

FILED

BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE  
COMMISSIONER

2017 DEC -1 A 7:52

HEARINGS UNIT  
OFFICE OF  
INSURANCE COMMISSIONER

In the Matter of:

The Form A and Form E Applications for the  
Proposed Acquisition of Control of:

REtitle Insurance Company,

By

A10 Capital, LLC

Docket No. 17-0369

**A10 Capital LLC Brief Addressing  
Status Conference Matters**

Pursuant to the October 12, 2017, Case Management Order issued herein, applicant A10 Capital, LLC ("A10") hereby submits this Brief Addressing Status Conference Matters.

**a. Consolidation of the Form A and Form E applications for purposes of the adjudicative hearing.**

A10 does not have any objection to consolidating the Form A and Form E applications for the purposes of the adjudicative hearing.

**b. Issues regarding confidentiality of documents submitted in the Form A and Form E applications.**

A10 and the OIC have not reached an agreement regarding the confidentiality of certain documents submitted by A10 as part of the application process. The following is a discussion of the information upon which A10 and the OIC have not yet reached agreement regarding confidentiality.

A10's Ownership Structure

Pursuant to Washington Revised Code (RCW) 48.31B.020, the Form E statute, the Washington Insurance Commissioner "must give confidential treatment" to information

submitted thereunder "in the same manner as provided in RCW 48.31B.038." RCW 48.31B.038 provides, in pertinent part, that:

Documents, materials, or other information in the possession or control of the commissioner that are obtained by or disclosed to the commissioner or any other person... are confidential by law and privileged, are not subject to chapter 42.56 RCW, are not subject to subpoena, and are not subject to discovery or admissibility in evidence in any private civil action...

Here, the Form E includes an exhibit (Exhibit A) which outlines A10's ownership structure. That exhibit is identical to an exhibit attached to A10's Form A (Exhibit B). Further, at the OIC's request, A10 has submitted additional information regarding the details of A10's ownership structure, which information has supplemented A10's Form E and Form A filing in an identical fashion. The fact that the information was submitted as an attachment to the Form A as well as the Form E should not strip it of its statutory protection; such a result would render REC 48.31B.020 meaningless, and would essentially create a "trap" for anyone submitting a Form A and Form E (i.e., the information is protected insofar as it is attached to the Form E, but the very same information becomes available to the public because you have to submit it along with your Form A). Accordingly, A10's position is that all such information should receive the statutory protection provided by RCW 48.31B.020; more specifically, that an order should be issued declaring the financial information is not subject to public inspection or disclosure, is not subject to subpoena or discovery, and is not admissible in evidence in any private civil action. *See* RCW 34.05.446(1), and Washington Court General Rules (GR) 15(c)(1), (2)(B) (providing protective orders).

#### A10's Financial Statements

A10 contends that its financial statements are subject to protection under Washington's Uniform Trade Secrets Act, and under Washington State Court Rule 26(c)(7).

Trade Secret. The Uniform Trade Secrets Act (UTSA), Chapter 19.108 RCW, prohibits the disclosure of a "trade secret." The UTSA is an "other statute" and therefore serves as a PRA exemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d, 243, 262, 884 P.2d 592 (1994). See generally WAC 44-14-06002(7) (discussing trade secret exemption). The UTSA defines a trade secret expansively as:

[I]nformation, including a formula, patten, compilation, program, device, method, technique, or process that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4).

The information must be "novel" in the sense that the information must not be readily ascertainable from another source." *Spokane Research and Def. Fund v. City of Spokane (Spokane Research I)*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999), review denied, 140 Wn.2d 1001 (2000).

A trade secret does not lose its confidential status when it is submitted to a public agency. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52, 738 P.2d 665 (1987). Even though the PRA usually encourages broad disclosure, trade secrets are different. The legislature...recognized that protection of trade secrets, other confidential research, development, or commercial information concerning products 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. *PAWS II*, 125 Wn.2d at 263 (quoting Laws of 1994, Ch.42, Section 1, p.130. The Supreme Court has carried

out the legislature's instruction and held the PRA "is simply an improper means to acquire knowledge of a trade secret." *PAWS II*, 125 Wn.2d at 262; *see also Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998) (the PRA "may not be used to acquire knowledge of a trade secret.").

Washington State Court Rule 26(c)(7). Rule 26(c)(7) provides courts with the ability to issue protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. Fed. R. Civ. P. 26(c)(7). For good cause to exist under Fed. R. Civ. P. 26(c), the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted. If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary.

Here, A10 will be able to provide evidence that both the UTSA and Rule 26(c)(7) are applicable because A10's financial statements include highly sensitive trade secrets regarding its loans, including interest rates it charges its customers, financing sources, its risk rating structure, profitability, etc. A10 keeps this information confidential; only certain key employees, investors and its CPA's have access to this information. All individuals with access to this information are subject to confidentiality agreements which prohibit them from disclosing any of the information. As a result, this data is not generally known to the public; in particular, A10's competitors. A10's business model (which is revealed by reviewing its financial statements) is novel and unique in the commercial finance industry. Having this information made available to A10's competitors would be financially harmful to A10 because it would allow A10's competitors the ability to see what A10 is charging its customers and the corresponding amount

of money A10 is making on its loans; this would effectively give A10's competitors an unfair peek at A10's playbook and make strategic decisions to counteract A10's business strategy. This would be extremely unfair and anti-competitive to A10's ability to continue effectively competing in the commercial real estate lending market.

Precedence for treating sensitive financial records confidential can be found in the Notice of Hearing on the Proposed Acquisition of Mason County Title Insurance Company by REtitle Holding Company LLC, filed with the Office of Insurance Commissioner on March 5, 2015. In that proceeding, the applicant entity (REtitle Holding Company, LLC) had no assets, so the OIC had to look to the personal financial statements of the three members of the applicant entity to determine whether the financial condition of the applicant met the applicable standards for acquisition of control of a title insurer in the State of Washington. The OIC agreed those financial records should be prohibited from being filed in the public record. More specifically, the OIC held:

"The personal financial statements of the three managing members of the applicant shall not be filed in the public record or posted, but shall be retained by the OIC. I do not find that such sensitive information is relevant to the merits of the application or of public significance."

*Id.*, p.2, paragraph 2. Here, A10 is in the same position as the three managing members in the earlier proceeding and A10 should be provided with the same protection.

Based on the foregoing, A10's position is that its financial statements should receive confidential treatment under the UTSA and Rule 26(c)(7); more specifically, that an order should be issued declaring the financial information is not subject to public inspection or disclosure, is not subject to subpoena or discovery, and is not admissible in evidence in any private civil action.

- c. Whether the OIC Staff has issued data or information requests to REtitle or Applicant, and if so, the nature and number of those requests, and the status of REtitle or Applicant's responses to any requests.**

As of the date of this submission, the OIC Staff has issued two (2) requests to A10 for additional information and documentation relating to A10's financial status, ownership structure and business plan for A10. A10 has responded to both requests.

A10 is not aware of any requests to REtitle for additional information.

- d. Plans of the OIC Staff, if known at this time, to issue data and information requests to REtitle or Applicant in the future.**

A10 is unaware of any requests the OIC Staff may make in the future.

- e. Each parties' estimate of the time that each parties' experts will require to prepare written reports regarding the transaction proposed in the Forms A and E.**

A10 does not currently anticipate the need for expert witness testimony. It may be necessary for A10 to submit testimony and/or sworn statements in relation to a motion for protective order (see item b above), but such evidence would not be "expert testimony" as that term is used in the Washington State Court Rules.

Notwithstanding the foregoing, A10 estimates a 10-day turn around will be needed to respond with written reports to requests regarding the transaction proposed in the Forms A and E.

- f. Any other issues which may affect the issuance of a final recommendation by the OIC on the Form A and Form E applications and scheduling of the adjudicative hearing.**

A10 is not currently aware of any issues which may affect the issuance of a final recommendation by the OIC.

DATED This 1<sup>st</sup> day of December, 2017.

A10 CAPITAL, LLC

A handwritten signature in black ink, appearing to read "W. Ben Slaughter", is written over a horizontal line.

W. Ben Slaughter  
General Counsel

CERTIFICATE OF SERVICE

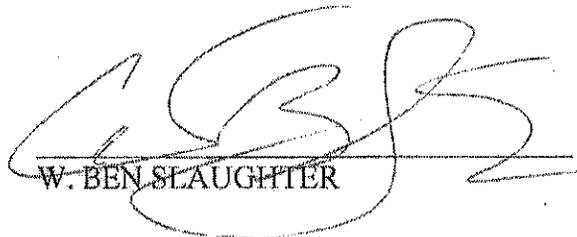
I HEREBY CERTIFY that on this 1<sup>st</sup> day of December, 2017, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below, pursuant to the Case Management Order filed herein:

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W. BEN SLAUGHTER