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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF WHITMAN

9 ELSEVIER, INC., a foreign corporation,

10 Plaintiff,

11 v.

12 WASHINGTON STATE UNIVERSITY,

13 Defendant.

No. 09-2-00137-3

REPLY MEMORANDUM IN SUPPORT
OF "PLAINTIFF ELSEVIER'S MOTION
FOR PRELIMINARY AND/OR
PERMANENT INJUNCTION"

14
15 I. **WSU DOES NOT CONTROVERT BUT—IMPLICITLY AND/OR EXPRESSLY—**
16 **ACKNOWLEDGES KEY FACTS DEVELOPED IN JAMES TONNA'S**
17 **DECLARATION.**

18 WSU's June 17, 2009 memorandum (the "Response") opposing Elsevier's Motion for
19 Preliminary and/or Permanent Injunction (the "Motion"), and its accompanying Nelson and
20 Carroll declarations, do not controvert the specific **factual allegations** set forth in James
21 Tonna's declaration. Rather, in substantial part they implicitly—and/or expressly—support
the essential matters there developed.

22 Mr. Tonna's declaration's basic points—and WSU's confirmation and/or non-
23 responses—are several:

24 1. Plaintiff Elsevier is a leading publisher of science and health information
25 providing information and services to more than 30 million users. WSU supports that
26

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1 conclusion, disclosing that \$1.1 million of its annual \$2.7 million online publishing budget is
2 attributable to Elsevier's offerings.

3 2. Elsevier faces substantial alternative vendors in a competitive marketplace.
4 WSU so confirms, stating that it acquires such on-line services—for which it pays \$1.6
5 million—from numerous other publishers.

6 3. Elsevier's success has resulted, in substantial part, from its developing (over
7 years and by costly efforts) proprietary pricing methods and formulae that are not generally
8 known (due to Elsevier's continuing efforts) which allow it to flexibly meet its customers'
9 individual requirements. WSU does not dispute this.

10 4. Disclosure of its pricing methods and formula would unleash competitive
11 pressures that would force it to a "one size/price fits all formula," disadvantaging Elsevier as
12 was as its largest (often) public users such as WSU. WSU does not dispute this.

13 Indeed, the Response's confirmation and/or non-controversion of these key facts
14 becomes near express when it states:

15
16 Although WSU lacks sufficient knowledge of Elsevier's business plans and
17 operations to adequately evaluate whether the price terms at issue are trade
18 secrets, Elsevier's motion for preliminary injunction raises some concerns
with regard to Elsevier's claim of trade secret.¹

19 WSU lacks sufficient knowledge to know whether the un-redacted disclosure
20 of the license agreements would result in public harm.²

21 Having thus failed to controvert Elsevier's Motion's key factual underpinnings set
22 forth in the Tonna Declaration, the Response nevertheless opposes redaction of price terms
23 that would disclosure Elsevier's proprietary pricing methods and formula. (Elsevier does not
24

25 ¹ Response, p. 2, ll. 22-24 (emphasis added).

26 ² Response, p. 6, ll. 8-9 (emphasis added).

1 oppose disclosure of aggregate contract value and list pricing.) WSU does so based on a
2 misreading of several cases with markedly different facts that do not require disclosure here.

3 In both *Woo v. Fireman's Fund Insurance Company*, 137 Wn. App. 480, 154 P.3d
4 236 (2007), and *McCallum v. Allstate Property and Insurance Company*, 149 Wn. App. 412,
5 204 P.3d 944 (2009), the courts ruled that insurance companies could not—for litigation
6 advantage—withhold entire claims manuals from evidence and/or discovery (and
7 subsequent public disclosure) based on trade secret grounds. But no showing was there
8 attempted or made (let alone one that was un-controverted, such as in this case) that
9 specific pricing methods and terms could not be redacted from otherwise produced
10 contracts.

11 Similarly, in both *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn.
12 App. 568, 938 P.3d 676 (1999), and *West v. Koenig*, 146 Wn. App. 108, 192 P.3d 926
13 (2007), the courts ruled that lease documents **not containing exempt material** should be
14 disclosed. But neither case bars redaction of material (albeit contained in a lease or other
15 contract) that **does qualify for exemption**. In fact, certain lease-related materials were
16 exempted in *West*. See 146 Wn. App. 114, 119, n. 25.

17 Here, a case for exemption of the price terms has been made by un-controverted
18 showing, and neither the two claims manual nor lease cases dictate a contrary result. To so
19 demonstrate, we consider Elsevier's Motion's three asserted bases for exemption in the
20 order there presented. (The Response addresses them in reverse order.)

21
22 **II. EXEMPTION IS PROPER UNDER RCW 42.56.270(1) ("VALUABLE FORMULAE").**

23 RCW 42.56.270) exempts "financial, commercial, and proprietary information"
24 including:

1 (1) Valuable formulae, designs, drawings, computer source code or object
2 code, and research data obtained by any agency within five years of the
3 request for disclosure when disclosure would produce private gain and public
4 loss.³

5 The Tonna declaration develops that “valuable [pricing] formulae” produced by years
6 of effort are reflected in the price terms sought to be redacted, and that showing is un-
7 controverted by WSU. The Response **admits** that “WSU lacks sufficient knowledge to know
8 whether the unredacted disclosure ... would result in public harm”, but suggests that,
9 because such harm would result from Elsevier’s adoption of a “one size/price fits all” pricing
10 methodology, that it should be disregarded. No authority is cited and the proposition is
11 unsound. If public disclosure will—as Elsevier has shown—produce a competitive change
12 that would result in public harm, that exemption element is sustained.

13 The Response notes that *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d
14 1124 (1995), “did not address whether the Port of Bellingham’s executed lease agreements
15 were exempt from disclosure”, which is true because the issue was not raised. WSU also
16 observes that in *Spokane Research* the lease in question was held not to contain valuable
17 research data. Here, however—unlike either *Servais* or *Spokane Research*—the Motion
18 *does raise* the issue of whether price terms should be redacted from an otherwise disclosed
19 contract, and *Servais*’ sustaining the withholding of analogous material supports Elsevier’s
20 position.

21 The Response argues that the public harm threatened in *Evergreen Freedom*
22 *Foundation v. Lucke*, 127 Wn.App. 243, 110 P.3d 858 (2008), was of a greater magnitude
23 than that threatened here. That may be true, but the statutory requirement is nevertheless
24

25 ³ (Emphasis added.)

1 met by Elsevier's showing of a threatened public harm involving public contracting with an
2 annual value exceeding \$1 million.

3 In short, the Response's RCW 42.56.270(1) arguments fail. However, if this is the
4 sole basis for exemption, Elsevier acknowledges that materials antedating the Request date
5 by more than five years would lose exemption.

6 **III. EXEMPTION IS PROPER UNDER RCW 42.56.270(11)**

7 This section exempts:

8
9 Proprietary data, trade secrets, or other information that relates to: (1) A
10 vendor's unique methods of conducting business, (b) data unique to the
11 produce or services of the vendor; or (c) determining prices or rates to be
12 charged for services, submitted by any vendor to the department of social
13 and health services for purposes of the development, acquisition, or
14 implementation of state purchased health care as defined in RCW
15 41.05.011A.⁴

16 The Response states at page 8, ll. 1-3:

17
18 WSU understands that RCW 42.16.270(11) only applies to vendor
19 information submitted to the Department of Social and Health Services for
20 health care purchases and, therefore, would not apply to this matter.⁵

21 No authority is cited for that understanding. The statute does not so state, but rather
22 is in the (see emphasis) disjunctive. Further, its literal reading (supporting Elsevier's
23 position) best comports with RCW 4.24.601's mandate that:

24
25 The legislature also recognizes that protection of trade secrets, other
26 confidential research, development, or commercial information concerning
produces or business methods promotes business activity and prevents
unfair competition. Therefore, the legislature declares it a matter of public
policy that the confidentiality of such information be protected and its
unnecessary disclosure be prevented.⁶

24 ⁴ (Emphasis added.)

25 ⁵ (Emphasis added.)

26 ⁶ (Emphasis added.)

1 **IV. EXEMPTION IS PROPER UNDER THE UTSA.**

2 WSU's trade secret argument is summarized at page 5, ll. 10-16:

3 In summary, for the price terms to be trade secrets, the court must find: 1)
4 the price terms derive independent economic value, actual or potential, from
5 not being generally known to, and not being readily ascertainable by proper
6 means by other persons who can obtain economic value from its disclosure;
7 2) Elsevier has made reasonable efforts to maintain the secrecy of the price
8 terms; and 3) the price terms are novel. Thus based on the facts before the
9 court, the court should find that the price terms in issue are not exempt from
10 disclosure under RCW 19.108 [the UTSA]],

11 Rather, these facts are established by the Tonna Declaration.

12 **Requirement No. 1 ("independent economic value") is un-rebutted.** No
13 declaration controverts the value of Elsevier's pricing formulae, and that this information is
14 not generally known or "readily ascertainable" due to the efforts of Elsevier and its sales
15 representatives. The value of this information to competitors, i.e., of knowing the exact
16 pricing and cancellation policies as to hundreds of publications that they have to meet or
17 beat in a competition involving a specific customer, is self-evident. This information is far
18 more valuable than the mere aggregate pricing that is reflected in the two lease cases relied
19 upon by WSU, *West* and *Spokane Research*.

20 **Element No. 2 ("reasonable efforts") is established.** The Tonna declaration
21 develops Elsevier's non-publication of individualized pricing (compared to published list
22 prices) and its sales representatives' efforts to follow pricing methods and formulae on a
23 customer-specific basis. Notwithstanding inconsistent inclusion of price confidentiality
24 terms, Elsevier's entire marketing approach is calculated to deny its competitors knowledge
25 of its detailed customer-specific pricing and cancellation formulae and methods.

26 **Element No. 3 ("novelty") is established.** WSU's basic argument here is that
because insurers' claims manuals—dealing with how to administer and process claims—

1 were held not be trade secrets in *Woo* and *McCallum*, because there was nothing
2 demonstrably novel about their administration, that therefore Elsevier's pricing formulae and
3 methodologies are not novel. The difference in the two cases is obvious: if competitors
4 know the specific and details of Elsevier's customer specific pricing, they know what price
5 and terms they must meet or beat. Customer-specific detailed pricing, in this context, is
6 inherently unique and "novel", and subject to UTSA exemption.

7 **V. CONCLUSION**

8 The Motion record supports entry of a preliminary and/or permanent injunction.

9 Dated this 17th day of June, 2009.

10
11 OLES MORRISON RINKER & BAKER LLP

12
13 By: Arthur D. McGarry
14 Arthur D. McGarry, WSBA 4808
15 Hillary A. Madsen, WSBA 41038
16 Attorneys for Plaintiff Elsevier, Inc.
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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
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9 ELSEVIER, INC., a foreign corporation,

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NO. 09-2-00137-3

DECLARATION OF SERVICE

14 I, Christine J. Smith, declare that I am employed by the law offices of Oles Morrison
15 Rinker & Baker, LLP, in the County of King, State of Washington. I am over the age of
16 eighteen and not a party to the within action; my business address is: 701 Pike Street, Suite
17 1700, Seattle, Washington 98101. On the date last written below, I served copies of the
18 following documents:

- 19 1. REPLY MEMORANDUM IN SUPPORT OF "PLAINTIFF ELSEVIER'S
20 MOTION FOR PRELIMINARY AND/OR PERMANENT INJUNCTION; and
21 2. This DECLARATION OF SERVICE

22 to the following by US Mail First Class (and by earlier email):

23 Frank M. Hruban, Assistant Attorney General
24 Office of the Attorney General
25 Washington State University Division
26 332 French Administration Building
Pullman, WA 99164-1031
Phone: (509) 335-2636/ Fax: (509) 335-1663
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701 PIKE STREET, SUITE 1700
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FAX: (206) 682-6234

1 I declare under penalty of perjury under the laws of the State of Washington that
2 the foregoing is true.

3 Dated this Wednesday, June 17, 2009.

4 
5
6 Christine J. Smith

From: Origin ID: LKEA (206) 623-3427
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Seattle, WA 98101



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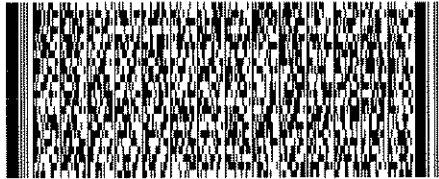
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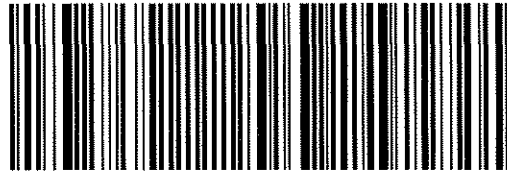
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