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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GARFIELD BEACH CVS LLC,

Plaintiff,

v.

MOLLISON PHARMACY, SAMERA
YOKOUB, an individual, and DOES 1
through 50,

Defendants.

Case No.: 17-cv-00879-AJB-MDD

**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS FOR LACK
OF JURISDICTION**

(Doc. No. 26)

Pending before the Court is Defendants Mollison Pharmacy and Samera Yokoub’s (collectively referred to as “Defendants”) motion to dismiss for lack of jurisdiction. (Doc. No. 26.) On July 14, 2017, Plaintiff Garfield Beach CVS LLC (“Plaintiff”) filed an opposition. (Doc. No. 32.) Pursuant to Civil Local Rule 7.1.d.1, the Court finds the motion suitable for determination on the papers. Accordingly, the motion hearing set for August 24, 2017, is **VACATED**. As explained more fully below, having considered both parties’ arguments and the applicable law, the Court **DENIES** Defendants’ motion to dismiss.

BACKGROUND

The contours of this case are straightforward. Plaintiff, a subsidiary of CVS Health, alleges that confidential inventory and trade secret files were kept by Defendant Samera

1 Yokoub (“Yokoub”) a former El Cajon Express Pharmacy (“Express”) employee.¹ (Doc.
2 No. 1 ¶¶ 2, 6, 21.) Plaintiff contends that Yokoub was an Express driver that was entrusted
3 with confidential and proprietary information including the delivery log. (*Id.* ¶ 21.) After
4 Plaintiff purchased Express, Yokoub told Plaintiff that she had to quit as she had to care
5 for her sick husband. (*Id.* ¶ 25.) Instead, Plaintiff alleges that Yokoub began working for
6 Defendant Mollison Pharmacy (“Mollison”), Plaintiff’s competitor. (*Id.*) Plaintiff
7 maintains that it demanded that Yokoub return the delivery logs from March through April
8 before she left her position with Express, however, Plaintiff asserts that Yokoub has failed
9 to do so. (*Id.* ¶ 26.)

10 The allegedly confidential information at issue in the instant action are prescription
11 files that Plaintiff purchased, which includes hard copy prescriptions, signature logs,
12 customer lists, as well as similar electronic data that Express maintained in confidence. (*Id.*
13 ¶ 16.) One of the subsets of the prescription files was known as a delivery log and it
14 included customers’ names, their prescription numbers, customers’ signatures confirming
15 receipt of the delivery, and co-pay information for each prescription. (*Id.* ¶ 20.) All of the
16 prescription files are not readily available public information. (*Id.* ¶ 18.)

17 Plaintiff instituted this action on May 1, 2017, alleging violations of the (1) Defend
18 Trade Secrets Act (“DTSA”); (2) California Uniform Trade Secrets Act; (3) Breach of
19 Contract; (4) Unfair Competition; (5) Conversion; and (6) Tortious Interference with
20 Business Relationship/Contact. (*See generally* Doc. No. 1.) On May 2, 2017, Plaintiff filed
21 an ex parte motion for a temporary restraining order, (Doc. No. 3), which was denied on
22 June 9, 2017, (Doc. No. 24). Shortly thereafter, Defendants filed the present action, their
23 motion to dismiss for lack of jurisdiction. (Doc. No. 26.) On June 28, 2017, both parties
24 filed a joint motion to continue the briefing schedule for Defendants’ motion, (Doc. No.
25

26
27 ¹ On April 11, 2017, Plaintiff closed a transaction and purchased the confidential inventory,
28 trade secret prescription files, and goodwill of Double Star Pharmacy, Inc., doing business
as Express. (Doc. No. 1 ¶ 3.)

1 28), which was granted on June 30, 2017, (Doc. No. 30).

2 LEGAL STANDARD

3 Federal Rule of Civil Procedure 12(b)(1) allows a motion to dismiss where a court
4 lacks subject-matter jurisdiction. Because “[f]ederal courts are courts of limited
5 jurisdiction,” a court “presume[s] that a cause [of action] lies outside this limited
6 jurisdiction[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
7 Rule 12(b)(1) motion “can attack the substance of a complaint’s jurisdictional allegations
8 despite their formal sufficiency, and in so doing rely on affidavits or any other evidence
9 properly before the court.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).
10 No presumption of truthfulness attaches to the allegations of the plaintiff’s complaint as
11 the plaintiff bears the burden of establishing subject matter jurisdiction. *Thornhill Publ’g.*
12 *Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Thus, the court must
13 presume it lacks jurisdiction until subject matter jurisdiction is established. *Stock West, Inc.*
14 *v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Any party may raise a defense
15 based on lack of subject matter jurisdiction at any time. *See Attorneys Trust v. Videotape*
16 *Computer Products, Inc.*, 93 F.3d 593, 594–95 (9th Cir. 1996).

17 DISCUSSION

18 A. Judicial Notice

19 As an initial matter, the Court will turn to Plaintiff’s request for judicial notice. (Doc.
20 No. 32-1.) Plaintiff seeks judicial notice of documents of legislative history: (1) Senate
21 Report No. 114-220; and (2) House Report No. 104-788. (*Id.*) Defendants do not oppose
22 this request. (*See generally* Doc. No. 36.)

23 Here, the Court finds judicial notice of the legislative documents at issue to be
24 appropriate. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (explaining
25 that a court may judicially notice undisputed matters of public record but not disputed facts
26 stated therein); *see also Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005)
27 (granting plaintiff’s request to take judicial notice of the legislative history of a state
28 statute). Accordingly, the Court **GRANTS** Plaintiff’s unopposed request for judicial

1 notice.

2 B. Merits of the Motion to Dismiss

3 Defendants move to dismiss this case for lack of jurisdiction. (*See generally* Doc.
4 No. 26-1.) Defendants allege that the trade secrets at issue do not involve a product or
5 service used, or intended for use in, interstate or foreign commerce as required by the
6 DTSA. (*Id.*) Plaintiff refutes this assertion. (*See generally* Doc. No. 32.)

7 Congress enacted the DTSA on May 11, 2016. *Cave Consulting Grp., Inc. v. Truven*
8 *Health Analytics Inc.*, Case No. 15-cv-02177-SI, 2017 WL 1436044, at *3 (N.D. Cal. Apr.
9 24, 2017). The DTSA only covers acts occurring “on or after the date of the enactment of
10 this Act.” *Id.* The Act creates a cause of action for the “owner of a trade secret that is
11 misappropriated . . . if the trade secret is related to a product or service used in, or intended
12 for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). A trade secret includes
13 “all forms and types” of information that derives value from being secret and that the owner
14 took reasonable measures to keep secret. *Id.* at § 1839(3)(A)(B).

15 First, the Court notes that both parties dispute whether Defendants’ motion is a facial
16 or factual attack on jurisdiction. (Doc. No. 32 at 5; Doc. No. 36 at 2.) In a facial attack,
17 “the challenger asserts that the allegations contained in a complaint are insufficient on their
18 face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
19 (9th Cir. 2004). By contrast, in a factual attack, “the challenger disputes the truth of the
20 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* Here, the
21 Court finds that Defendants’ jurisdictional attack is factual because they present extrinsic
22 evidence to challenge Plaintiff’s contention that the trade secrets at issue are products used,
23 or intended for use, in interstate or foreign commerce as is required by the DTSA. (Doc.
24 No. 26-1 at 2; Doc. Nos. 26-2, 26-3 (*see Safe Air for Everyone*, 373 F.3d at 1039 (noting
25 that a jurisdictional challenge was a factual attack where it relied on extrinsic evidence)
26 (citation omitted)).)

27 Defendants’ extrinsic evidence comes in the form of two affidavits from Yokoub
28 and Bassam Massaad. (Doc. Nos. 26-2, 26-3.) Yokoub states that when she was making

1 deliveries for Express, the patients she delivered to all resided in California, and almost
2 exclusively within San Diego County. (Doc. No. 26-2 ¶ 3.) Bassam Massaad² testified that
3 Mollison serves customers that exclusively live in San Diego County and that Yokoub only
4 delivered prescription's to Mollison's customers located within San Diego County. (Doc.
5 No. 26-3 ¶¶ 4, 6.) Based on this, Defendants contend that Plaintiff's cannot bring a claim
6 under the DTSA as the allegedly confidential information was never used in interstate or
7 foreign commerce.

8 In response, Plaintiff does not "furnish affidavits or other evidence necessary to
9 satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone*, 373
10 F.3d at 1039 (citation omitted). Instead, Plaintiff asserts that a "jurisdictional finding of
11 genuinely disputed facts is inappropriate" where like here "the jurisdictional issue and
12 substantive issues are so intertwined that the question of jurisdiction is dependent on the
13 resolution of factual issues going to the merits of an action."³ (Doc. No. 32 at 6 (citing *Safe*
14 *Air for Everyone*, 373 F.3d at 1039).) Additionally, Plaintiff argues that a motion to dismiss
15 for lack of subject matter jurisdiction is only proper when the allegations in the complaint
16 are frivolous. (Doc. No. 32 at 6.)

17 Here, the question of whether Plaintiff's trade secrets comply with the jurisdictional
18 standard as set forth in the DTSA goes to the heart of Plaintiff's federal claim. The Court
19 illuminates that Plaintiff's complaint is only in federal court based on its DTSA violation,
20 which is a federal cause of action. Thus, Plaintiff's DTSA claim is the source of both
21 subject matter jurisdiction and Plaintiff's substantive claim for relief. *See Safe Air for*
22 *Everyone*, 373 F.3d at 1039 ("The question of jurisdiction and the merits of an action are
23 intertwined where a statute provides the basis for both the subject matter jurisdiction of the
24 federal court and the plaintiff's substantive claim for relief.").

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26 ² Bassam Massaad is the president of Defendant Mass Drugs, Inc. doing business as
27 Mollison Pharmacy. (Doc. No. 26-3 ¶ 1.)

28 ³ Defendants make no arguments to oppose this assertion in their reply brief. (*See generally*
Doc. No. 36.)

1 However, whereas here, Defendants have provided declarations that dispute
2 allegations in the complaint, “the question of jurisdiction is dependent on the resolution of
3 factual issues going to the merits.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.
4 1987) (citation omitted). Thus, a review of Defendants’ motion under the typical Rule
5 12(b)(1) standard applicable to factual motions would not be proper. Instead, “the trial
6 court should employ the standard applicable to a motion for summary judgment” when
7 “ruling on a jurisdictional motion involving factual issues which also go to the merits[.]”
8 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In the current matter, after
9 a careful analysis of the docket, the Court is reluctant to utilize a Federal Rule of Civil
10 Procedure 56⁴ standard to analyze the motion. This is due to the fact that the instant action
11 is in its early stages of litigation; thus a Rule 56 standard would be premature as both parties
12 have not engaged in substantial discovery.

13 Consequently, as the Court is disinclined to convert the present action into a motion
14 for summary judgment, Defendants’ motion to dismiss for lack of jurisdiction is **DENIED**
15 **without PREJUDICE** to raising this argument in a properly noticed and appropriately
16 timed motion for summary judgment. *See Johnson v. Hernandez*, 69 F. Supp. 3d 1030,
17 1035 (E.D. Cal. 2014) (finding that converting the motion to dismiss for lack of jurisdiction
18 into a motion for summary judgment would be “premature because [p]laintiff [had] not yet
19 had the opportunity to engage in discovery and thus [had] not had the opportunity to
20 develop the evidence he may need to rebut Defendants’ facts”) (internal quotation marks
21 omitted); *see also Johnson v. Jacobs*, No. 2:14-cv-02323-JAM-EFB, 2015 WL 1607986,
22 at *3 (E.D. Cal. Apr. 9, 2015) (“Rather than convert this motion into one for summary
23 judgment at this early stage, the Court DENIES Defendants’ motion to dismiss for lack of
24 jurisdiction without prejudice in order to allow for discovery by both parties . . .”).


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27 ⁴ Federal Rule of Civil Procedure 56 states that “the court shall grant summary judgment
28 if the movant shows that there is no genuine dispute as to any material fact and the movant
is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

1 CONCLUSION

2 For the reasons just stated, Defendants' motion to dismiss is **DENIED without**
3 **PREJUDICE.**

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5 **IT IS SO ORDERED.**

6 Dated: August 22, 2017

7 
8 Hon. Anthony J. Battaglia
9 United States District Judge

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