HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELSTER SOLUTIONS, LLC , a Delaware Limited Liability Company, Plaintiff, vs. 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.	Case No. 2:16-cv-00771 RSL PLAINTIFF ELSTER SOLUTIONS, LLC'S OPPOSITION TO DEFENDANT MUCKROCK FOUNDATION, INC.'S RULE 12(b)(6) AND 12(b)(1) MOTION TO DISMISS **Noting Date: October 14, 2016**

COMES NOW Plaintiff Elster Solutions, LLC ("Elster") hereby respectfully submits its Opposition to Defendant Muckrock Foundation, Inc.'s ("Muckrock") Rule 12(b)(6) and 12(b)(1) Motion to Dismiss in the above-captioned action.

I. INTRODUCTION

Defendant Muckrock Foundation, Inc.'s ("Muckrock") Rule 12(b)(6) and 12(b)(1) Motion to Dismiss lacks merit in that:

(1) Muckrock's contention that the Complaint is not adequately pled is untenable, based on the amount of detailed facts presented in Elster's Complaint for Injunctive and

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Declaratory Relief, which well exceed the minimal notice pleading requirement of Federal Rule of Civil Procedure 8. Moreover, Muckrock is a necessary and indispensable party to this litigation based on its role in requesting Plaintiff Elster Solutions, LLC's ("Elster") public records at issue. As a result, Muckrock is on notice that it is subject to any injunctive or declaratory relief granted herein, despite any claimed deficiencies in pleading. Finally, the Court has already granted Elster's preliminary injunction in this action, and thus the Court has already implicitly determined that the Complaint for injunctive relief is sufficient.

(2) Muckrock's challenge to subject matter jurisdiction on the basis of Communications Decency Act ("CDA") is improper, as so-called "CDA immunity" has not been allowed as a basis to dismiss the complaint at the pleading stage, and does not apply to claims for injunctive and declaratory relief, such as the case at bar.

II. LEGAL STANDARD

A. Notice Pleading and Rule 12(b)(6) Motion to Dismiss Standards

To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8. *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1119 (N.D. Cal. 2009). Rule 8(a)(2) requires only that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *McGary v. Inslee, No. C15-5840 RBL-DWC*, 2016 U.S. Dist. LEXIS 94875, at *4 (W.D. Wash. June 30, 2016)(quoting *Erickson v. Pardus, et al.*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)). Rule 8(a) of the Federal Rules of Civil Procedure prescribes a notice-pleading standard for reviewing the sufficiency of a complaint, requiring "enough facts to state a claim to relief that is plausible on

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its face." *In re Wash. Mut.*, 259 F.R.D. 490, 503 (W.D. Wash. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

On a 12(b)(6) motion to dismiss, the Court must assess the legal feasibility of the Complaint. *In re Wash. Mut.*, 259 F.R.D. 490, 494-95 (W.D. Wash. 2009) (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). Accordingly, the Court accepts Plaintiffs' factual allegations as true and draws all reasonable inferences in Plaintiffs' favor. *Id.* (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). Dismissal is appropriate only where a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

B. Rule 12(b)(1) Motion to Dismiss Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009, 124 S. Ct. 2067, 158 L. Ed. 2d 619 (2004). To establish standing, a Plaintiff must show (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) likelihood that the injury will be, '"redressed by a favorable decision.'" *Score LLC v. City of Shoreline*, 319 F. Supp. 2d 1224, 1229 (W.D. Wash. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

A plaintiff seeking injunctive relief may demonstrate by showing that he has suffered or is threatened with a "concrete and particularized" legal harm, coupled with "a sufficient likelihood that he will again be wronged in a similar way." *Bates v. UPS*, 511 F.3d 974, 981 (9th Cir. 2007) (citing *Lujan*, 504 U.S. at 560; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

At the pleading stage, for purposes of establishing standing, general factual allegations of injury resulting from the defendant's conduct may suffice. *Williams v. Boeing Co.*, 517 F.3d

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1120, 1127 (9th Cir. 2008) (citing, *inter alia, Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992)).

III. ISSUES PRESENTED

A. Whether Elster has met the minimal notice pleading requirements in its Complaint for Declaratory and Injunctive Relief, sufficient to withstand a Rule 12(b)(6) Dismissal.

B. Whether Elster has standing to bring suit against Muckrock, a requester of public records at issue in this case, to enjoin release of Elster's sensitive confidential and proprietary trade secrets, on the basis of Communications Decency Act immunity, which has been held not to apply to jurisdictional challenges such as this one, and which does not apply to claims for injunctive relief such as the instant matter.

IV. LEGAL ARGUMENT

A. THE COMPLAINT IS NOT SUBJECT TO DISMISSAL AS ELSTER HAS FAR EXCEEDED THE FEDERAL RULES' LIBERAL NOTICE PLEADING REQUIREMENT

To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8. *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1119 (N.D. Cal. 2009). Rule 8(a)(2) requires only that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

FRCP Rule 8(a) prescribes a notice-pleading standard for reviewing the sufficiency of a complaint, requiring "enough facts to state a claim to relief that is plausible on its face." *In re Wash. Mut.*, 259 F.R.D. 490, 503 (W.D. Wash. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *McGary v. Inslee, No. C15-5840 RBL-DWC*, 2016 U.S. Dist. LEXIS

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94875, at *4 (W.D. Wash. June 30, 2016)(quoting *Erickson v. Pardus, et al.*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)).

On a Rule 12(b)(6) motion to dismiss, the Court must assess the legal feasibility of the Complaint. *In re Wash. Mut.*, 259 F.R.D. 490, 503 (W.D. Wash. 2009) (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). Accordingly, the Court accepts Plaintiffs' factual allegations as true and draws all reasonable inferences in Plaintiff's favor. *Id.* (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).[1]

As set forth in more detail below, and as set forth in the Complaint, Elster included Muckrock in the Complaint as a necessary party, as Muckrock (along with Defendant Philip Mocek), were the requestors of the public records at issue in this case. (Complaint, at ¶8, ¶18). As the Complaint seeks injunctive and declaratory relief to prevent disclosure of Elster's proprietary and confidential bid proposal, Elster is clearly seeking the same injunctive relief against the holder of the public records, the City of Seattle and Seattle City Light, and against Philip Mocek and Muckrock as the requestors of the public records at issue.

The Complaint highlights that Elster has gone above and beyond the notice pleading standard in adequately pleading specific facts to show entitlement to injunctive and declaratory relief as against Muckrock. As such, Elster's Complaint must necessarily survive Muckrock's Rule 12(b)(6) motion to dismiss.

1. Muckrock Is a "Requestor" of Public Records, and Thus a Necessary and Indispensable Party According to Washington Law

As set forth in the Complaint, Elster is seeking to enjoin the Defendants City of Seattle, Seattle City Light, Philip Moceck ("Mocek") and Muckrock, from releasing confidential and

[1] In its Motion Muckrock cites *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1950 (2009) for the proposition that the Court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, however, also states "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. **When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief**." *Id.*, at 679 [emphasis added].

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proprietary information contained in its unsuccessful bid for Advanced Metering Infrastructure. Defendant Mocek made a Public Records Act ("PRA") request for this information through Muckrock's website. *See* Complaint, at ¶18. Mocek and Muckrock, as requestors of the public records at issue, were included in this litigation as necessary and indispensable parties to the action, pursuant to *Burt v. Washington State Dept. of Corrections,* 168 Wn.2d 828, 231 P.3d 191 (2010).[2] *See* Complaint, at ¶8, ¶18.

As a result, any request for declaratory and injunctive relief necessitates inclusion of Mocek and Muckrock as necessary parties. To that end, based on the liberal pleading standards of Rule 8, even though Muckrock is not mentioned explicitly in all parts of the Complaint, they have sufficient notice that the injunctive relief sought to prevent release of Elster's confidential and proprietary trade secrets, is also sought against Muckrock.

2. Elster Has Pled Adequate Facts to Survive Dismissal of its Injunctive and Declaratory Relief Claims

Elster's Complaint against the four Defendants, including Muckrock, is one for injunctive and declaratory relief under RCW 19.108.020 and RCW 42.56.540. Elster has far exceeded the minimal notice pleading requirements of Rule 8 in pleading more detailed facts than are necessary to support its claims for both declaratory and injunctive and relief in this case.

As set forth in the Complaint, the declaratory relief action was brought as against "all parties"--which clearly applies to Muckrock as a defendant--and is thus more than sufficient to meet Rule 8's minimal pleading requirement. The Complaint specifically states, "[a]n actual and justifiable controversy exists as to whether certain records, and/or information contained therein, relating to Elster's RFP Proposal are exempt from disclosure under RCW 42.56.070. Declaratory relief will clarify the rights and obligations of **the parties** and is, therefore, appropriate to resolve this controversy." *See* Complaint, ¶33 [emphasis added].

[2] The case held that a requestor of public records is a necessary party, subject to mandatory joinder. *Id.*, at 836-37.

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Similarly, the request for injunctive relief must also survive dismissal, as Elster has exceeded the minimal notice pleading requirement. Under Washington law, "[i]n the context of RCW 42.56.540, a party seeking a TRO or preliminary injunction to prevent the disclosure of certain records must show a likelihood that an exemption applies and that the disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or vital government functions." *SEIU Healthcare 775NW v. State Dep't of Soc. & Health Servs.*, --P.3d--, 193 Wn. App. 377, 393, 2016 WL 1447304, at *5 (Wash. Ct. App. Apr. 12, 2016) (citing *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 177 Wn.2d 467, 487 (2013).

In accordance with *SEIU Healthcare*, Elster has pled sufficient facts to seek a PRA Injunction by pleading: (1) the likelihood that a PRA exemption applies, (2) that disclosure would clearly not be in the public interest, and (3) disclosure would substantially and irreparably damage any person or vital government functions. *SEIU*, 192 Wn. App. at 393.

For the first element, the likelihood that a PRA exemption applies, Elster has pled facts to show that several PRA exemptions apply, including the Uniform Trade Secrets Act, RCW 19.108.020 under the "other statute" PRA exemption,[3] (*See, e.g.*, Complaint, at ¶2, ¶13, ¶21, ¶24-25, ¶28) and RCW 42.56.270(1), which exempts from disclosure certain financial, commercial, and proprietary information (*See, e.g.*, Complaint, at ¶13, ¶28, ¶38, ¶39); *see also* RCW 42.56.270(11) (Unique business and unique data PRA exemption); RCW 42.56.420(4) (Network security PRA exemption).

For instance, paragraph 13 of the Complaint provides:

> Elster's Proposal contains trade secrets and other highly confidential and proprietary information, including the following:
>
> - System architecture and design.
> - Product features, design, data and specifications.

[3] RCW 42.56.070(1); *see also Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn. 2d 243, 262, 884 P.2d 592 (1994)(The UTSA, which protects trade secrets, qualifies as an "other statute" under RCW 42.56.070(1)).

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- System security information.
- Nonpublic customer and employee data.
- Data compilations.
- Pricing information.

See Complaint, at ¶13.

The foregoing paragraph, alone, should be sufficient, for purposes of notice pleading, to show the PRA exemptions that apply. *See* RCW 42.56.070(1); RCW 42.56.270(1); *see also* RCW 42.56.270(11) (Unique business and unique data PRA exemption); RCW 42.56.420(4) (Network security PRA exemption).

Paragraph 25 of the Complaint also contains details how certain contents of the Proposal constitute "trade secrets" within the meaning of RCW § 19.108.010(4), further supporting Elster's contention that the Complaint is much more detailed than required, and thus must survive Rule 12 dismissal. *See* Complaint, at ¶25.

As set forth in Paragraph 32, Elster has pled the second element that disclosure of its Proposal would not be in the public interest.[4] Served concurrently with the Complaint was Elster's Memorandum in Support of its Motion for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction ("Motion for TRO," Docket Doc. No. 3), which provides Muckrock with additional details regarding this element: "[i]ndeed, the public interest will be best served by the granting of the injunctive relief for the following reasons. …[T]his Court has ruled that '[t]he public has an interest in enforcing statutory obligations under the Uniform Trade Secrets Act.'" *See* Docket Doc. No. 3, Motion for TRO, at 15-16 (citing *U.S. Water Servs. v. Itoh*, 2011 U.S. Dist. LEXIS 27382; *Progressive Animal Welfare Soc'y v. Univ.*

[4] Any perceived deficiency on this minor element should not serve to invalidate the request for injunctive relief, as a Complaint should be read in its entirety, and any Rule 12 motion to dismiss should be guided by reason and common sense. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"); *see also In re Wash. Mut.*, 259 F.R.D. 490, 503 (W.D. Wash. 2009) (reviewing the sufficiency of a complaint, requires "enough facts to state a claim to relief that is plausible on its face") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

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of Wash., 125 Wn.2d 243, 263, 884 P.2d 592 ("[T]he legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented").

Finally, Elster has pled numerous details regarding the third element to illustrate that disclosure would substantially and irreparably damage any person or vital government functions. The term "person" within the context of the PRA also includes commercial entities such as limited liability companies, and so any harm to Elster would also be a relevant inquiry in this context. *See Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wash. App. 649, 662, 343 P.3d 370, 377 (2014).

As illustrations of the substantial and irreparable harm to Elster that would result from disclosure, the Complaint alleges:[5]

- If made available to competitors, Elster would be placed at a competitive disadvantage which could result in financial harm. (Complaint, at ¶19).
- Elster's market competitors could obtain economic value from disclosure of such information. (Complaint, at ¶25).
- If [Seattle City Light] released or disclosed the above-described information contrary to Elster's efforts to ensure protection of trade secrets, recipients would be in a position to learn and disseminate Elster's trade secrets to Elster's competitors' economic advantage and Elster's detriment. (*Id.*)
- If SCL is permitted to disseminate confidential information concerning Elster's business practices, products and services pricing, personnel lists and future development plans to third parties, Elster's would be irreparably harmed by the revelation of proprietary and confidential information. (Complaint, at ¶37).

[5] The Complaint alone is sufficient to show the substantial and irreparable harm to Elster, but taken together with its Motion for TRO, which was served concurrently with the Complaint, there can be no question that Muckrock has sufficient notice and details of the nature of the harm that Elster is seeking to avoid. *See* Motion for TRO, at 13-14.

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3. Elster Has Adequately Pled a Rule 65 Preliminary Injunction Request

Elster has also adequately pled all requirements for a Rule 65 preliminary injunction, which serves as further support that Muckrock's Rule 12(b)(6) motion lacks merit. A preliminary junction will issue where the moving party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions going to the merits are raised and the balance of hardships tips sharply in the moving party's favor. *United States v. Kukhahn*, No. C08-5212BHS, 2008 U.S. Dist. LEXIS 71560, at *7 (W.D. Wash. May 29, 2008)(citing *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987)).[6]

In the case at bar, Elster has pled that it has a "probable success on the merits" based on the following allegations in the Complaint:

1. Facts showing the proprietary and confidential nature of Elster's bid response, that the information was developed at great expense to Elster, and that Elster has taken certain steps to maintain their confidentiality (Complaint, at ¶¶13-15);

2. Facts showing Elster's bid response to the City's Request for Proposal are "trade secrets" as defined by RCW § 19.108.010(4) (Complaint, at ¶25);

3. Allegations that release of such information would constitute threatened "misappropriations" of trade secrets (*Id.*, at ¶26); and that

4. As a result of the threatened and imminent misappropriations of Elster's trade secrets, Elster is entitled to an injunction prohibiting release or disclosure of any confidential financial, commercial and proprietary information (*Id.*, at ¶26).

The Complaint alone is sufficient to satisfy Elter's entitlement to a preliminary injunction, but taken together with its Motion for TRO, which was served concurrently with the

[6] This is an alternative to the so-called "traditional test" under Rule 65, under which a party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that irreparable harm is likely, not just possible, if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *See* Fed. R. Civ. P. 65; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

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Complaint, there can be no question that Muckrock is on notice of the subject and requested contents of a preliminary injunction to prevent disclosure of its confidential and proprietary trade secrets.

In its Motion for TRO, which was served concurrently with the Complaint, Elster also set forth the requisite elements for a Temporary Restraining Order, which are equivalent to those for a preliminary injunction.[7] *See* Motion for TRO, Docket Doc. No. 3, at 7-9 (setting forth facts regarding likelihood of success on the merits under the Uniform Trade Secrets Act); *id.*, at 10-13 (facts regarding likelihood of success on the merits under the Public Records Act); *id.*, at 13-14 (facts regarding irreparable harm to Elster); *id.*, at 14-15 (facts showing that balancing of the equities favors Elster); *id.*, at 15-16 (facts showing that the TRO or preliminary injunction are in the public interest).

B. THE COURT IMPLICITLY DETERMINED THAT THE COMPLAINT FOR INJUNCTIVE RELIEF WAS ADEQUATE AS IT HAS ALREADY GRANTED A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Elster also submits that because this Court has already granted a Temporary Restraining Order and Preliminary Injunction in this case, the Court implicitly found that the Complaint was adequately pled as against all Defendants, including Muckrock, and thus not subject to dismissal. Indeed, in its Temporary Restraining Order, the Court explicitly stated "**Defendants are enjoined and restrained…from releasing or otherwise disclosing any** confidential or proprietary information, including without imitation any trade secrets, contained in Elster's [Proposal Response]." (Docket, Doc No. 8, Temporary Restraining Order)[8] [emphasis added].

In *Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd., No.* C13-1034-MJP, 2014 U.S. Dist. LEXIS 189112, at *11 (W.D. Wash. Feb. 3, 2014), the Court held that Plaintiffs satisfied the pleading

[7] *Zango, Inc. v. PC Tools Pty Ltd.*, 494 F. Supp. 2d 1189, 1194 (W.D. Wash. 2007) (citing *Graham v. Teledyne-Continental Motors, Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986))

[8] The Preliminary Injunction states "[t]he temporary restraining order is hereby converted to a preliminary injunction." (Docket, Doc. No. 27, at p. 2, ¶1).

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standard for injunctive relief, as the Court had granted Plaintiffs' request for a temporary restraining order, and had already found Plaintiffs were likely to succeed on the merits of their claims. *Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd., No*. C13-1034-MJP, 2014 U.S. Dist. LEXIS 189112, at *11 (W.D. Wash. Feb. 3, 2014).

Based on the Court's grant of a injunctive relief against all Defendants (including Muckrock) in this case, Elster requests that this Court deny Muckrock's Rule 12(b)(6) Motion for failure to state a claim, as the Court has already found that Elster is likely to succeed on the merits of its claims.

C. SHOULD THE COURT BE INCLINED TO DISMISS ON THE BASIS OF RULE 12(B)(6), ELSTER REQUESTS LEAVE TO AMEND THE COMPLAINT

To the extent that the Court finds that Elster has not adequately set forth its claims for injunctive and declaratory relief against Muckrock, Elster respectfully requests that the Court grant Elster leave to amend its complaint. When the court grants a motion to dismiss, it must also decide whether to grant leave to amend. *Jensen v. Ferguson*, No. C14-0740JLR, 2014 U.S. Dist. LEXIS 131818, at *10 (W.D. Wash. Sep. 17, 2014) (citation omitted).

Ordinarily, leave to amend a complaint should be freely given following an order of dismissal. *Jensen*, 2014 U.S. Dist. LEXIS 131818, at *10 (citing Fed. R. Civ. P. 15(a)(2)). To that end, in the alternative, Elster requests that it be granted leave to amend the Complaint.

Finally, "[t]he court should freely give leave [to amend the Complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). Elster submits that justice requires that Elster amend its Complaint against Muckrock in this case, so that Muckrock will continue to be subject to the injunctive relief the Court has already granted.

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D. THE COMPLAINT IS NOT SUBJECT TO DISMISSAL UNDER RULE 12(B)(1) AS ELSTER HAS THE REQUISITE STANDING TO REDRESS THE TANGIBLE THREAT OF HARM WHEN ELSTER'S PROPRIETARY AND CONFIDENTIAL TRADE SECRETS ARE RELEASED, WHICH SEATTLE CITY LIGHT HAS THREATENED TO DO UNLESS AN INJUNCTION IS ISSUED

Muckrock next claims that Elster's Complaint is subject to dismissal on the basis of Rule 12(b)(1) for lack of subject matter jurisdiction based on lack of standing. (Muckrock's Motion to Dismiss, at 5-6). Elster's Complaint is similarly resistant to dismissal on Rule 12(b)(1) grounds as Elster will demonstrate all of the prerequisites for standing.

To establish standing, a Plaintiff must show (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) likelihood that the injury will be, "'redressed by a favorable decision.'" *Score LLC v. City of Shoreline*, 319 F. Supp. 2d 1224, 1229 (W.D. Wash. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

A Plaintiff seeking prospective injunctive relief may demonstrate standing by showing that he has suffered or is threatened with a "concrete and particularized" legal harm, coupled with "a sufficient likelihood that he will again be wronged in a similar way." *Bates v. UPS*, 511 F.3d 974, 981 (9th Cir. 2007) (citing *Lujan*, 504 U.S. at 560; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

In order to counter Muckrock's "factual" challenge of subject matter jurisdiction in this case on the basis of lack of standing, Elster will rely upon the facts set forth in the documents and declarations that have been produced to date as part of other briefings,. *See, e.g., Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)(In a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction; in resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment).

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In the Declaration of Robert Henes which Elster submitted In Support of its Supplemental Memorandum of Law In Support of Its Motion For Temporary Restraining Order and Order To Show Cause Regarding Preliminary Injunction (hereinafter "Henes Declaration"), Elster enunciated very detailed facts supporting its request for injunction, and to show that the resulting harm to Elster if an injunction is not issued. *See generally* Docket Doc No. 39, Henes Declaration.

The Henes Declaration details how release of the highly confidential, proprietary and trade secret information contained in Elster's Proposal would permanently and significantly damage the competitive interests of Elster and its vendors. *See generally* Docket Doc No. 39, Henes Declaration, Section 5. For example, release of such information would provide competitors a detailed roadmap to replicate Elster's efforts and take advantage of the extensive and expensive efforts that were required to create the proposed AMI structure, Elster's unique system, network, software, and architecture, for which Elster has spent approximately twenty million dollars per year to develop and improve. *Id.*, ¶¶ 39-41. Release of the un-redacted Proposal would allow competitors for similar systems in other markets to access to Elster's detailed strategy and competitive pricing, giving such competitors an unfair advantage against Elster in any future bidding contests, allowing competitors to undercut Elster's prices. *Id.*, ¶49. Competitors could obtain an unfair economic advantage by the release of the confidential and proprietary details about Elster's proposed AMI structure, network, and pricing, for example by predicting Elster's bids in future RFP's, and using information to reverse engineer the pricing models and proprietary technology and systems of Elster and its Interested Vendors, allowing them to undercut Elster in future public works bidding contests. *Id.*, ¶49.

Elster has been threatened with "concrete and particularized" legal harm, in the form of Defendant Seattle City Light's statement that it will release Elster's bid proposal in its entirety, which contains proprietary and confidential trade secrets. If the injunction is not issued, the

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documents will be released to Defendant Mocek, and posted onto Muckrock's website for the public, including Elster's competitors, to see. Elster's business will be harmed in this highly competitive industry of advanced metering, of which Elster is a part.

The Declaration of Allen W. Estes, III in Support of Elster's Motion for Temporary Restraining Order and Order to Show Cause) (hereinafter "Estes Declaration"), as well as the supporting documents attached thereto, contain sufficient facts to show "a sufficient likelihood that [Elster] will again be wronged in a similar way" by virtue of Seattle City Light's statement that it will release Elster's records by a date certain. *See* Docket Doc. No. 5, Estes Declaration, ¶13, Exhibit I. The email attached to the Estes Declaration as "Exhibit I" contains an email from Stacy Irwin, a Seattle City Light Public Disclosure Officer, to Elster, stating in pertinent part that,

> [O]ur requestor [Mocek] will not accept redacted bids in response to his request. **This means that you will need to file an injunction with the court to prohibit disclosure**. I am extending the deadline for the requestor to May 26, 2016, so **an injunction would need to be received by COB, May 25, 2016**.

Id. [emphasis added].

As a result, without the issuance of a permanent injunction, Seattle City Light will release Elster's proprietary and confidential trade secrets and records, showing "a sufficient likelihood that [Elster] will again be wronged in a similar way." The foregoing evidence should suffice to show that Elster has the requisite standing to seek injunctive relief in this matter.

E. COMMUNICATIONS DECENCY ACT "IMMUNITY" IS NOT A VALID BASIS TO DISMISS A COMPLAINT AT THE PLEADING STAGE

Muckrock's Rule 12(b)(1) motion for lack of subject matter jurisdiction appears to be based on its claim that it is immune from liability under the Communications Decency Act, 47 U.S.C. § 230(c) ("CDA"). This argument lacks merit in that:

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(1) CDA "immunity" is an affirmative defense, and not a valid basis to dismiss a complaint at the pleading stage, or on a jurisdictional challenge; and

(2) CDA "immunity" only provides immunity from *liability*, and not immunity from a claim for injunctive and declaratory relief, as in the case at bar.

Courts have been reluctant to dismiss a complaint based on CDA immunity. In *Perfect 10, Inc. v. Google, Inc.*, the Court declined to dismiss a Complaint based on CDA immunity, noting that "whether any of Google's conduct disqualifies it for immunity under the CDA will undoubtedly be fact-intensive," and that "it would be improper for the Court to resolve this issue on the pleadings and the limited evidentiary record before it." *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx), 2008 U.S. Dist. LEXIS 79200, at *23 (C.D. Cal. July 16, 2008).

Similarly, in *Energy Automation Sys., Inc. v. Xcentric Ventures LLC*, No. 3:06-1079, 2007 U.S. Dist. LEXIS 38452, at (M.D. Tenn. May 25, 2007) the Court held that "[a]lthough courts speak in terms of 'immunity' . . . this does not mean that the CDA has created an 'immunity from suit' . . . Whether or not that defense applies in any particular case is a question that **goes to the merits of that case, and not to the question of jurisdiction**." 2007 U.S. Dist. LEXIS 38452 [emphasis added]. The *Energy Automation* Court also noted the impropriety of dismissing a Complaint on jurisdictional challenges on the basis of CDA immunity:

> The distinction between statutory immunity from liability and immunity from suit--that is, immunity from being hailed into federal court at all--is an important one. As the Supreme Court has noted, "[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case."

Energy Automation Sys., 2007 U.S. Dist. LEXIS 38452, at *37 (M.D. Tenn. May 25, 2007) (quoting *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 88, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

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The *Energy Automation* Court also stands for the proposition that the CDA does not create immunity from suit (i.e. being hailed into Court); instead, it is merely an affirmative defense from liability that goes to the merits, and ***that is not the appropriate subject for a jurisdictional challenge***:

> Although courts speak in terms of 'immunity' with regard to the protections afforded by the CDA, this does not mean that the CDA has created an 'immunity from suit' or otherwise implicated this court's personal jurisdiction. Rather, the CDA has created a broad defense to liability. Whether or not that defense applies in any particular case is a question that **goes to the merits of that case, and not to the question of jurisdiction**.

Energy Automation Sys., 2007 U.S. Dist. LEXIS 38452, at *40-41 (citing *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329) (3d Cir. 1999)[emphasis added]; *see also Levitt v. Yelp! Inc.*, No. C 10-1321 MHP, 2011 U.S. Dist. LEXIS 99372, at *23 (N.D. Cal. Mar. 22, 2011) (Yelp provides no authority for the broader proposition that Section 230(c) affects this court's subject matter jurisdiction).

Indeed, the Ninth Circuit in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) very astutely noted "it appears clear that neither this subsection **nor any other** declares a general immunity from liability from third-party content . . . 'Subsection (c)(1) does not mention 'immunity' or any synonym.'" *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1100 (9th Cir. 2009) (quoting *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008))[emphasis added]; *see* also *Energy Automation Sys., Inc. v. Xcentric Ventures LLC*, No. 3:06-1079, 2007 U.S. Dist. LEXIS 38452, (M.D. Tenn. May 25, 2007) ("Although courts speak in terms of 'immunity' . . . this does not mean that the CDA has created an 'immunity from suit' . . . Whether or not that defense applies in any particular case is a question that goes to the merits of that case, and not to the question of jurisdiction").

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F. MUCKROCK IS NOT SUBJECT TO COMMUNICATIONS DECENCY ACT "IMMUNITY" AS THAT ACT ONLY SHIELDS A PARTY FROM *LIABILITY*, AND DOES NOT PREVENT A CLAIM FOR INJUNCTIVE RELIEF

Muckrock's Rule 12(b)(1) motion for lack of subject matter jurisdiction similarly fails as the CDA provide immunity from *liability*, and not to injunctive relief, which is what Plaintiff is seeking in the case at bar.

The Communications Decency Act does not declare "a general immunity from liability deriving from third-party content." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009).[9] "[T]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Doe v. Internet Brands*, 824 F.3d at 852-53 (quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008)). Congress has not provided an all purpose get out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses. *Doe v. Internet Brands*, 824 F.3d at 853.

Plaintiff reliance upon CDA's § 230 immunity provision is misplaced, as that immunity provision *does not* apply to claims for injunctive and declaratory relief such as the case at bar. *See Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 561 (E.D.Va.1998) (finding that § 230 provides immunity from actions for damages; it does not, however, immunize defendant from an action for declaratory and injunctive relief). The *Mainstream Loudon* court reasoned "If Congress had intended the [CDA] statute to insulate Internet providers from both liability and declaratory and injunctive relief, it would have said so." *Id.*, at 561; *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (""we must be careful not to exceed the scope of the [CDA] immunity provided by Congress'…Congress could have written the statute more

[9] In that case, the Ninth Circuit also limited CDA immunity in the context of promissory estoppel claims, holding that promissory estoppel is beyond reach of 47 USCS § 230(c)(1). *Barnes v Yahoo!, Inc.* 565 F3d 560 (9th Cir. 2009).

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broadly, but it did not").

Similarly, in *Hassell v. Bird*, 247 Cal. App. 4th 1336, 203 Cal. Rptr. 3d 203, 207 (2016), the Court stated that state law procedures that authorized a trial court to issue an injunction preventing the repetition of statements that have been adjudged to be defamatory by the trier of fact, and that empower the court to enforce its judgment by ordering that an injunction run to a non-party through whom the enjoined party may act, **are "not inconsistent with 47 U.S.C.S. § 230 because they do not impose any liability**." *See Hassell v. Bird*, 247 Cal. App. 4th 1336, 1363-*64*, 203 Cal. Rptr. 3d 203, 207 (2016) [10] [emphasis added].

The Ninth Circuit has warned "[a] court must be careful not to exceed the scope of the immunity provided by Congress under the Communications Decency Act." *Doe*, 824 F.3d at 853. Based on the foregoing, then, any subject matter jurisdictional challenge, or request to dismiss the Complaint at the pleading stage on the basis of CDA immunity, is improper and should be denied.

V. CONCLUSION

For the foregoing reasons, Elster respectfully requests that this Honorable Court deny Muckrock's Rule 12(b)(6) and 12(b)(1) Motion to Dismiss. In the alternative, Elster requests that the Court grant it leave to amend the Complaint to correct any claimed pleading deficiencies.

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[10] Petition for review granted, Sept. 21, 2016, 2016 Cal. LEXIS 7914.

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Dated this 11th day of October 2016.

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CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on this 11th day of October 2016, I caused a true and correct copy of the foregoing document to be served via CM / ECF system on:

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