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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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SCOTT JOHNSON,

No. 2:14-cv-02323-JAM-EFB

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Plaintiff,

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v.

**ORDER DENYING DEFENDANTS' MOTION  
TO DISMISS**

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KELLIE ANNE JACOBS, in her  
individual and representative  
capacity as Trustee for The  
Kellie Anne Revocable Trust;  
VALLEY BREWING COMPANY, INC.,  
a California Corporation, and  
Does 1-10,

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Defendants.

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Defendants Kellie Anne Jacobs ("Jacobs"), in her individual  
and representative capacity as Trustee of the Kellie Anne  
Revocable Trust, and Valley Brewing Company, Inc. ("Valley  
Brewing") (collectively "Defendants") contend the Court lacks  
subject matter jurisdiction over the claims in Plaintiff Scott  
Johnson's ("Plaintiff") complaint (Doc. #1) and have moved to  
dismiss (Doc. #8) pursuant to Federal Rule of Civil Procedure  
12(b)(1) ("Rule 12(b)(1)").<sup>1</sup> In his opposition (Doc. #9),

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<sup>1</sup> This motion was determined to be suitable for decision without  
oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled  
for March 25, 2015.

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1 Plaintiff argues this attack on the merits of his claims is  
2 premature and is better suited as a motion for summary judgment.  
3 The Court agrees.  
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#### 5 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

6 Valley Brewing Company is a business establishment and place  
7 of public accommodation owned and operated by Defendants.  
8 Plaintiff is a California resident with physical disabilities.  
9 As a C-5 quadriplegic, he uses a wheelchair for mobility.

10 Plaintiff alleges there are significant accessibility issues  
11 at Valley Brewing Company involving features of the bar/counter,  
12 tables and bathroom. Plaintiff alleges he ate at Valley Brewing  
13 on two occasions and encountered these barriers. As a result,  
14 Plaintiff experienced difficulty and discomfort and has been  
15 deterred from visiting on subsequent occasions. The complaint  
16 states four causes of action arising out of these encounters:  
17 (1) violation of the Americans with Disabilities Act of 1990  
18 ("ADA"), 42 U.S.C. § 12101, et seq.; (2) violation of the Unruh  
19 Civil Rights Act, California Civil Code §§ 51-53; (3) violation  
20 of the California Disabled Persons Act, California Civil Code  
21 §§ 54-54.8; and (4) negligence.  
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#### 23 II. OPINION

##### 24 A. Legal Standard

25 Dismissal is appropriate under Rule 12(b)(1) when a district  
26 court lacks subject matter jurisdiction over the claim. When a  
27 defendant brings a Rule 12(b)(1) motion, the plaintiff has the  
28 burden of establishing subject matter jurisdiction. See

1 Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095, 1102 n.1 (9th  
2 Cir. 2007) ("Once challenged, the party asserting subject matter  
3 jurisdiction has the burden of proving its existence."). There  
4 are two permissible jurisdictional attacks under Rule 12(b)(1): a  
5 facial attack, where the court's inquiry is limited to the  
6 allegations in the complaint; or a factual attack, which permits  
7 the court to look beyond the complaint at affidavits or other  
8 evidence. Savage v. Glendale Union High Sch., 343 F.3d 1036,  
9 1039 n.2 (9th Cir. 2003).

10 If the moving party asserts a facial challenge, the court  
11 must assume that the factual allegations asserted in the  
12 complaint are true and must construe those allegations in the  
13 light most favorable to the plaintiff. Li v. Chertoff, 482 F.  
14 Supp. 2d 1172, 1175 (S.D. Cal. 2007) (citing United States v.  
15 One 1997 Mercedes E420, 175 F.3d 1129, 1130-31 & n.1 (9th Cir.  
16 1999) and Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136,  
17 1139 (9th Cir. 2003)). If the moving party asserts a factual  
18 attack, the court "is free to hear evidence regarding  
19 jurisdiction and to rule on that issue prior to trial, resolving  
20 factual disputes where necessary." Id. (citing Safe Air for  
21 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)).

22 In resolving a factual attack, district courts "may review  
23 evidence beyond the complaint without converting the motion to  
24 dismiss into a motion for summary judgment." Safe Air for  
25 Everyone, 373 F.3d at 1039 (citing Savage, 343 F.3d at 1039 n.2).  
26 Courts consequently need not presume the truthfulness of  
27 plaintiff's allegations. Id. (citing White v. Lee, 227 F.3d  
28 1214, 1242 (9th Cir. 2000)). "Once the moving party has

1 converted a motion to dismiss into a factual motion by presenting  
2 affidavits or other evidence properly before the court, the party  
3 opposing the motion must furnish affidavits or other evidence  
4 necessary to satisfy its burden of establishing subject matter  
5 jurisdiction." Id. (quoting Savage, 343 F.3d at 1039 n.2).

6 However, "jurisdictional finding of genuinely disputed facts  
7 is inappropriate when the jurisdictional issue and the  
8 substantive issues are so intertwined that the question of  
9 jurisdiction is dependent on the resolution of factual issues  
10 going to the merits of an action." Safe Air for Everyone, 373  
11 F.3d at 1039 (internal citations and quotations omitted).

12 Jurisdiction and the merits of an action are intertwined where "a  
13 statute provides the basis for both the subject matter  
14 jurisdiction of the federal court and the plaintiff's substantive  
15 claim for relief." Id. (internal citations and quotations  
16 omitted).

17 B. Discussion

18 1. Jurisdiction and Standing

19 Defendants first contend that Plaintiff's ADA allegations  
20 are "moot." Defendants then argue that their expert "disagrees  
21 that any of Plaintiff's allegations of ADA violations pled in his  
22 Complaint are true, and as a matter of law, he is correct." MTD  
23 at p.7. Upon thorough analysis of Defendants' motion, in  
24 conjunction with the declaration filed by Defendants' counsel  
25 (Doc. #8-2) and the attached exhibits, it appears Defendants are  
26 contending that whatever barriers may have previously existed,  
27 "each and every claimed barrier to access has been altered to  
28 comply with applicable accessibility requirements." MTD at p. 9.

1 Exhibit C (Doc. #8-6) to the declaration of Defendants' counsel  
2 is a "Unilateral Stipulation of Voluntary ADA/Title 24 Compliance  
3 Prior to Service of Summons and Complaint" in which Defendants  
4 state that by the time they were served "Ms. Jacobs had made all  
5 relevant changes, but also more than what [Plaintiff] complained  
6 about." Exhibit D (Doc. #8-7) is the report of Defendants'  
7 expert, Kim Blackseth, which contains his opinion that all  
8 alleged barriers have been removed as of his site inspection on  
9 January 14, 2015.

10 Defendants argue that because there are no longer any  
11 remaining barriers based on this evidence, Plaintiff's claims are  
12 moot and all that remains are state law claims. They next argue  
13 the Court should decline to exercise supplemental jurisdiction  
14 over these remaining claims. MTD at pp. 9-11.

15 Plaintiff responds to Defendants' arguments by contending  
16 that the question of jurisdiction and the merits of the action  
17 are so intertwined that the issue can and should be raised in a  
18 motion for summary judgment rather than a motion to dismiss.  
19 Opp. at pp. 2-4. Additionally, Plaintiff argues that conversion  
20 of the instant motion to one for summary judgment would be  
21 "premature and unfair" as Plaintiff has not had the opportunity  
22 to conduct discovery or a site inspection to assess the alleged  
23 alterations performed by Defendants. Opp. at p.4,n.1

24 Defendants' motion represents a factual attack on the  
25 complaint because it "disputes the truth of the allegations that,  
26 by themselves, would otherwise invoke federal jurisdiction,"  
27 namely whether barriers to access existed at Defendants'  
28 facility. Safe Air for Everyone, 373 F.3d at 1039. The Court

1 may therefore review evidence beyond the complaint, such as that  
2 relied on by Defendants here, in resolving such an attack on  
3 jurisdiction unless the issue of jurisdiction and the underlying  
4 merit of Plaintiffs claims are too intertwined. Id.

5       Clearly the ADA provides the basis for both the subject  
6 matter jurisdiction of this Court and Plaintiff's substantive  
7 claims for relief. Addressing the merits of Defendants' attack  
8 on jurisdiction would require the Court to resolve disputed  
9 issues of fact. Thus, the Court finds that the issue of  
10 jurisdiction presented by Defendants and the substantive issues  
11 presented by this litigation are in fact so intertwined that the  
12 question of jurisdiction is dependent on the resolution of  
13 factual issues going to the merits of this action. See Safe Air  
14 for Everyone, 373 F.3d at 1039 (internal citations and quotations  
15 omitted). Therefore, a "jurisdictional finding of genuinely  
16 disputed facts is inappropriate." Id. Other courts in this  
17 district have come to the same conclusion under similar  
18 circumstances and an identical plaintiff. See Johnson v. Conrad,  
19 No. 2:14-CV-00596-MCE, 2014 WL 6670054, at \*4 (E.D. Cal. 2014);  
20 Johnson v. Hernandez, No. 2:14-CV-01635-MCE, 2014 WL 6670170, at  
21 \*4 (E.D. Cal. 2014).

22       Rather than convert this motion into one for summary  
23 judgment at this early stage, the Court DENIES Defendants' motion  
24 to dismiss for lack of jurisdiction without prejudice in order to  
25 allow for discovery by both parties before the issue of mootness  
26 is addressed. See Johnson v. Conrad, 2014 WL 6670054, at \*4  
27 (finding the conversion of a Rule 12(b)(1) motion "to one for  
28 summary judgment would be premature because Plaintiff has not yet

