

HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELSTER SOLUTIONS, LLC, a Delaware
Limited Liability company,

Plaintiff,

v.

THE CITY OF SEATTLE, a municipal
corporation; SEATTLE CITY LIGHT, a
publicly owned utility, MUCKROCK
FOUNDATION, INC., a Massachusetts
corporation; and PHIL MOCEK, an
individual,

Defendants.

NO. 2:16-cv-00771 RSL

MUCKROCK FOUNDATION, INC.’S
RULE 12(b)(6) and 12(b)(1) MOTION TO
DISMISS

NOTED FOR HEARING: **OCTOBER 14,
2016**

INTRODUCTION

The claims against Defendant MuckRock Foundation, Inc. (“MuckRock”) must be dismissed because it is merely a neutral platform that lacks any interest in the underlying documents, and is granted broad immunity by Section 230 of the Communications Decency Act from liability for damages and suit. Even without such immunity, the complaint is bereft of any allegations against MuckRock, and this alone warrants dismissal. But there is no dispute that MuckRock is a neutral platform that merely makes available tools people can use to make public records requests. Under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, MuckRock cannot be held liable for any documents posted to its site by third parties should Defendant City of Seattle or any of its components release documents at issue in this case to the

1 requestor, Defendant Phil Mocek. Therefore, MuckRock should be dismissed from this lawsuit.

2 This is a public records lawsuit brought by Plaintiff Elster Solutions, LLC (“Elster”),
3 seeking to enjoin the disclosure of information under the Washington Public Records Act. The
4 underlying dispute about whether the records at issue are trade secrets has nothing to do with
5 MuckRock. MuckRock did not request, nor does it currently possess, any of Elster’s documents
6 that are subject to this Court’s previous orders and the relief Elster seeks.

7 Pursuant to FED. R. CIV. P. 12(b)(6) and 12(b)(1), MuckRock hereby moves for an order
8 dismissing all of Elster’s claims against MuckRock.

9 FACTUAL BACKGROUND

10 A. MUCKROCK IS A NEWS SITE AND PUBLIC RECORDS REQUEST 11 PLATFORM

12 MuckRock is a nonprofit collaborative news site, public records archive, and online
13 service that provides journalists, researchers, and the general public the ability to request and
14 access hundreds of thousands of government documents. Declaration of Michael Morisy
15 (“Morisy Decl.”) ¶¶ 1-2. Through its services, MuckRock aims to make politics more transparent
16 and democracies more informed.¹ *Id.*

17 MuckRock offers online tools to facilitate requesting and tracking state and federal public
18 records requests. *Id.* at ¶¶ 2-5. MuckRock provides users with a unique email address for each
19 request they file. *Id.* at ¶¶ 3. When agencies respond to the unique MuckRock email address
20 provided to the requestor, the correspondence and any documents are automatically uploaded to
21 MuckRock’s website and made public, enabling users to track their requests and all the
22 documents they have received. *Id.* at ¶¶ 4-5. MuckRock also provides its users with helpful
23 information on how to file a public records request and hosts a forum where users can help each

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25 ¹ The site and its features have received extensive media coverage. *See, e.g.*, Joseph
26 Lichterman, “FOIA site MuckRock launches new efforts to let users track projects and contribute
27 to reporting costs,” Nieman Lab, Sept. 3, 2015 (available at <
<http://www.niemanlab.org/2015/09/foia-site-muckrock-launches-new-efforts-to-let-users-track-projects-and-contribute-to-reporting-costs/>>).

1 other with their public records requests. *Id.* at ¶ 7.

2 MuckRock has no control over the requests users file or the public records they receive.
3 While MuckRock generally supports its users' goals to make government more transparent, it
4 has no interest in or any control over any of its users' requests or the records they may receive.
5 *Id.* at ¶ 6

6 MuckRock also supports investigatory journalism, academic research, and activism.
7 Because the records requested by MuckRock's users are public and searchable, journalists and
8 other users of the site can comb through the site's archives to identify newsworthy stories or
9 unearth new areas of research. Journalists also publish reports on MuckRock daily that are based
10 on the public documents they obtained via MuckRock. *Id.* at ¶ 8.

11 **B. PHIL MOCEK'S REQUEST TO SEATTLE CITY LIGHT**

12 On April 12, 2016, Phil Mocek used MuckRock's platform to file a public records
13 request with the City of Seattle and Seattle City Light. *Id.* at ¶ 9. The request sought:

14 Plans for, schedules of, policies dictating the performance of, requests for proposals
15 to, contracts for, discussion of, and results of all security audits performed of "smart
16 meter" devices (remotely-addressable electrical meters sometimes referred to as
17 "advanced metering infrastructure"), along with metadata. These devices are
18 designed to replace traditional electric meters. They contain sensors that monitor
activities inside subscribers' premises and automatically communicate information
collected by those sensors to machines in remote locations.

19 On April 19, 2016, Seattle City Light responded to Mocek's request and provided him
20 with two documents.² *Id.* at ¶ 10. As explained above, unless the requestor changes the default
21 settings, MuckRock automatically posts all correspondence between a requestor and the
22 government along with any documents received. The two documents Seattle City Light produced
23 to Mocek were thus automatically published on MuckRock's website on April 19. *Id.* at ¶ 11.

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26 ² Correspondence between Mocek and Seattle is available at
27 [https://www.muckrock.com/foi/seattle-69/smart-meter-security-audit-plans-schedules-proposals-
contracts-discussion-results-seattle-10378/#comms](https://www.muckrock.com/foi/seattle-69/smart-meter-security-audit-plans-schedules-proposals-contracts-discussion-results-seattle-10378/#comms).

1 Court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*,
2 556 U.S. 662, 678 (2009). A complaint “must contain specific factual allegations regarding each
3 Defendant that would enable the Court to conclude that a claim exists.” *Williams v. Duong*, No.
4 C 05-2105 CW, 2007 U.S. Dist. LEXIS 58725, at *2 (N.D. Cal. Aug. 1, 2007); *see also Yates v.*
5 *Naphcare, Inc.*, No. 2:12-cv-01725-JCM-VCF, 2014 U.S. Dist. LEXIS 71077, at *9 (D. Nev.
6 May 22, 2014) (“Plaintiff therefore must present specific allegations of actual fact, not
7 conclusory labels, tending to establish a causal connection between the alleged events and the
8 involvement of each defendant named in the pleadings.”).

9 Under FED. R. CIV. P. 12(b)(1), a court must dismiss an action if it determines that it
10 lacks subject matter jurisdiction. “Federal courts are courts of limited jurisdiction. . . . It is to be
11 presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the
12 contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*,
13 511 U.S. 375, 377 (1994). Thus, once jurisdiction is questioned, the party opposing the motion to
14 dismiss must “satisfy its burden of establishing that the court, in fact, possesses subject matter
15 jurisdiction.” *Ass’n. of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000)
16 (internal quotations omitted). Article III standing is a threshold requirement for federal court
17 jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Standing requires the
18 party invoking federal jurisdiction to establish three elements: (1) injury in the form of an
19 invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or
20 imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the
21 defendant's conduct; and (3) the likelihood, not mere speculation, that a favorable decision will
22 redress the injury. *Id.* at 560-61. A plaintiff is required under *Lujan* to establish “standing as to
23 each defendant sued.” *Buchholz v. Rural Cmty. Ins. Co.*, No. 05-C-0115-C, 2005 U.S. Dist.
24 LEXIS 14807, at *4 (W.D. Wis. July 20, 2005). A court considering a Rule 12(b)(1) motion to
25 dismiss for lack of subject matter jurisdiction may consider “affidavits or any other evidence
26 properly before the court,” even material extrinsic to the pleadings. *Id.*

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1 **B. THE COMPLAINT FAILS TO ALLEGE ANY INVOLVEMENT**
2 **WHATSOEVER BY MUCKROCK**

3 The Court should dismiss MuckRock from the lawsuit due to the obvious deficiencies in
4 in Elster’s allegations in the Complaint. With respect to MuckRock, the Complaint contains
5 precisely the type of bare, conclusory, or formulaic allegations the Court said were insufficient in
6 *Iqbal*. See *Yates*, 2014 U.S. Dist. LEXIS 71077, at *8 (“[b]are, conclusory and formulaic
7 allegations of involvement do not state a claim for relief against a particular defendant”).

8 The Complaint mentions MuckRock in only three paragraphs, and in all three instances
9 fails to specify any conduct by MuckRock that underlies any purported claim against it. (*See*
10 Complaint ¶¶ 2, 6, 18.) Paragraph 6 references MuckRock’s domicile and state of incorporation.
11 Paragraph 18 merely recites that Phil Mocek made a request for certain documents. And
12 paragraph 2 is an introductory paragraph vaguely alleging that Mocek “and/or” MuckRock
13 submitted a records request.

14 **C. ELSTER LACKS STANDING TO PROCEED AGAINST MUCKROCK**
15 **BECAUSE MUCKROCK IS IMMUNE FROM SUIT UNDER FEDERAL**
16 **LAW**

17 Even if Elster had alleged any involvement by MuckRock, MuckRock must be dismissed
18 due to the broad immunity granted by 47 U.S.C. § 230 (“Section 230”). Because Section 230
19 provides such broad immunity from suit, Elster lacks standing to assert its trade secrets claims
20 against MuckRock.

21 1. Background Section 230 Principles.

22 MuckRock is an Internet intermediary protected by Section 230’s immunity from suit that
23 results from hosting content provided by its users. Section 230 provides that “[n]o provider or
24 user of an interactive computer service shall be treated as the publisher or speaker of any
25 information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

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1 “Under the CDA, an ‘information content provider’³ may be subject to state law liability in
 2 relation to content that it develops but an ‘interactive computer service’ is immune from suit for
 3 state law claims in relation to merely hosting such content on a website.” *J.S. v. Village Voice*
 4 *Media Holdings LLC*, 184 Wn.2d 95, 101 (2015) (quoting *Carafano v. Metrosplash.com, Inc.*,
 5 339 F.3d 1119, 1123 (9th Cir. 2003)) (footnote in original; other footnotes omitted).

6 Importantly, Section 230 provides immunity from suit for interactive computer services,
 7 not just liability: “**No cause of action may be brought and no liability may be imposed under**
 8 **any State or local law that is inconsistent with this section.**” 47 U.S.C. § 230(e)(3) (emphasis
 9 added). “By its plain language, [Section] 230 creates a federal immunity to any cause of action
 10 that would make service providers liable for information originating with a third-party user of the
 11 service.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); see also *Backpage.com,*
 12 *LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (invalidating SB 6251, which
 13 “criminalized the ‘knowing’ publication, dissemination, or display of specified content,” because
 14 of conflict with Section 230); *Kimzey v. Yelp Inc.*, 21 F. Supp. 3d 1120, 1122 (W.D. Wash.
 15 2014), *aff’d*, 2016 U.S. App. LEXIS 16665 (9th Cir. Wash., Sept. 12, 2016) (“CDA immunizes
 16 providers of interactive computer services against liability arising from content created by third
 17 parties”).

18 2. The Claims Against MuckRock Fall Within Section 230.

19 Section 230 applies in this case and bars the claims against MuckRock, all of which arise
 20 from MuckRock hosting the content of third-parties on its website.

21 MuckRock is plainly a provider of an “interactive computer service” under Section
 22 230(c)(1). An “interactive computer service” is “any information service, system, or access
 23 software provider that provides or enables computer access by multiple users to a computer
 24 server, including specifically a service or system that provides access to the Internet and such
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26 ³ An “information content provider” is “any person or entity that is responsible, in whole or in
 27 part, for the creation or development of information provided through the Internet or any other
 interactive computer service.” 47 U.S.C. § 230(f)(3).

1 systems operated or services offered by libraries or educational institutions.” 47 U.S.C.
2 § 230(f)(2).

3 The claims also treat MuckRock as the publisher of the allegedly offending content. But
4 MuckRock merely provides a platform for the publication of content created and/or provided by
5 others. MuckRock provides an online service to its users that allow them to draft, file, and
6 catalog their public records requests and the responsive documents they receive. Morisy Decl. ¶¶
7 2-8. By default, MuckRock publishes all correspondence and documents its users receive via
8 their public records requests on its website. Morisy Decl. ¶ 3. This automatic posting is a
9 function of the platform MuckRock provides for its users, and MuckRock has no control over the
10 requests its users make or the public records users receive from governmental agencies as a
11 result of such requests.

12 This is precisely what occurred in this case. Mocek used the MuckRock platform to file a
13 public records request with Seattle. Morisy Decl. ¶ 9. Because Mocek retained the default
14 settings to his MuckRock account, all correspondence with Seattle and any documents Seattle
15 provided were automatically posted to MuckRock’s website. Morisy Decl. ¶¶ 10-11.

16 3. Elster’s Trade Secrets Claims do not Fall Within Any Exception.

17 Section 230’s limited exception for “intellectual property” claims, 47 U.S.C. § 230(e)(2),
18 does not apply to state law trade secret claims such as those at issue here. The Ninth Circuit has
19 construed Section 230’s intellectual property exception to be limited to federal intellectual
20 property claims, namely, copyright and patents. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102,
21 1119 (9th Cir. 2007). Thus, even if a state trade secret claim were considered an intellectual
22 property claim—which it should not be—Section 230 would nevertheless bar it. *See Stevo Design,*
23 *Inc. v. SBR Mktg.*, 919 F. Supp. 2d 1112, 1125 (D. Nev. 2013) (Section 230 provided a website
24 immunity from state law trade secrets claims).

25 Recent amendments to federal law confirm that trade secret claims do not fall within
26 Section 230’s narrow intellectual property exception. The Defend Trade Secrets Act of 2016,
27 which created a federal law claim for trade secret infringement, specifically states that “[t]his

1 section and the amendments made by this section shall not be construed to be a law pertaining to
2 intellectual property for purposes of any other Act of Congress.” Pub. L. 114-153, §2, 130 Stat.
3 376, 382 (May 11, 2016). This provision was specifically included to negate arguments that
4 Congress broadened the intellectual property exception to Section 230 to include state or federal
5 law trade secret claims. Section 230’s limited intellectual property exception thus remains inapt
6 in cases involving state trade secrets claims against Internet intermediaries like MuckRock.

7 **CONCLUSION**

8 For the above-stated reasons, this Court must dismiss all of Elster’s claims against
9 MuckRock.

10 DATED: September 19, 2016

Respectfully submitted,

11 FOCAL PLLC

12 By: *s/ Venkat Balasubramani*

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all defendants who have signed up for CM/ECF. I separately caused a copy of the foregoing to be mailed to Phil Mocek.

DATED: September 19, 2016

s/ Venkat Balasubramani
Venkat Balasubramani, WSBA No. 28269

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