a defendant does not waive the defense
23 and obtains the trial court's determination that a plaintiff
24 lacks standing, that determination and the doctrine of

25 ²⁷ Plaintiff retained an attorney in New Zealand to pursue different claims against McCarthy in his home
26 country of New Zealand, based on his specific conduct and version of the Conditions, with those separate
issues to be litigated under the law of McCarthy's country of citizenship. See McCarthy Decl. at Ex. I.

1 standing prohibit the plaintiff from raising another's legal
2 rights. *Haberman v. Wash. Pub. Power Sup. Sys.*, 109
3 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987).
4 It is improper for a plaintiff lacking standing to assert the
5 rights of other parties or nonparties; its claims fail on
6 account of its lack of standing. *Id.* Thus, while not a
7 matter of subject matter jurisdiction, the claims of a
8 plaintiff determined to lack standing are not his or hers to
9 assert and cannot be resolved in whole or in part on the
10 merits. *Cf. Skagit Surveyors & Eng'rs, LLC v. Friends of*
11 *Skagit County*, 135 Wn.2d 542, 580, 958 P.2d 962
12 (1998) (Talmadge, J., dissenting) (a dismissal due to lack
13 of standing is tantamount to a finding that the trial court
14 lacks subject matter jurisdiction to hear the claim).

15 162 Wn.App. at 604. The *Ullery* court then determined that “having found that [the
16 defendant] lacked standing, the trial court should not have proceeded to the merits.
17 (recognizing that “[l]ack of jurisdiction over the subject matter renders the superior court
18 powerless to pass on the merits of the controversy brought before it”). *Id.* at 604 (internal
19 citation omitted). Similarly, McCarthy is not a party to the contract at issue. Therefore, he
20 lacks standing and his motion should be dismissed.

21 **B. The Special Motion to Strike Fails Under Its Own Lack of Merit.**

22 **1. McCarthy’s Motion Is Untimely.**

23 The time to file a special motion to strike under RCW 4.24.525 has passed.²⁸
24 Plaintiff filed its only Complaint in this matter on October 29, 2012. McCarthy’s motion
25 was served on Plaintiff’s attorneys on March 22, 2013, nearly six months after Plaintiff’s
26 Complaint was filed, after the majority of discovery has been completed. McCarthy’s
27 motion was noted for hearing on May 10, 2013, after witness disclosures are due, less
28 than 35 days before the discovery cut off, and 45 days before trial.

29 ²⁸ RCW 4.24.525(5)(a) provides that “[t]he special motion to strike may be filed within sixty days of the
30 service of the most recent complaint or, in the court’s discretion, at any later time upon terms it deems
31 proper.”

1 Courts have properly denied a motion to strike under similar circumstances. In
2 *Morin v. Rosenthal*, 122 Cal. App. 4th 673, 681, 19 Cal. Rptr. 3d 149 (2004), the court
3 held that the trial court had not abused its discretion in denying the defendants' request
4 to file a motion to strike one month after the 60-day period had expired.²⁹ The court
5 emphasized that the purpose of the statute was to facilitate the prompt resolution of
6 lawsuits:
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8 The overall purpose of the SLAPP statute is to provide defendants with a
9 procedural remedy 'which would allow *prompt* exposure and dismissal of
10 SLAPP suits.' The 60 day period in which a defendant may file a SLAPP
11 motion as a matter of right appears to be intended to permit the defendant
to test the foundation of the plaintiff's action before having to 'devote its
time, energy and resources to combating' a 'meritless lawsuit.'

12 *Id.* (citation omitted) (emphasis in original). In concluding that the trial court had not
13 abused its discretion, the court stated that the defendants had not acted in a fashion
14 consistent with the anti-SLAPP statute:

15 Here, instead of attempting to promptly expose and dismiss Morin's suit as
16 a SLAPP, defendants chose to devote their time, energy and resources to
17 moving the case from state court to federal court and, after remand from
the federal court, moving the case from one branch of the superior court to
another and then from one judge to another in the chosen branch.

18 *Id.* Similarly, here, McCarthy concedes that he has been aware of Plaintiff's Complaint
19 since three days after it was filed in October 2012.³⁰ Yet instead he has lain in wait until
20 after a case scheduling order was issued and noted his motion to coincide with the end of
21 the discovery period and shortly before trial. Everything about McCarthy's conduct in
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23 ²⁹ RCW 4.24.525 was only added in 2010, so there is no published authority on point; however, since the
24 legislature modeled the statute on California's Anti-SLAPP Act, Cal. Civ. Code § 425.16, courts have turned
25 to California law on issues of first impression. See *Aronson*, 738 F. Supp. 2d at 1110 ("This is a case of
first impression. There is no authority interpreting this newly enacted legislation. However, the legislation
mirrors the California Anti-SLAPP Act and both parties cite to California law as persuasive authority for
interpreting the Washington Amendments.").

26 ³⁰ McCarthy Decl. at ¶ 13.

1 bringing this motion and continuing to pursue it—even after Plaintiffs have made clear
2 that they are not pursuing a case against the Does—smacks of an effort to delay and
3 unnecessarily complicate Plaintiff’s prosecution of its claims.³¹ See *Kunysz v. Sandler*,
4 146 Cal. App. 4th 1540, 1543, 53 Cal. Rptr. 3d 779 (2007). In *Kunysz*, the court held
5 that the trial court had not erred in denying the defendant’s anti-SLAPP motion, which
6 was filed nine months after the amended complaint, observing that “the purpose of the
7 anti-SLAPP statute is to dismiss meritless lawsuits designed to chill the defendants’ free
8 speech rights at the earliest stage of the case. That consideration, obviously, no longer
9 applies once the complaint has been answered and the case has been pending for nearly
10 a year.” *Id.*

12 Similarly, the court in *Platypus Wear, Inc. v. Goldberg*, 166 Cal. App. 4th 772, 775,
13 83 Cal. Rptr. 3d 95 (2008) stated that “[i]n exercising its discretion in considering a
14 party’s request to file an anti-SLAPP motion *after* the 60-day period, a trial court must
15 carefully consider whether allowing such a filing is consistent with [the statute’s]
16 purpose.” *Platypus Wear*, 166 Cal. App. 4th at 776 (emphasis added). Applying this
17 principle, the court stated that the defendant failed to provide a “compelling explanation”
18 for the delay and did not articulate any “extenuating circumstances” to justify the late
19 filing. *Id.* The court was particularly troubled by the fact that the defendant “did not file
20 the application until after the parties had completed substantial discovery in the case.”
21 *Id.* It concluded that, “[u]nder these circumstances,” allowing the defendant to file a

25 ³¹ After McCarthy’s attorney was provided with a copy of the Confirmation of Joinder and Plaintiff’s CR 41
26 Voluntary Dismissal of the Does, conclusively establishing that McCarthy’s motion was moot, McCarthy
failed to withdraw his motion. See Declaration of Andrea H. McNeely at ¶ 3.

1 motion to strike constituted an abuse of discretion.³² Here, McCarthy's motion was filed
2 "after the parties had completed substantial discovery in the case," and noted shortly
3 before the close of discovery, yet McCarthy fails to provide a "compelling explanation" for
4 not filing the motion earlier or articulating "extenuating circumstances justifying a later
5 filing." *Id.* at 776. McCarthy's motion should be denied as untimely.

7 **2. McCarthy's Own Declaration Establishes (1) He Fails to Meet His Initial
8 Burden and (2) Plaintiff's Probability of Prevailing on Its Claim.**

9 McCarthy bears the initial burden under RCW 4.24.525 of showing by a
10 preponderance of the evidence that the claim is based on an action involving public
11 participation and petition. RCW 4.24.525(4)(b), defines public participation as including
12 "any . . . lawful conduct in furtherance of the exercise of the constitutional right of free
13 speech in connection with an issue of public concern." RCW 4.24.525(2)(e). Here, as
14 explained below, McCarthy's conduct as acknowledged in his declaration is in breach of a
15 1993 contract and is not lawful.

16 However, if the Court determines that McCarthy's initial burden is satisfied, the
17 burden shifts to the responding party to establish by clear and convincing evidence a
18 probability of prevailing on the claim." RCW 4.24.525(4)(b). If so, the court is directed to
19 deny the motion. *Id.* In making this determination, "the court shall consider pleadings
20 and supporting and opposing affidavits stating the facts upon which the liability or
21

22 ³² The principles articulated in *Platypus Wear* are equally valid in the context of RCW 4.24.525. Like Cal.
23 Civ. Code § 425.16, the purpose of RCW 4.24.525 is to facilitate the "speedy adjudication of strategic
24 lawsuits against public participation." Laws of 2010, ch. 118, § 1 (emphasis added). Everything about the
25 statute conveys the importance of speed: the special motion is typically filed "within sixty days"; the
26 "hearing shall be held . . . not later than thirty days after service" unless docket conditions dictate
otherwise; "the court is directed to hold a hearing with all due speed" and accord the hearing "priority"; "the
court shall render its decision as soon as possible but not later than seven days after the hearing is held;
"[e]very party has a right of expedited appeal from a trial court order on the special motion or from a trial
court's failure to rule on the motion in a timely fashion." RCW 4.24.525(5) (emphasis added).

1 defense is based.” RCW 4.24.525(4)(c). In considering the pleadings and the parties’
2 affidavits, the court accepts as true all evidence favorable to the plaintiff and assesses
3 the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a
4 matter of law.” *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal.App.4th 688, 699-
5 700, 61 Cal.Rptr.3d 29 (2007).

6
7 The anti-SLAPP statute operates like a “motion for summary judgment in ‘reverse.”
8 *College Hospital, Inc. v. Superior Court*, 8 Cal.4th 704, 719, 34 Cal.Rptr.2d 898, 882
9 P.2d 894 (1994). That is the setting in which the court determines whether plaintiff has
10 met the required showing, a showing that is “not high.” *Overstock.com, supra*, 151
11 Cal.App.4th at p. 700, 61 Cal.Rptr.3d 29. In other words, a plaintiff need show only a
12 “minimum level of legal sufficiency and triability.” *Linder v. Thrifty Oil Co.*, 23 Cal.4th
13 429, 438, fn. 5, 97 Cal.Rptr.2d 179, 2 P.3d 27 (2000) or a case of “minimal merit.” (See
14 *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal.App.4th 658,
15 675, 35 Cal.Rptr.3d 31 (2005), quoting *Navellier v. Sletten*, 29 Cal.4th 82, 95, 124
16 Cal.Rptr.2d 530, 52 P.3d 703 (2002).

17
18 Here, Plaintiff is in the bizarre position of showing the merit of a claim it has not
19 brought. However, Plaintiff has brought a claim based on a 2006 contract that has been
20 previously upheld by this Court, as well as a similar 2007 version. The only defendant,
21 Coverdale, has acknowledged in deposition that she has signed the contract, initialed
22 each paragraph, that she disseminated the materials at issue in Plaintiff’s complaint on
23 YouTube, and that she then sent the materials to McCarthy.

24
25 McCarthy acknowledges that he “apparently” signed a 1993 contract in which he
26 agreed that “[t]he information and techniques taught here [at RSE] are for your

1 knowledge only.”³³ He also acknowledges in his declaration that he posted a number of
2 videos containing RSE material, and that he posted an October 28, 2012 video entitled,
3 “JZ Knight Behind the Mask Part I of 4.” This 20 minute video is primarily made up of
4 video footage from the February 2012 live streaming event taught at the school and by
5 Coverdale in her YouTube post.³⁴ These facts alone, particularly when construed under
6 the standard articulated in *Overstock, College Hospital*, and *Peregrine*, above, establish
7 both that Plaintiff has met its burden.
8

9 The anti-SLAPP statute does not bar a plaintiff from litigating an action for breach
10 of contract that arises from the defendant’s free speech or petitioning, *Navellier v.*
11 *Sletten*, 29 Cal.4th 82, 92 (2002), and Courts have repeatedly denied anti-SLAPP motions
12 as to breach of contract claims. In *Zopatti v. Ranch Dorado Homeowners Ass’n*, No.
13 10CV1091 DMS (WVG), 2010 WL 5174534 (S.D. Cal. Dec. 15, 2010), for example, the
14 district court, applying California law, denied the defendant’s motion after the plaintiff
15 demonstrated her contract claim possessed the “minimal merit necessary to survive an
16 anti-SLAPP motion.” In that case, the plaintiff’s breach of contract claims were based on
17 a confidentiality agreement. The defendant, an attorney for the plaintiff’s homeowners
18 association, allegedly breached the agreement by making certain statements during a
19 Department of Fair Employment and Housing (DFEH) proceeding. In her opposition to
20 defendant’s anti-SLAPP motion, plaintiff cited the confidentiality agreement and
21 statements made by the defendant during the DFEH hearing. The court held this
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25 ³³ Ex. A to McCarthy Decl.

26 ³⁴ McCarthy Decl. at ¶ 11. See also Ex. D to McNeely Decl.

1 sufficient to support a finding that plaintiff “has demonstrated a reasonable probability of
2 prevailing on her claim for breach of contract.”

3 In *Midland Pac. Building Corp. v. King*, 157 Cal. App.4th 264 (2008), the California
4 Court of Appeals found that plaintiff’s breach of contract cause arose from protected
5 petitioning activity. However, the court also found that the plaintiff, by showing that the
6 defendant had sought and obtained preliminary approval for a “high density tract map,”
7 after agreeing to use best efforts obtain city approval for plaintiff’s “low density tract
8 map,” had shown a prima facie case for breach of contract. Accordingly, the court denied
9 the defendant’s anti-SLAPP motion.
10

11 Here, this Court, in this case, has already twice found that Plaintiff’s claim against
12 Defendant Coverdale is meritorious and likely to succeed. Such was a necessary finding
13 to issue both a temporary restraining order and preliminary injunction. The arguments
14 advanced are based on a lawsuit that does not exist. But, to the extent Plaintiff must
15 justify a hypothetical lawsuit, it can. *If* McCarthy signed the 2006 and 2007 CoP, and *if*
16 he resided in Washington, and *if* Plaintiff had named McCarthy as a defendant, Plaintiff’s
17 suit would be justified and McCarthy’s motion properly dismissed.
18

19 **C. McCarthy’s Motion Is Frivolous and JZK, Inc. Is Entitled to Its Attorneys’ Fees,
20 Costs, and Statutory Damages Pursuant to RCW 4.24.525.**

21 Pursuant to RCW 4.24.525(6)(b), if the court finds that McCarthy’s motion was
22 frivolous or intended solely to cause delay, the responding party is entitled to costs,
23 attorney’s fees, and ten thousand dollars in damages. Here, Plaintiff filed its Complaint
24 on October 29, 2012. In highly publicized hearings, Plaintiff obtained a Temporary
25 Restraining Order and a Preliminary Injunction. The Complaint and the two hearings were
26 discussed widely on the Enlighten Me Free message board that McCarthy acknowledges

1 he created.³⁵ Since the Complaint was filed, Plaintiff has engaged in costly discovery
2 efforts and hard fought motion practice most if not all of which have been the subject of
3 comment on Enlighten Me Free. Throughout all of this time, if as McCarthy appears to
4 claim, he believes himself to be a defendant in this lawsuit, he failed to bring a motion to
5 intervene and failed to contact Plaintiff's attorneys to disclose his involvement. Instead,
6 he watched and waited until the parties received a trial schedule and until discovery was
7 nearly closed. Only then did he bring this motion, with no standing to do so, delaying
8 Plaintiff's efforts to move forward on its actual claims and forcing Plaintiff to incur the
9 expense of responding.
10

11 McCarthy's motion was both frivolous and brought for the purpose of delay. See
12 *Olsen v. Harbison*, 134 Cal. App. 4th 278, 35 Cal. Rptr. 3d 909 (2005). In *Olsen*, the
13 defendant appealed the trial court's order denying a motion to strike filed 278 days after
14 the complaint was filed. The Court of Appeal not only dismissed the appeal, but imposed
15 sanctions on the defendant, concluding that the appeal was frivolous. Plaintiff is entitled
16 to its attorneys' fees, costs, and \$10,000 in damages under RCW 4.24.525.
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18 The members of Enlighten Me Free do not like RSE or JZK, Inc. They do not have
19 to. They may criticize Plaintiff within the confines of the law and have freely done so for
20 well over a decade. But the strategic misuse of RCW 4.24.525 to inflict unnecessary
21 legal expenses on JZK, Inc. is inappropriate. Mr. McCarthy attempts to use a Thurston
22 County legal forum to engender attention for his cause, and Plaintiff should not have to
23 foot the bill.
24

25 _____
26 ³⁵ McCarthy Decl. at ¶ 4.

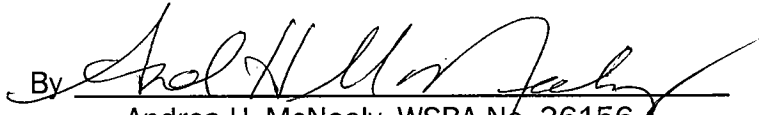
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III. CONCLUSION

McCarthy is not a party able to bring a special motion to strike under RCW 4.24.525, he lacks standing and his motion fails upon its merits. As a result, McCarthy's motion should be denied and Plaintiff should be awarded its attorneys' fees and costs as well as statutory damages.

Dated this 29th day of April, 2013.

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