HONORABLE ROBERT S. LASNIK

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 REPLY IN SUPPORT OF RULE 12(b)(6) and 12(b)(1) MOTION TO DISMISS NOTED FOR HEARING: **OCTOBER 14, 2016**

INTRODUCTION

Plaintiff Elster Solutions' Opposition makes clear that MuckRock's Motion to Dismiss must be granted. Elster's summary allegation that MuckRock is a "requestor" without any allegation that MuckRock has any stake in the merits of the public records dispute is insufficient to state a claim against MuckRock or establish this court's subject matter jurisdiction as to the claim against MuckRock. And Elster's narrow reading of Section 230 immunity goes against both the weight of controlling and other authority, which Elster fails to cite, and the policies underlying Congress's decision to immunize Internet intermediaries.

The Motion to Dismiss must be granted.

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ARGUMENT

A. ELSTER FAILED TO SUFFICIENTLY PLEAD MUCKROCK'S INVOLVEMENT IN THE PUBLIC RECORDS DISPUTE IN LIGHT OF MUCKROCK'S SECTION 230 DEFENSE AND WASHINGTON PUBLIC RECORDS LAW.

1. Section 230 Provides a Basis for a Motion to Dismiss.

Section 230, 47 U.S.C. § 230, is not only a grant of immunity from publisher liability; it is a shield against lawsuits themselves. "Preemption under the Communications Decency Act is an affirmative defense, but it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." *Klayman v. Zuckerberg,* 753 F.3d 1354, 1357 (D.C. Cir. 2014) (affirming the grant of a motion to dismiss). Courts correctly recognized that legal protections that take hold only at a later stage of a case—for example, after discovery—do not address the chilling effects Congress sought to prevent. "[I]mmunity is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) (affirming a dismissal pursuant to FRCP 12(b)(6)) (citation and internal quotation marks omitted). *See also Ricci v. Teamsters Union Local, 456*, 781 F.3d 25, 28 (2d Cir. 2015) (following *Klayman*).

Section 230 may thus properly be the basis for a motion to dismiss.[1] The Ninth Circuit recognized as much in *Kimzey v. Yelp!, Inc.*, ___F.3d ___, 2016 WL 4729492, *3, *5 (9th Cir. 2016) (affirming the dismissal of Washington state law claim because of Section 230 immunity). As the Ninth Circuit explained in *Kimzey*:

> This case is in some sense a simple matter of a complaint that failed to allege facts sufficient to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556

[1] For additional cases adopting this position, see *Vazquez v. Buhl,* 90 A.3d 331 336 (Conn. App. 2014) (holding that Section 230 can be basis for motion to strike complaint); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1103-04 (N.D. Cal. 2011) (finding Section 230 defense properly considered on 12(b)(6) motion); *Goddard v. Google, Inc.,* 640 F. Supp. 2d 1193, 1200 n. 5 (N.D. Cal. 2009) (same); *Langdon v. Google, Inc.,* 474 F. Supp. 2d 622, 630–31 (D. Del. 2007) (granting Rule 12(b)(6) motion to dismiss based on application of CDA immunity).

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> U.S. 662, 678 (2009). But it is also more consequential than that, given congressional recognition that the Internet serves as a "forum for a true diversity of . . . myriad avenues for intellectual activity" and "ha[s] flourished . . . with a minimum of government regulation."[2]

The Ninth Circuit did not hold otherwise in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), as asserted by Elster. To the contrary, in *Barnes*, the Ninth Circuit affirmed the grant of a 12(b)(6) motion dismissing a negligent undertaking claim because the claim, as set forth in the complaint, was based on Yahoo!'s role in publishing or failing to remove a profile, and thus barred by Section 230. *Id.* at 1105-06. That the court took issue with labeling Section 230's protection as "immunity" was not an obstacle to deciding the statute's application on a motion to dismiss. Rather, the Ninth Circuit was simply explaining that Section 230 does not make website hosts comprehensively immune from all legal actions, just ones in which liability is based on their role as publishers. The Ninth Circuit thus declined to dismiss a promissory estoppel claim against Yahoo! that it found was not based on Yahoo!'s role as a publisher. *Id*. at 1108.

Elster misreads its chief authority, *Energy Automation Systems, Inc. v. XCentric Ventures, LLC*, 2007 WL 1557202 (M.D. Tenn., May 25, 2007). That case addressed the role of Section 230 in a FRCP 12(b)(2) motion for lack of personal jurisdiction, not in a motion to dismiss pursuant to FRCP 12(b)(1) or 12(b)(6). *Id.* at *11-*12. A later decision of the same court expressly limited *Energy Automation Systems* to challenges to personal jurisdiction. *See Backpage.com LLC v. Cooper*, 939 F. Supp. 2d 805, 826 (M.D. Tenn. 2013). And indeed, the *Energy Automation System* court itself conceded that it could have considered a Section 230 defense had it been faced with a proper 12(b)(6) motion. 2007 WL 1557202 at *14. *See also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 564 F. Supp. 2d 544, 551 (E.D. Va. 2008), *aff'd by Nemet Chevrolet*, 591 F.3d at 254-55 (referring to *Energy Automation System* as

[2] *See also Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014) ("Given the role that the CDA plays in an open and robust internet by preventing the speech-chilling threat of the heckler's veto, we point out that determinations of immunity under the CDA should be resolved at an earlier stage of litigation.").

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"unpersuasive and misguided").[3]

2. The Complaint Fails To Allege Any Involvement By MuckRock That is Not Protected By Section 230.

The Complaint clearly bases its claims against MuckRock on MuckRock's intermediary role for which Section 230 protects it, and does not sufficiently allege any other role that would take MuckRock outside the scope of Section 230's broad protection.

As explained above, a Section 230 defense supports a motion to dismiss "if the statute's barrier to suit is evident from the face of the complaint," as is the case here. *Klayman,* 753 F.3d at 1357. The applicability of Section 230 will be "evident from the face of the complaint" if the complaint does not contain specific facts that explain why the defendant is being sued for its role as an "information content provider," rather than merely as a publisher of user-generated content. *See Klayman*, 753 F.3d at 1358-59 (dismissing a complaint on Section 230 grounds in light of insufficient allegations). As the Fourth Circuit explained, affirming the granting of motion to dismiss based on Section 230 immunity, the complaint must "plead sufficient facts to allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct.'" *Nemet*, 591 F.3d at 254-56.

Congress's intent to immunize Internet intermediaries cannot be so easily circumvented by a conclusory allegation that might potentially bring the claim outside of Section 230's protection. The rule in the Ninth Circuit and other federal circuits is that plaintiffs must allege *specific*, *non-speculative* facts demonstrating that it was actually the platform, and not the user, which undertook allegedly offending conduct, or else the claim must promptly be dismissed.

[3] *Perfect 10, Inc. v. Google. Inc.*, 2008 WL 4217837 (N.D. Cal., July 16, 2008), also cited by Elster, was distinguished by a later ruling of the same court because it dealt with a different provision of Section 230 and because in that case, the complaint actually presented a question of fact as to whether Google was being sued in its role as a content provider rather than in its intermediary role. *Holomaxx Technologies*, 783 F. Supp. 2d at 1104. In *Levitt v. Yelp! Inc.,* No. C 10-1321 MHP, 2011 U.S. Dist. LEXIS 99372 (N.D. Cal., Mar. 22, 2011), cited by Elster, the court declined to consider Yelp's 12(b)(1) motion, but considered and granted its 12(b)(6) motion. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (subsequent opinion in the same case following amendment of the complaint).

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Kimzey, __ F.3d at __, 2016 WL 47294292 at *4 (quoting *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014)). Thus in *Klayman*, 753 F.3d at 1358, allegations that Facebook controlled, allowed, furthered, and failed to remove the offending post, or had some contractual obligation to act, were insufficient to defeat Section 230 immunity. And in *Nemet*, 591 F.3d at 250, a conclusory allegation that the site operator was "an information content provider" that was insufficiently supported by specific factual allegations failed to survive a motion to dismiss. *See also Goddard v. Google, Inc.,* 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) ("Plaintiff has not come close to substantiating the 'labels and conclusions' by which she attempts to evade the reach of the CDA.").

Elster has not pled facts sufficient to show that MuckRock engaged in activity beyond the protections of Section 230. Elster has not alleged that MuckRock authored or had any interest at all in the records request at issue here. Elster's *only* factual allegations on this point are that Moceck "and/or" MuckRock requested records from the City of Seattle. Complaint, ¶ 2. Such "threadbare allegations . . . are implausible on their face and are insufficient to avoid immunity under the CDA." *Kimzey*, 2016 WL 47294292 at * 4. Elster's naked assertion that Mocek "and/or" MuckRock was the "requestor" fails, especially in light of Elster's acknowledgment in its Opposition that Mocek submitted his request "through MuckRock's website." ECF No. 44, Elster's Opposition to Motion to Dismiss ("Elster Opp.") at 6. As the Ninth Circuit explained in *Kimzey*, "[w]ere that the case, CDA immunity could be avoided simply by reciting a common line that user-generated" content is not actually user-generated. *Id*.

3. Elster has Pled Insufficient Facts to Show MuckRock is a Necessary Party Under Washington Law.

Elster's complaint against MuckRock must also be dismissed because it contains no factual allegations to support its legal conclusion that MuckRock is a necessary party under Washington state law. Legal conclusions in a complaint must be adequately supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Elster's complaint concludes that "The MuckRock Defendants," are, collectively,

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necessary parties by law because "Mocek and/or MuckRock" requested the underlying records at issue in this case, pursuant to *Burt v. Washington State Dept. of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010). In that case, the Washington Supreme Court held that under the Public Records Act, the records requester was a necessary party subject to mandatory joinder. 168 Wn.2d at 837. Elster Opp. at 5-6; Complaint at ¶¶ 2, 6, 18.

But *Burt* requires more than the labeling of a party as a "requestor"; it requires the joinder only of those who have an interest in the records request they create, and a stake in whether or not the requested records will be produced. *Id*. at 836-37. These interested parties are necessary parties as a matter of law to prevent courts from adjudicating public records disputes without the presence of those most likely to advocate for disclosure. *Id*. at 834-36.

Elster's bare allegation that MuckRock is a "requestor" thus fails in the absence of an additional allegation that MuckRock has any interest in the underlying records. *Iqbal*, 556 U.S. at 678-79. The allegations in the complaint do not support an inference, much less plausibly establish, that MuckRock has any stake in the outcome of the underlying records dispute that requires its presence in this case. *See* Complaint ¶¶ 6 (referencing MuckRock's domicile and state of incorporation); 18 (reciting that that Phil Mocek made a request for certain documents); 2 (vaguely alleging that Mocek "and/or" MuckRock submitted a records request). Elster appears to acknowledge MuckRock's lack of interest in the request at issue here, admitting that Mocek made his request "through MuckRock's website." Elster Opp. at 6.

Moreover, if upheld, Elster's broad reading of *Burt* as the legal hook to drag MuckRock into this case would have untenable consequences for any third party that in some way facilitates public records requests in Washington. Elster's reading of *Burt* would require the joinder of all email providers, postal and private mail services, and facilities that offer fax machines for public use, among others. The public regularly uses those services, including MuckRock, to transmit public records requests to government agencies.

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B. SECTION 230 BARS CLAIMS FOR INJUNCTIVE RELIEF AS WELL AS DAMAGES.

Elster's assertion that Section 230 does not bar claims for injunctive relief is also incorrect. In the 18 years since Elster's chief authority, *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 561 (E.D. Va. 1998), was decided, courts throughout the country have rejected its holding limiting Section 230 immunity to damages claims.[4] *See Ben Ezra, Weinstein & Co. v. America Online, Inc.,* 206 F.3d 980, 983-86 (10th Cir. 2000) (applying Section 230 to bar claims for both damages and injunctive relief), *cert. denied,* 531 U.S. 824 (2000); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1319 (M.D. Fla. 2015) (applying Section 230 to claims for injunctive and declaratory relief). *See also Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So. 2d 727, 731 (Fla. Dist. Ct. App. 2014) (collecting cases). *See generally* Eric Goldman, TECH. & MKTG. LAW BLOG: "Section 230 Precludes Injunctive Relief Against Message Boards–Medytox v. InvestorsHub" (Dec. 4, 2014), available at *http://blog.ericgoldman.org/archives/2014/12/section-230-precludes-injunctive-relief-against-message-boards-medytox-v-investorshub.htm*.

Elster's other purportedly contrary authority, *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1343-48 (2016),[5] addresses an entirely different situation: a party that obtained a default judgment is attempting to enforce a resulting injunction against an entity, Yelp, that was not a party to the lawsuit in which the judgment was granted. The court's holding that Section 230 immunity from liability does not apply to the enforcement of that order against Yelp is based on

[4] Courts have disapproved of and distinguished *Mainstream Loudoun* on various bases. *Kathleen R. v. City of Livermore,* 87 Cal. App. 4th 684, 693-94 (Cal. App. 2001), limited the case to governmental defendants seeking the immunity of Section 230(c)(2). *See also Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907, 4-5 (E.D. La., Dec. 17, 2002) (adopting the reasoning of *Kathleen R*). In the present case, MuckRock seeks the protection of Section 230(c)(1).

[5] As Elster notes, *Hassell v. Bird*, is now under review by the California Supreme Court on this very point. 2016 Cal. LEXIS 9714 (Sept. 21, 2016). Prior to a recent rule change, effective July 1, 2016, decisions of the California Court of Appeal for which review was granted were automatically vacated. Under the new rule, while review is pending, the Court of Appeal's opinion "has no binding or precedential effect, and maybe cited for persuasive value only." Cal. Rule of Court 8.1115(e)(1).

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the fact that Yelp was not a defendant in the lawsuit and thus had no liability imposed on it, as may have been the case had it been a party. *Id.* at 1363-64. That is, of course, the exact opposite of the situation here. The *Hassell* court did not exclude injunctive relief from Section 230; it excluded contempt orders. *Id*. at 1363-65. In fact, *Hassell* itself distinguishes *Medytox* and the cases catalogued therein, on this very basis. *Id.* at 1364.

C. THE COURT HAS YET TO DECIDE THE SUFFICIENCY OF ELSTER'S COMPLAINT WITH RESPECT TO MUCKROCK.

Elster's argument that this Court has implicitly determined the sufficiency of its complaint and claims as to MuckRock is also incorrect. Elster cites no authority, and MuckRock is not aware of any, that forecloses a challenge to a court's jurisdiction or the sufficiency of the pleadings once a court has granted a preliminary injunction. Controlling Supreme Court and Ninth Circuit law recognize that a court's subject matter jurisdiction can be invoked at any stage of the proceedings by a federal court. *See Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 471-2 (1982) (holding that Article III requires courts to assess whether there is a case or controversy throughout proceeding); *Jones v. Brush*, 143 F.2d 733, 734 (9th Cir. 1944) (holding that regardless of whether subject matter jurisdiction is invoked properly, court must decide whether it has jurisdiction once it has been raised).

This Court can entertain MuckRock's motion.

Moreover, Elster's argument makes no practical sense. Like what happened here, courts often grant preliminary injunctions without the benefit of opposing parties' briefing that challenges jurisdiction or the sufficiency of the pleadings. Indeed, courts often grant such relief *ex parte*. Elster's unworkable rule would allow procedure to overcome substance, as plaintiffs could establish the sufficiency of their pleadings and jurisdiction by moving for preliminary injunctions to foreclose adversarial proceedings that challenge whether a defendant should be hailed before a court in the first instance.

Indeed, in the present case, MuckRock's TRO and preliminary injunction motion did not

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even seek any relief against MuckRock, or otherwise adjudicate its rights, defenses or the court's subject matter jurisdiction over it; it sought only relief against co-defendants the City of Seattle and Seattle City Light. *See* Memorandum in Support of Motion for Temporary Restraining Order and order to Show Cause Regarding Preliminary Injunction, ECF No. 3 at 1.[6]

Elster's authority, *Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd.*, No. C13-1-34-MJP, 2014 WL 12026974 (W.D. Wash. Feb. 3, 2014), does not support its argument, much less apply here. After finding that the *Kyko* plaintiffs met the heightened pleading requirements for fraud-based claims under Fed. R. Civ. Pro. 9(b), the court noted that it had previously found plaintiffs were likely to succeed on the merits by granting a temporary restraining order. *Id*. at *3. The case is distinguishable on the different pleading standards alone, as Elster has not met the higher bar required under Rule 9(b). In any event, as described elsewhere, Elster's complaint fails to state a claim under the much lower threshold of Rule 8(a)(2).

CONCLUSION

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

DATED: October 14, 2016

Respectfully submitted,

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[6] "Pursuant to Federal Rule of Procedure 65 ("FRCP 65"), Local Court Rule 65 ("LCR 65"), and RCW 42.56.540, Plaintiff Elster Solutions, LLC ("Elster") seeks immediate injunctive relief enjoining Defendants The City of Seattle ("the City") and Seattle City Light ("SCL") from disclosing Elster's trade secrets, proprietary information and other categories of sensitive confidential information that are protected from public disclosure under Washington's Uniform Trade Secrets Act ("UTSA"), RCW Chapter 19.108, and the Washington Public Records Act ("PRA"), RCW Chapter 42.56."

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 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: October 14, 2016

s/Venkat Balasubramani
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