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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

NGOC LAM CHE,

Plaintiff,

v.

SAN JOSE/EVERGREEN COMMUNITY  
COLLEGE DISTRICT FOUNDATION, et  
al.,

Defendants.

Case No. 17-cv-00381-BLF

**ORDER DENYING DEFENDANT  
IMWALLE’S MOTION TO DISMISS**

[Re: ECF 22]

Before the Court is Defendant Imwalle Properties Inc.’s motion to dismiss Plaintiff Ngoc Lam Che’s complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Having considered the motion and the opposition filed by Che (no reply was filed), the Court concludes that the motion is appropriate for disposition without oral argument. *See* Civ. L.R. 7-1(b).

The motion is DENIED for the reasons set forth below.

**I. BACKGROUND**

The complaint alleges the following facts: Che is a T-6 paraplegic who requires a wheelchair at all times because he is unable to stand or walk. Compl. ¶ 8, ECF 1. He is “physically disabled” as defined by all applicable California and Federal laws. *Id.* On April 8, 2015, Che patronized the business complex at 4848 San Felipe Rd., San Jose, California 95135 (“Property”). Compl. ¶¶ 1, 9. Che uses the Property for dining and entertainment at least once a week. Compl. ¶1.

During the April 8th visit, Che encountered several barriers which interfered with his ability to use and enjoy the “goods, services, privileges and accommodation” offered by the Property. Compl. ¶10. The complaint alleges that the Property contains: improperly sized and

1 sloped access aisles for accessible parking spaces, improperly sized accessible parking spaces,  
2 improperly sized and sloped accessible pathways, accessible parking spaces lacking the proper  
3 tow-away signage, and improperly marked and configured access aisles. *Id.*

4 Che filed this action on January 25, 2017 against Defendants San Jose Evergreen  
5 Community College District (“District”) and Imwalle Properties, Inc. (“Imwalle”), who are  
6 alleged to be “the owners, operators, lessors and/or lessees of the Property.” Compl. ¶ 7, ECF 1.  
7 The complaint asserts two claims for disability discrimination, the first under California state law  
8 and the second under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12010  
9 et seq. *Id.* ¶¶ 15-28. Jurisdiction is based on federal question with respect to the ADA claim and  
10 supplemental jurisdiction with respect to the state law claim. *Id.* ¶¶ 3-4.

11 The District answered the complaint and Imwalle filed the present motion to dismiss for  
12 lack of subject matter jurisdiction. The Court initially struck Imwalle’s motion as being filed in  
13 violation of General Order 56. Order Striking Motion to Dismiss, ECF 32. However, the Court  
14 subsequently reinstated the motion and set a briefing schedule which required Che to file  
15 opposition to the motion within fourteen days after the joint site inspection. Order Granting  
16 Defendant Imwalle’s Motion for Administrative Relief, ECF 34.

17 Following completion of the joint site inspection, the Court granted the parties’ stipulated  
18 request to extend the deadline for opposition to June 16, 2017. Stipulation and Order to Extend,  
19 ECF 38. The Court previously had ordered that any reply was to be filed within seven days after  
20 the filing of the opposition. Order Granting Defendant Imwalle’s Motion for Administrative  
21 Relief, ECF 34. Che timely filed opposition on June 16, 2017. Pl.’s Opp., ECF 39. Imwalle did  
22 not file a reply.

23 **II. LEGAL STANDARD**

24 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for a motion to dismiss based  
25 on lack of subject matter jurisdiction. It is a fundamental precept that federal courts are courts of  
26 limited jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. *Owen*  
27 *Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The plaintiff has the burden to  
28 establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S.

1 375, 377 (1994); *In re Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001). This burden, at the  
2 pleading stage, must be met by pleading sufficient allegations to show a proper basis for the court  
3 to assert subject matter jurisdiction over the action. *McNutt v. General Motors Acceptance Corp.*,  
4 298 U.S. 178, 189 (1936); Fed. R. Civ. P. 8(a)(1). The pleading must show “affirmatively and  
5 distinctly the existence of whatever is essential to federal jurisdiction, and if [it] does not do so,  
6 the court, on having the defect called to its attention or on discovering the same, must dismiss the  
7 case, unless the defect be corrected by amendment.” *Tosco Corp. v. Communities for a Better*  
8 *Env’t*, 236 F.3d 495, 499 (9th Cir. 2001).

9 A motion to dismiss for lack of subject matter jurisdiction may be either facial, or factual.  
10 *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). When a defendant challenges  
11 jurisdiction “facially,” all material allegations in the complaint are assumed true, and the question  
12 for the court is whether the lack of federal jurisdiction appears from the face of the pleading itself.  
13 *See Wolfe*, 392 F.3d at 362; *Miranda v. Reno*, 238 F.3d 1156, 1157 n. 1 (9th Cir. 2001); *Thornhill*  
14 *Publishing Co. v. General Telephone Electronics*, 594 F.2d 730, 733 (9th Cir. 1979); *Mortensen v.*  
15 *First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). When a defendant makes a  
16 factual challenge “by presenting affidavits or other evidence properly brought before the court, the  
17 party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden  
18 of establishing subject matter jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
19 (9th Cir. 2004); *Savage v. Glendale Union High School*, 343 F.3d at 1036, 1039 n. 2 (9th Cir.  
20 2003).

21 Dismissal for lack of subject matter jurisdiction is “exceptional” in federal question cases  
22 and is warranted only “where the alleged claim under the constitution or federal statutes clearly  
23 appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or  
24 where such claim is wholly insubstantial and frivolous.” *Safe Air*, 373 F.3d at 1039 (internal  
25 quotation marks and citation omitted). Dismissal “is inappropriate when the jurisdictional issue  
26 and substantive issues are so intertwined that the question of jurisdiction is dependent on the  
27 resolution of factual issues going to the merits of an action.” *Id.* (internal quotation marks and  
28 citation omitted). “The question of jurisdiction and the merits of an action are intertwined where a

1 statute provides the basis for both the subject matter jurisdiction of the federal court and the  
2 plaintiff's substantive claim for relief." *Id.* (internal quotation marks and citation omitted).

3 **III. DISCUSSION**

4 As noted above, subject matter jurisdiction is based on the federal question raised by Che's  
5 ADA claim. Since the ADA is the basis for both Che's federal jurisdiction and substantive claim  
6 for relief, the issues in this case are "intertwined." *Safe Air*, 373 F.3d at 1039-40. Thus Imwalle is  
7 entitled to dismissal only if the ADA claim appears to be asserted solely for the purpose of  
8 obtaining federal jurisdiction, or if it is insubstantial and frivolous. *See Safe Air*, 373 F.3d at 1039.

9 Imwalle does not suggest that the ADA claim was asserted solely to obtain federal  
10 jurisdiction. Instead, Imwalle appears to be asserting that the claim is insubstantial and frivolous  
11 because all alleged barriers to access on the Property have been remedied. Imwalle argues that  
12 "Plaintiff's ADA claim is moot, and thus Plaintiff lacks standing to bring his claim, because the  
13 property in question is currently in compliance with the ADA." Def.'s Motion at 1, ECF 22.  
14 Imwalle asks the Court to dismiss the ADA claim for lack of subject matter jurisdiction and to  
15 remand the state law claim "to California's state courts, where specialized procedures exist for the  
16 early evaluation and disposition of such claims." *Id.*

17 As an initial matter, this Court could not remand Che's state law claim even if it were to  
18 dismiss Che's ADA claim, because this action was originally filed in federal court. *See* 28 U.S.C.  
19 § 1447 (describing procedures for remand following removal from state court); *Fuse v. Arizona*  
20 *Bd. of Regents*, No. CV 07-2351-PHX-FJM, 2009 WL 837645, at \*1 (D. Ariz. Mar. 27, 2009)  
21 ("[W]e cannot remand plaintiff's claims to state court because this action was originally filed in  
22 federal court.").

23 Turning to Imwalle's jurisdictional argument, Imwalle conflates the concepts of standing  
24 and mootness. "Standing and mootness are distinct issues that underlie whether the Court has  
25 jurisdiction under Article III to adjudicate a case and are separate from the merits of the claims  
26 asserted." *CRS Recovery, Inc. v. Laxton*, No. C 06-7093 CW, 2013 WL 140084, at \*7 (N.D. Cal.  
27 Jan. 10, 2013). In order to have standing to bring a claim, the plaintiff must have a sufficient  
28 personal stake in the outcome of the controversy at the time the complaint is filed. *Id.* "Mootness

1 can be characterized as the doctrine of standing set in a time frame: The requisite personal interest  
2 that must exist at the commencement of the litigation (standing) must continue throughout its  
3 existence (mootness).” *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003)  
4 (internal quotation marks and citation omitted). Because Imwalle’s jurisdictional challenge is  
5 based on the current condition of the Property rather than its condition at the time the complaint  
6 was filed, the challenge is properly characterized as one based on mootness.

7 In support of its mootness challenge, Imwalle submits the declaration of its retained  
8 “certified access specialist,” Dwight Ashdown. Ashdown Decl. ¶ 1, ECF 22-1. Ashdown states  
9 that based on two inspections of the property conducted on March 3, 2017 and April 26, 2017  
10 (after the complaint was filed) he has determined that the Property is “fully ADA compliant.” *Id.*  
11 ¶¶ 2-4. In opposition to Imwalle’s motion, Che submits the declaration of his own “certified  
12 accessibility specialist,” Jihee Lee. Lee Decl. ¶ 1, ECF 39-1. Lee inspected the property on May  
13 19, 2017 (after Ashdown’s inspections) and observed a number of architectural features which did  
14 not comply with ADA standards or the California Building Code. *Id.* ¶ 3. Lee states that “[t]he  
15 Property is not fully ADA compliant.” *Id.*

16 Resolution of Imwalle’s mootness challenge is intertwined with the merits of Che’s ADA  
17 claim. “[A] jurisdictional finding of genuinely disputed facts is inappropriate when the  
18 jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is  
19 dependent on the resolution of factual issues going to the merits of an action.” *Safe Air*, 373 at  
20 1039 (internal quotation marks and citation omitted). Accordingly, it would be inappropriate to  
21 dismiss Che’s ADA claim at this stage of the proceedings.

22 The cases relied on by Imwalle are factually distinguishable because they did not involve  
23 conflicting evidence going to the merits of the ADA claims. *See, e.g., Langler v. Roclar Co.*, No.  
24 14-cv-01623-ODW(AJWx), 2014 U.S. Dist. LEXIS 66488, at \*4 (C.D. Cal. May 14, 2014)  
25 (granting motion to dismiss where defendants submitted evidence that plaintiff’s ADA claim was  
26 mooted by property’s compliance with ADA and plaintiff offered no contradictory evidence);  
27 *Vogel v. Waldorf Rest. Grp. Centinela, LLC*, No. CV 13-09420-R, 2014 U.S. Dist. LEXIS 187183,  
28 at \*2 (C.D. Cal. April 11, 2014) (granting motion to dismiss ADA claim where evidence

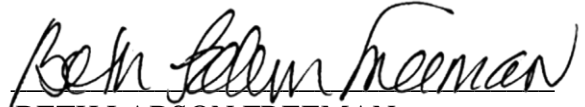
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established that the barriers alleged in the complaint had been remedied).

**IV. ORDER**

Defendant Imwalle's motion to dismiss for lack of subject matter jurisdiction is DENIED.

Dated: July 11, 2017

  
BETH LABSON FREEMAN  
United States District Judge