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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

**B. PHIL MOCEK’S REQUEST TO SEATTLE CITY LIGHT**

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

Plans for, schedules of, policies dictating the performance of, requests for proposals to, contracts for, discussion of, and results of all security audits performed of “smart meter” devices (remotely-addressable electrical meters sometimes referred to as “advanced metering infrastructure”), along with metadata. These devices are 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.

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

² Correspondence between Mocek and Seattle is available at https://www.muckrock.com/foi/seattle-69/smart-meter-security-audit-plans-schedules-proposals-contracts-discussion-results-seattle-10378/#comms.
C. MUCKROCK WAS NAMED IN THREE SUITS RESULTING FROM MOCEK’S REQUEST AND HAS BEEN DISMISSED FROM TWO SUITS

Between May 24 and 25, 2016, Elster and several other companies contacted MuckRock and notified the website that they would each be seeking temporary restraining orders and preliminary injunctions barring release of the records Seattle planned to release to Mocek, as well as seeking to de-publish the two documents Mocek had already received that had been posted to the MuckRock website. Morisy Decl. ¶¶ 12-13. These companies initiated three separate lawsuits, each naming MuckRock as a defendant: (1) Landis+Gyr Technologies, Inc. v. City of Seattle, No. 16-2-12149-7 SEA; (2) Ericsson, Inc. v. City of Seattle, No. 16-2-12262-1 SEA; and (3) this lawsuit. In the Landis+Gyr case, Judge Downing dissolved a temporary restraining order issued against Mocek and MuckRock, citing the First Amendment interests at stake. See Declaration of Venkat Balasubramani, Ex. A. The plaintiffs in the two other cases subsequently dismissed MuckRock as a defendant. See MorisyDecl. ¶¶ 14-15 & Exs. A, B.

In the present case, Elster alleges that MuckRock directly submitted the underlying public records request to the City of Seattle. Dkt. No. 1, Complaint ¶¶ 2, 18. Elster further alleges that releasing unredacted versions of the requested documents would violate Washington’s Uniform Trade Secrets Act, RCW Chapter 19.108, and the Public Records Act, RCW Chapter 42.56. Id. ¶¶ 23-34.

ARGUMENT

A. LEGAL STANDARDS GOVERNING 12(B)(6) AND 12(B)(1) MOTIONS

Under Federal Rule of Civil Procedure 12(b)(6), dismissal of one or more claims is appropriate if the pleading fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal can be based on “the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). The pleadings must raise the right to relief beyond the speculative level, and a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). On a motion to dismiss, the

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

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

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

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

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

1. Background Section 230 Principles.

MuckRock is an Internet intermediary protected by Section 230’s immunity from suit that results from hosting content provided by its users. Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).
“Under the CDA, an ‘information content provider’\(^3\) may be subject to state law liability in relation to content that it develops but an ‘interactive computer service’ is immune from suit for state law claims in relation to merely hosting such content on a website.” *J.S. v. Village Voice Media Holdings LLC*, 184 Wn.2d 95, 101 (2015) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)) (footnote in original; other footnotes omitted).

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

2. The Claims Against MuckRock Fall Within Section 230.

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

MuckRock is plainly a provider of an “interactive computer service” under Section 230(c)(1). An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such

\(^3\) An “information content provider” is “any person or entity that is responsible, in whole or in 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).
systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2).

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

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

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

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

Recent amendments to federal law confirm that trade secret claims do not fall within Section 230’s narrow intellectual property exception. The Defend Trade Secrets Act of 2016, which created a federal law claim for trade secret infringement, specifically states that “[t]his
section and the amendments made by this section shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.” Pub. L. 114-153, §2, 130 Stat. 376, 382 (May 11, 2016). This provision was specifically included to negate arguments that Congress broadened the intellectual property exception to Section 230 to include state or federal law trade secret claims. Section 230’s limited intellectual property exception thus remains inapt in cases involving state trade secrets claims against Internet intermediaries like MuckRock.

CONCLUSION

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

DATED: September 19, 2016

Respectfully submitted,

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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