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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SCOTT JOHNSON,

Plaintiff,

v.

FLORENCE B. HERNANDEZ, et al.

Defendants.

No. 2:14-cv-01635-MCE-KJN

**MEMORANDUM AND ORDER**

Plaintiff Scott Johnson ("Plaintiff") initiated this action against Defendants Florence B. Hernandez, in her individual and representative capacity as Trustee of the Florence B. Hernandez Trust, and Stop the Presses, Inc. (collectively "Defendants") seeking damages and injunctive relief for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq.; California's Unruh Civil Rights Act, California Civil Code §§ 51-53; California's Disabled Persons Act, California Civil Code §§ 54-54.8; and for negligence. Presently before the Court is Defendants' Motion to Dismiss for lack of subject matter jurisdiction (ECF No. 7). For the following reasons, the Motion is DENIED.<sup>1</sup>

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<sup>1</sup> Because oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g); see also ECF No. 11.

1 **BACKGROUND<sup>2</sup>**

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3 Plaintiff is a quadriplegic who cannot walk and has significant dexterity  
4 impairments. He uses a wheelchair for mobility and has a specially equipped van.  
5 Together, Defendants own and/or lease the property on which a Stop the Presses  
6 Printing Company (“Stop the Presses”) is located.<sup>3</sup> Stop the Presses is a business  
7 establishment and place of public accommodation.

8 Plaintiff avers that he has frequented Stop the Presses on more than one  
9 occasion and encountered barriers to access. More specifically, although parking is  
10 provided to Stop the Presses patrons, no functioning and compliant handicap parking  
11 space is available. According to Plaintiff, whether through neglect, apathy or otherwise,  
12 the defendants have permitted the handicap parking spaces and signage to either  
13 deteriorate to the point of being non-functioning or to be maintained incorrectly. Plaintiff  
14 also complains that the door hardware and transaction counter are noncompliant.  
15 Plaintiff has thus been deterred from additional attempts at patronage. As a result,  
16 Plaintiff initiated this action alleging violations of state and federal law.

17 Defendants now move to dismiss Plaintiff’s ADA claim on the grounds that each  
18 of the purported barriers allegedly has been modified so that the parking lot, door, and  
19 transaction counter all comply with federal law. In support, Defendants offer the  
20 declaration of Randall Stout, President of Construction Services & Investigations, Inc., a  
21 construction defect consulting company, who avers that he “coordinated and oversaw  
22 the necessary repairs and renovations” and “all of the items identified in the complaint as  
23 being noncompliant with the ADA [have] been resolved so that they [are] fully  
24 compliant . . . .” Decl. of Randall Stout, ECF No. 7-4 ¶¶ 3-4. Mr. Stout further opined  
25 that “a handicap accessible parking space with compliant signage, slope and path of

26 <sup>2</sup> Unless otherwise indicated, the following facts are taken, at times verbatim, from Plaintiff’s  
27 Complaint. ECF No. 1.

28 <sup>3</sup> Stop the Presses is located in the City of Stockton, California, which is within the jurisdiction of  
the Eastern District of California.

1 travel was installed, an accessible business service transaction counter was added, and  
2 the entry door hardware was renovated to be compliant.” Id. ¶ 4. “[A]dditional  
3 renovations were also completed, including installation of compliant path of travel  
4 designations from the public right of way to the Premises, including truncated domes,  
5 and the leveling of the slope at the landing area adjacent to the entry doors to the  
6 Premises.” Id.<sup>4</sup>

7 Since the only remedy sought under the ADA is an injunction, and since, given  
8 their remedial efforts Defendants contend there is no likelihood of future harm,  
9 Defendants ask that the ADA claim be dismissed, essentially as moot, and that the Court  
10 decline to exercise supplemental jurisdiction over Plaintiffs’ state law claims. Plaintiff  
11 contends dismissal of the ADA claim would be improper because, among other things,  
12 the jurisdictional question is intertwined with the merits and should not be resolved at this  
13 early juncture and because Defendants have not established the violations have been  
14 remedied such that the ADA claim is moot. Defendants’ Motion is DENIED.

## 15 16 STANDARD

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18 Federal courts are courts of limited jurisdiction, and are presumptively without  
19 jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
20 377 (1994). The burden of establishing the contrary rests upon the party asserting  
21 jurisdiction. Id. Because subject matter jurisdiction involves a court’s power to hear a  
22 case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630  
23 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at  
24 any point during the litigation, through a motion to dismiss pursuant to Federal Rule of  
25 Civil Procedure 12(b)(1). Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int’l  
26 Union of Operating Eng’rs v. County of Plumas, 559 F.3d 1041, 1043-44 (9th Cir. 2009).

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28 <sup>4</sup> Defendants’ proffered additional evidence, including photographs and measurements, with their  
Reply brief. The Court will not consider that evidence. See Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir.  
2007) (“The district court need not consider arguments raised for the first time in a reply brief.”).

1           There are two types of motions to dismiss for lack of subject matter jurisdiction: a  
2 facial attack and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.,  
3 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the  
4 allegations of jurisdiction contained in the nonmoving party's complaint, or may  
5 challenge the existence of subject matter jurisdiction in fact, despite the formal  
6 sufficiency of the pleadings. Id.

7           When a party makes a facial attack on a complaint, the attack is unaccompanied  
8 by supporting evidence, and it challenges jurisdiction based solely on the pleadings.  
9 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to  
10 dismiss constitutes a facial attack, the Court must consider the factual allegations of the  
11 complaint to be true, and determine whether they establish subject matter jurisdiction.  
12 Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir.  
13 2003). In the case of a facial attack, the motion to dismiss is granted only if the  
14 nonmoving party fails to allege an element necessary for subject matter jurisdiction.  
15 Safe Air for Everyone, 373 F.3d at 1039.

16           In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's  
17 allegations." Thornhill, 594 F.2d at 733 (internal citation omitted). The party opposing  
18 the motion has the burden of proving that subject matter jurisdiction does exist, and must  
19 present any necessary evidence to satisfy this burden. St. Clair v. City of Chico,  
20 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are  
21 challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the  
22 mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind.,  
23 Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche  
24 Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may  
25 review any evidence necessary, including affidavits and testimony, in order to determine  
26 whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560  
27 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its

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1 burden and the court determines that it lacks subject matter jurisdiction, the court must  
2 dismiss the action. Fed. R. Civ. P. 12(h)(3).

3 However, “jurisdictional finding of genuinely disputed facts is inappropriate when  
4 the jurisdictional issue and substantive issues are so intertwined that the question of  
5 jurisdiction is dependent on the resolution of factual issues going to the merits of an  
6 action.” Safe Air for Everyone, 373 F.3d at 1039 (internal citations and quotations  
7 omitted). “The question of jurisdiction and the merits of an action are intertwined where  
8 a statute provides the basis for both the subject matter jurisdiction of the federal court  
9 and the plaintiff's substantive claim for relief.” Id. at 1039-40 (internal citations and  
10 quotations omitted).

11 “A court may not resolve genuinely disputed facts where ‘the question of  
12 jurisdiction is dependent on the resolution of factual issues going to the merits.’”  
13 Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting Augustine v. United  
14 States, 704 F.2d 1074, 1077 (9th Cir. 1983)). “In such a case, the district court assumes  
15 the truth of allegations in a complaint . . . unless controverted by undisputed facts in the  
16 record.” Id. “Dismissal is then appropriate where it appears beyond doubt that the  
17 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”  
18 Id. (internal quotations and citations omitted). “This standard, often cited in Rule 12(b)(6)  
19 motions, . . . is equally applicable in motions challenging subject matter jurisdiction when  
20 such jurisdiction may be contingent upon factual matters in dispute.” Id. If, after this  
21 threshold inquiry, subject matter jurisdiction is not precluded, the Court may entertain  
22 arguments “on either a motion going to the merits [i.e., a summary judgment motion,] or  
23 at trial.” Id. at 1178.

## 24 25 ANALYSIS

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27 Defendants contend dismissal is warranted because they have remedied the  
28 barriers that provide the basis for Plaintiff’s request for injunctive relief under the ADA

1 and, consequently, for this Court's federal question jurisdiction. Plaintiff opposes the  
2 Motion, arguing that Defendants' jurisdictional challenge is inappropriate as a Rule  
3 12(b)(1) motion and that Defendants have not established either that the facilities have  
4 been made compliant or that the violations will not recur. Plaintiff's arguments are well  
5 taken.

6 The question of whether Defendants' facilities comply with the ADA goes to the  
7 heart of Plaintiff's federal claim. Because the jurisdictional inquiry and the merits are  
8 fundamentally intertwined, review of Defendants' Motion under the typical Rule 12(b)(1)  
9 standard applicable to factual motions would not be proper. Instead, the Court assumes  
10 the facts alleged in the Complaint are true unless contradicted by any undisputed facts in  
11 the record. In this instance, the Court finds that it has subject matter jurisdiction to reach  
12 the merits of Plaintiff's claim because Defendants failed to offer any "facts" contradicting  
13 Plaintiff's allegations and, even if they had, the Court would be required to treat the  
14 instant motion as one for summary judgment, which it views as premature.

15 Most importantly here, there are no undisputed facts contradicting the allegations  
16 in Plaintiff's Complaint properly before the Court. Instead, Defendants offer only  
17 conclusory opinions of a purported expert that the alleged ADA violations have been  
18 "resolved" and that Defendants' facilities are now "compliant." These conclusions are  
19 not supported by any objective evidence from which the Court may make its own  
20 determination that Defendants' expert is correct and that Plaintiff's ADA claim is moot as  
21 a result. Accordingly, as under a facial Motion, the Court has considered the Complaint  
22 in its entirety and finds subject matter jurisdiction sufficient to allow the Court to reach  
23 the merits of this dispute.

24 Even if Defendants had offered some facts to support their position, however, the  
25 Court would be disinclined to grant their Motion at this early stage in the litigation. "In  
26 ruling on a jurisdictional motion involving factual issues which also go to the merits, the  
27 trial court should employ the standard applicable to a motion for summary  
28 judgment . . . ." Augustine, 704 F.2d at 1077. Converting the instant Motion to one for

1 summary judgment would be premature because Plaintiff has not yet had the opportunity  
2 to engage in discovery and thus has not had the opportunity to develop the evidence he  
3 may need to rebut Defendants' "facts." Accordingly, Defendants' Motion to Dismiss for  
4 lack of jurisdiction is DENIED without prejudice to raising this argument in a properly  
5 noticed and appropriately timed motion for summary judgment.<sup>5</sup>

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7 **CONCLUSION**

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9 For the reasons just stated, Defendants' Motion to Dismiss (ECF No. 7) is  
10 DENIED without prejudice.

11 IT IS SO ORDERED.

12 Dated: November 24, 2014

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15 MORRISON C. ENGLAND, JR., CHIEF JUDGE  
16 UNITED STATES DISTRICT COURT  
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28 <sup>5</sup> To the extent Defendants ask that the Court decline to exercise supplemental jurisdiction over Plaintiff's state law claims, that argument is derivative of their mootness argument and is thus similarly rejected.