BEFORE THE STATE OF WASHINGTON
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,** **Applicant.**	Docket No. 17-0369 **ORDER ADDRESSING CONFIDENTIALITY ISSUES**

TO: David Bayley, President
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AND TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
Ronald Pastuch, Holding Company Manager, Company Supervision Division
Toni Hood, Deputy Commissioner, Legal Affairs Division
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Background.

On December 20, 2017, the OIC, A10 Capital, LLC ("A10") and REtitle Insurance Company ("REtitle") (collectively, "Parties"), submitted a Joint Submission on Confidentiality Issues ("Submission") to me. In the Submission, the Parties stipulated to confidential treatment (sealing and/or redaction) as to four categories of documents: (1) Form E Statement (Exs. OIC-21, OIC-22); (2) biographical affidavits (Ex. OIC-4; Ex. C to the Form A filing); (3) financial projections (Exs. OIC-7, OIC-13, p.7; Ex. E to the Form A filing and Addendum #1 to Form A filing); and (4) resolutions/minutes of A10 and REtitle relating to approval of Stock Purchase Agreement ("SPA")(Ex. OIC-16; Ex. I to Addendum No. 1 to the Form A). I have reviewed the legal bases put forth by the Parties as to sealing and/or redaction of items (1)-(4) above, and am in agreement with their position. Items (1)-(4) will be sealed and/or redacted per the Parties' stipulations.

In the Submission, the Parties could not reach agreement on A10 and REtitle's request for confidential treatment (sealing and/or redaction) as to the following documents attached to the Form A: (5) The purchase price in the SPA, and plant lease and agency agreement (Exhibits B and C to the SPA)(Ex. OIC-2; Ex. A to the Form A); (6) detailed description of A10's ownership structure (Exs. OIC-3, OIC-14, and OIC-19; Exhibit B to the Form A; Addendums.No. 1 & 2 to the Form A); (7) A10's supplemental financial statements (Exs. OIC-17, OIC-18; Ex. J to Addendum No. 1 to Form A filing); and (8) proposed interim compensation for David Bayley as President of REtitle post-acquisition (Ex. OIC-1, pp. 4, 7). The Parties agreed to address items (5)-(8) above in their respective hearing briefs. I address items (5)-(8) below. Where applicable and relevant, I cite below to the Parties' respective briefs with reference to items (5)-(8) above.

Law Governing Discovery and Protective Orders in Matters before the OIC Hearings Unit.

WAC 284-02-070 articulates the standard for discovery in hearings before the OIC Hearings Unit, and states in part:

> (e) Discovery is available in adjudicative proceedings pursuant to Civil Rules 26 through 37 as now or hereafter amended without first obtaining the permission of the presiding officer or the administrative law judge in accordance with RCW 34.05.446(2).
>
> (i) Civil Rules 26 through 37 are adopted and incorporated by reference in this section, with the exception of CR 26 (j) and (3) and CR 35, which are not adopted for purposes of this section.
>
> (ii) The chief presiding officer or administrative law judge is authorized to make any order that a court could make under CR 37 (a) through (e), including an order awarding expenses of the motion to compel discovery or dismissal of the action.
>
> (iii) This rule does not limit the chief presiding officer's or administrative law judge's discretion and authority to condition or limit discovery as set forth in RCW 34.05.446(3).

(Emphasis added).

RCW 34.05.446(1) states that I may issue protective orders. RCW 34.05.446(3) provides me with discretion to decide whether protective orders may be granted in a hearing before the OIC's Hearings Unit, and states:

> Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(Emphasis added).

CR 26(c) provides courts with the ability to issue protective orders limiting discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and states:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had;
>
> * * *
>
> (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . .
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(Emphasis added).[1]

In examining the standard for a court to issue a protective order under CR 26(c), in *Marine Power & Equip. Co. v. Dep't of Trans.*, 107 Wn.2d 872, 875-876, 734 P.2d 480 (1987) the Court stated:

> CR 26(c) provides a court may "for good cause shown . . . make any order which justice

[1] FED. R. CIV. P. 26(c) contains language very similar to that in CR 26(c). Where a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive. *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 153 L.Ed.2d 806, 122 S.Ct. 2624 (2002)).

requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." The United States Supreme Court has stated:

> Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

(Footnote omitted.) *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

In *McCallum v. Allstate Prop. and Cas. Ins. Co.*, 149 Wn. App. 412, 423-424, 204 P.3d 944 (2009), the Court explained what constitutes good cause under CR 26(c), stating:

> Accordingly, in determining whether a protective order is needed, we must decide whether a party has shown good cause to limit the scope of discovery. CR 26(c); *Rufer*, 154 Wn.2d at 541. To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued. *See Dreiling*, 151 Wn.2d at 916-17 (citing *Foltz*, 331 F.3d at 1130). When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough. *Dreiling*, 151 Wn.2d at 916-17 (citing *Foltz*, 331 F.3d at 1130). And finally, in exercising its discretion to issue a protective order under CR 26(c) for raw fruits of discovery, a court must weigh the respective interests of the parties. *Rhinehart* I, 98 Wn.2d at 236; *see also T.S.*, 157 Wn.2d at 431; *Doe*, 117 Wn.2d at 778.

(Emphasis added). A movant must "make a specific demonstration of facts to support [its] request for the protective order and may not rely on conclusory or speculative statements concerning the need for a protective order." *Byrd v. District of Columbia*, 259 F.R.D. 1, 7 (2009) (citation omitted).

Purchase Price in the SPA, and Plant Lease and Agency Agreement attached thereto as Exhibits B & C.

At page 11 of its Pre-Hearing Brief ("Brief"), A10 argues that the purchase price in the SPA, and the plant lease and agency agreements attached thereto as Exhibits B and C, are trade secrets subject to protection under Washington's Uniform Trade Secrets Act, and CR 26(c)(7). A10 further argues that the purchase price is commercial information regarding REtitle's business that derives independent economic value by not being generally known to, or readily ascertainable by, potential future buyers of interests in REtitle. A10 asserts, for example, that if A10 were to ever sell or part with its ownership interest in REtitle, potential buyers would have an unfair advantage if A10's purchase price was public information. As to the plant lease and agency agreement, A10 asserts they contain private information regarding the amount of money REtitle agrees to pay for the use of Mason County Title Company's ("MCTC's") services, and other terms of the agreement (e.g., duration, extent of services, etc.). At pages 13-14 of its Brief, A10 argues that allowing such information to become publicly

available would harm REtitle and MCTC by providing a mechanism for REtitle's competitors and MCTC's other underwriters (or potential underwriters) to know the business terms under which REtitle and MCTC are operating. With such information, A10 asserts that REtitle's competitors would gain an unfair competitive advantage, for example, by being able to seek the same or better terms.

RCW 34.05.452 provides that the "presiding officer shall exclude evidence that is excludable based on . . . statutory grounds. . . ."

GR 15(c)(2) state in part:

> . . . [T]he court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:
>
> (A) The sealing or redaction is permitted by statute; or
>
> (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); . . .

(Emphasis added).

Per *McCallum* above, A10 has not shown good cause or specific prejudice or harm under CR 26(c), that would permit me to issue a protective order sealing the purchase price in the SPA, or the agency agreement or plant lease attached thereto. That other competitors of REtitle or MCTC may learn the details of their agency agreement or plant lease, or potential buyers *may* gain an unfair competitive advantage, does not rise to the level of good cause. Rather, they represent broad and conclusory allegations, and speculative statement, which per *McCallum* and *Byrd*, cannot serve as the basis for sealing and/or redacting the SPA and relevant attachments per CR 26(c). Also, under GR 15(c)(2), compelling privacy or safety concerns do not outweigh the public interest in access to the records at issue.

RCW 42.56.070(1) states in part: "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." (Emphasis added). RCW Chapter 19.108 qualifies as an "other statute" per RCW 42.56.070(1). *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney General*, 179 Wn. App. 711, 721, 328 P.3d 905 (2014); *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 656, 343 P.3d 370 (2014). The Public Records Act [RCW Chapter 42.56] may not be used to acquire knowledge of a trade secret. *Id.* (Citation omitted). "To

be a trade secret, information must be novel in the sense that the information must not be readily ascertainable from another source." *Id.* at 722 (citations omitted).

RCW 19.108.050 states: ". . . [A] court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, . . . sealing the records of the action. . . ." (Brackets and Emphasis added). RCW 19.108.010(4) defines "trade secret" as:

> . . . [I]nformation, including a formula, pattern, 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 can 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.

(Brackets and emphasis added).

The doctrine of *ejusdem generis* requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms. *City of Seattle v. State,* 136 Wn.2d 693, 699, 965 P.2d 619 (1998) (quoting *Dean v. McFarland,* 81 Wn.2d 215, 221, 500 P.2d 1244 (1972)). RCW 19.108.010(4) gives specific examples of information, such as a formula, pattern, compilation, program, device, method, technique, or process. Applying the doctrine of *ejusdem generis*, the purchase price in the SPA, and agency agreement and plant lease attached thereto, are not akin to the examples of information listed in RCW 19.108.010(4), and are therefore not trade secrets.

Another problem with A10's argument that the purchase price in the SPA, and the agency agreement and plant lease agreement attached thereto, are trade secrets, is the missing element of "independent economic value" required of such information to constitute a trade secret per RCW 19.108.010(4). As the OIC explains at 5:4-11 of its Hearing Brief , the common law addresses what constitutes "independent economic value" per RCW 19.108.010(4), and states:

> "A key factor in determining whether information has 'independent economic value' under the statute is the effort and expense that was expended in developing the information." *McCallum v. Allstate Prop. & Cas. Ins. Co.,* 149 Wn. App. 412, 424, 204 P.3d 944 (2009). "The alleged unique, innovative, or novel information must be described with specificity, and therefore, 'conclusory' declarations that fail to 'provide concrete examples' are insufficient to support the existence of a trade secret." *Id.*, at 425-26.

There is no evidence of effort or expense that A10 or REtitle expended in developing the purchase price in the SPA, or the agency agreement or plant lease attached thereto. As such, they have no independent economic value per RCW 19.108.010(4), and are not trade secrets.

Given the analysis above, the purchase price in the SPA, and the agency agreement and plant lease attached thereto, are not confidential, and will not sealed and/or redacted.

Detailed Description of A10's Ownership Structure.

At page 10 of its Brief, A10 argues that the Form E requires applicants to state the name and address of each person affiliated with it, and to "describe their affiliations." At page 10 of its Brief, A10 asserts that since certain information regarding A10's ownership structure was submitted with both its Forms A and E, it is confidential per RCW 48.31B.038 and must be sealed in its entirety, stating:

> In other words, the Form E requires applicants such as a A10, who have several affiliates with varying degrees of ownership, to identify all the owners and describe the nature of their respective ownership interests. This same information is sought in Items 2 and 3 of the Form A.
>
> Here commensurate with the requirements of the Form E, A10 attached 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 Holding Company Manager'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 (sic) 48.31B.020 meaningless. 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 information regarding the ownership structure is not subject to public inspection or disclosure, is not subject to subpoena or discovery, and is not admissible 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).

The fact that A10 submitted documents directly responsive to the Form A also with its Form E creates an issue. However, it is an issue that is easily resolved if we look at the regulations outlining what is to be included in both Forms A and E. WAC 284-19-910 dictates the required content of a Form A, including Item 2 which is directly relevant to our issue at hand, and specifically mentions ownership charts for an organization such as A10, and states:

> **ITEM 2. IDENTITY AND BACKGROUND OF THE APPLICANT**
>
> (a) State the name and address of the applicant seeking to acquire control over the insurer.
>
> (b) If the applicant is not an individual, state the nature of its business operations for the past five years or for such lesser period as the person and any predecessors thereof shall have been in existence. Briefly describe the business intended to be done by the applicant and the applicant's subsidiaries.
>
> (c) Furnish a chart or listing clearly presenting the identities of the inter-relationships among the applicant and all affiliates of the applicant. Indicate in the chart or listing the

> percentage of voting securities of each person which is owned or controlled by the applicant or by any other person. If control of any person is maintained other than by the ownership or control of voting securities, indicate the basis of the control. As to each person specified in such chart or listing indicate the type of organization (e.g., corporation, trust, partnership) and the state or other jurisdiction of domicile. If court proceedings involving a reorganization or liquidation are pending with respect to any such person, indicate which person, and set forth the title of the court, nature of proceedings and the date when commenced.

(Emphasis added).

On the other hand, WAC 284-19-950 dictates the required content of a Form E, including Item 2 therein, which does not suggest that A10 submit ownership charts as WAC 284-19-910 does for a Form A, but rather states:

> **ITEM 2. NAME AND ADDRESSES OF AFFILIATED COMPANIES**
> State the name and addresses of the persons affiliated with those listed in Item 1. Describe their affiliations.

Simply put, OIC's regulations do not require A10's submission of evidence concerning its ownership structure, including ownership charts, with its Form E. Therefore, detailed description of A10's ownership structure via charts or otherwise that A10 submitted with its Form A, as required by Item 2(c) of WAC 284-19-910, did not have to be included with its Form E per WAC 284-19-950. The latter regulatory provision only required that A10 state the names and addresses of persons affiliated with it, and to describe those affilations. That is not the same information required per Item 2(c) of WAC 284-19-910. Where a general statute includes the same matter as a specific statute and the two cannot be harmonized, the specific statute will prevail over the general. *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 542, 205 P.3d 159 (2009)(citing *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,* 165 Wash.2d 275, 309, 197 P.3d 1153 (2008)). The rules of statutory construction apply to agency regulations as well as statutes. *Tesoro Refining and Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008); *Madre v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003).

Therefore, documents A10 submitted with its Form A involving a detailed description of A10's ownership structure (Exs. OIC-3, OIC-14, and OIC-19; Exhibit B to the Form A; Addendums No. 1 & 2 to the Form A) are not confidential, and will not be sealed and/or redacted.

A10's Supplemental Financial Statements.

At page 7 of its Brief, A10 contends that it supplemental financial statements are trade secrets, and are subject to protection under CR 26(b)(7). Specifically, at page 8 of its Brief, A10 asserts that it has proven, via pre-filed testimony, that both the Uniform Trade Secrets Act and CR 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. For the reasons outlined above that I deny that the purchase price in the SPA, and

the agency agreement and plant lease attached thereto, are confidential trade secrets or ripe for a protective order under CR 26(c), and *McCallum* and *Byrd*, I make the same conclusion with respect to A10's supplemental financial statements. Therefore, they are not confidential, and will not be sealed and/or redacted.

Proposed interim compensation for David Bayley as President of REtitle post-acquisition.

While the OIC argues at 6:3-5 that there is no basis for Mr. Bayley's interim compensation post-acquisition (included in the Form A) to be deemed confidential, contrary to the invitation at page 4 of the Submission for A10 to address this issue, A10 chose not to do so in its Brief. Given this, I conclude that Mr. Bayley's interim compensation post-acquisition (included in the Form A) is not confidential, and shall not be sealed and/or redacted.

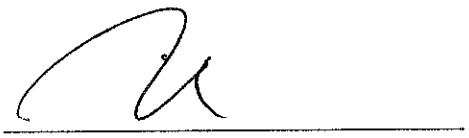
Order.

Pursuant to the analysis above, the undersigned orders that:

A. The following information is confidential and shall be sealed and/or redacted: (1) Form E Statement (Exs. OIC-21, OIC-22); (2) biographical affidavits (Ex. OIC-4; Ex. C to the Form A filing); (3) financial projections (Exs. OIC-7, OIC-13, p.7; Ex. E to the Form A filing and Addendum #1 to Form A filing); and (4) resolutions/minutes of A10 and REtitle relating to approval of Stock Purchase Agreement ("SPA")(Ex. OIC-16; Ex. I to Addendum No. 1 to the Form A); and

B. The following information is *not* confidential and shall *not* be sealed and/or redacted: (5) The purchase price in the SPA, and plant lease and agency agreement (Exhibits B and C to the SPA)(Ex. OIC-2; Ex. A to the Form A); (6) detailed description of A10's ownership structure (Exs. OIC-3, OIC-14, and OIC-19; Exhibit B to the Form A; Addendums No. 1 & 2 to the Form A); (7) A10's supplemental financial statements (Exs. OIC-17, OIC-18; Ex. J to Addendum No. 1 to Form A filing); and (8) proposed interim compensation for David Bayley as President of REtitle post-acquisition (Ex. OIC-1, pp. 4, 7).

Dated: January 26, 2018



William G. Pardee
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order Addressing Confidentiality Issues on the following people at their addresses listed below:

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Dated this 26th day of January, 2018, in Tumwater, Washington.

Dorothy Seaborne-Taylor
Paralegal
Hearings Unit