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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
11 Plaintiff,

12 v.

13 WASHINGTON STATE UNIVERSITY,
14
15 Defendant.

No.

[PLAINTIFF'S PROPOSED] FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND PRELIMINARY INJUNCTION

16 This matter came before the Court on "PLAINTIFF ELSEVIER, INC.'S MOTION FOR
17 PRELIMINARY AND/OR PERMANENT INJUNCTION," and having considered the
18 submissions and argument of the parties, the Court makes the following FINDINGS OF
19 FACT, CONCLUSIONS OF LAW, and grants injunctive relief as follows:

20 **I. FINDINGS OF FACT**

21 1. Plaintiff Elsevier, Inc., is licensed and qualified to do business in the State of
22 Washington. Plaintiff engages in sales and marketing activities for a related company,
23 Elsevier, BV, a foreign corporation based in The Netherlands (collectively, "Elsevier").

24 2. Elsevier is a leading publisher of medical and scientific journals. Its primary
25 business is providing information and services to technical, scientific, medical, and other
26 users.

[PLAINTIFF'S PROPOSED] FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
PRELIMINARY INJUNCTION - 1

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1 3. Elsevier publishes list prices but its representatives commonly negotiate
2 individual pricing with users. In so doing, they employ pricing formulae and methods in
3 order to meet the specific requirements of its customers. The resulting contracts contain
4 customer-specific pricing and terms, including conditions governing modifications to pricing
5 during the contract term in various circumstances (e.g., the cancellation, addition, or
6 substitution of access, to specific journals or sources).

7 4. Defendant Washington State University ("WSU"), through its Libraries, has
8 executed contracts with Elsevier providing WSU with access to hundreds of scientific and
9 medical journals and publications. A May 2009 request for disclosure of such contracts and
10 related material, under the Washington Public Records Act (RCW Chapter 42.56), has been
11 made to WSU by Dr. Theodore C. Bergstrom, of the University of California, Santa Barbara.
12 A copy of that request is Exhibit A (the "Request") to the Declaration of James Tonna (the
13 "Tonna Declaration").

14 5. Elsevier has started this action to enjoin un-redacted disclosure of the
15 materials sought by the Request. It has done so after Dr. Bergstrom declined Elsevier's
16 offer to itself make an unrestricted production of all requested documents, subject only to
17 confidentiality terms that would protect from disclosure pricing terms and conditions that
18 Elsevier contends are confidential, proprietary, and subject to statutory exemption, from
19 public disclosure and production, under the Public Records Act.

20 6. Mr. James Tonna is Elsevier's Vice President of Sales and Marketing. In his
21 declaration, he (inter alia) states:

- 22 • Elsevier has achieved its preeminent market success, in significant part, by
23 developing proprietary pricing methods and formulae;
- 24 • Elsevier's pricing formulae and methods are not generally known (to its
25 competitors or potential customers) because of Elsevier's continuing efforts to
26 maintain their confidentially, which proprietary information reflects Elsevier's
 pricing/business methods and constitutes data unique to its products and
 services;

- If Elsevier's pricing formulae and customer-specific pricing became a matter of public record disclosure, actual and substantial harm would result to Elsevier and its customers (particularly large customers such as WSU) because—such information being known to competitors—Elsevier would be pressured into a "one size fits all" pricing policy that would undermine its ability to advantageously tailor terms and conditions to a customer's individual requirements.

II. CONCLUSIONS OF LAW

1. Elsevier's undisputed showing has established, and/or it appears likely that it will prevail by establishing at trial, that it has a clear legal or equitable right to exemption from production, of those pricing terms which have been redacted on attached Exhibit 1, under each of the following statutes:

- RCW 42.56.270 "Financial, commercial and proprietary information," subpart (1):

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

- RCW 42.56.270 subpart (11):

Proprietary data, trade secrets, or other information that relates to: (a) A vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor;

- Protection is also proper under the Washington Uniform Trade Secrets Act's definition of a trade secret (in RCW 19.108.010(4)) as including "information, including a formula, pattern, compilation, ... [and] process" that "[d]erives independent economic value, actual or potential, from not being generally known to ... other persons who can obtain economic value from its disclosure or use," and which "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

2. Elsevier has a well-grounded fear of an immediate invasion of that right to exemption, based on WSU's stated intention to disclose absent contrary order.

3. The disclosure of the requested materials in un-redacted form will result in actual and substantial damage to Elsevier, by denying it the confidentiality of valuable exempt commercial information in violation of public policy embodied in RCW 4.24.601 and 4.24.611(3).

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III. PRELIMINARY INJUNCTION

Consequently, based on the preceding Findings of Fact, and so as to avoid the threatened actual and substantial damage to Elsevier identified in Conclusion of Law No. 3, the Court orders, adjudges and decrees:

1. Pursuant to CR 65, Defendant Washington State University, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, are preliminarily enjoined *pendente lite* from making any disclosure or production, pursuant to Dr. Theodore C. Bergstrom's Request, other than in the redacted form that is attached hereto as Exhibit 1.


2. This order is conditional upon plaintiff Elsevier's giving security in the amount of \$ _____ no later than _____ for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Entered this ____ day of June, 2009.

Whitman County Superior Court Judge
David Fraser

Presented by:

Oles Morrison Rinker & Baker LLP



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[PLAINTIFF'S PROPOSED] FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
PRELIMINARY INJUNCTION - 4

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1 Copy Received,
2 Notice of Presentation Waived,
3 Approved as to Form:

4 Office of the Attorney General

5 By Frank M. Hruban,
6 Assistant Attorney General
7 Counsel for Defendant
8 Washington State University
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[PLAINTIFF'S PROPOSED] FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
PRELIMINARY INJUNCTION - 5

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