

**Amerra Capital Mgt., LLC v Berkshire Hathaway
Specialty Ins. Co.**

2025 NY Slip Op 32558(U)

July 10, 2025

Supreme Court, New York County

Docket Number: Index No. 652101/2024

Judge: Anar R. Patel

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

AMERRA CAPITAL MANAGEMENT, LLC, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, <p style="text-align: center;">Defendants.</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 150px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">652101/2024</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black; text-align: right;">05/19/2025</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">005</td> </tr> <tr> <td colspan="2" style="text-align: center;">DECISION + ORDER ON MOTION</td> </tr> </table>	INDEX NO.	652101/2024	MOTION DATE	05/19/2025	MOTION SEQ. NO.	005	DECISION + ORDER ON MOTION	
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HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 167–172, 174 were read on this motion to/for REVIEW ORDER REFEREE / DISCLOSURE.

Relevant Factual and Procedural History

In this action, Plaintiff Amerra Capital Management, LLC (“Plaintiff”) seeks declaratory and compensatory relief against Defendants Berkshire Hathaway Specialty Insurance Company (“Berkshire”) and Travelers Casualty and Surety Company of America (“Travelers”) (collectively, “Defendants”). Plaintiff seeks a review and clarification of Judicial Hearing Officer (“JHO”) Alan C. Marin’s May 13, 2025 ruling regarding document discovery (NYSCEF Doc. No. 166) (“the Order”). Defendants oppose the Motion.

Plaintiff is a commodities investment manager and, as such, holds the debt of several companies, which at one point included the unsecured debt of Transmar Commodity Group Ltd. (“Transmar”) (*see ABN AMRO Capital USA LLC v Amerra Capital Mgt., LLC*, 2022 NY Slip Op 32086 [U], *3-6 [Sup Ct, NY County 2022], *modified on other grounds* 211 AD3d 566 [1st Dept 2022]). Among other investments, Plaintiff facilitated a loan by ABN AMRO Capital USA LLC, Société Generale, BNP Paribas, Natixis, New York Branch, Macquarie Bank Limited, Bank Hapoalim BM, MUFG Bank, Ltd., and Israel Discount Bank of New York (“the Lenders”) to Transmar, which was a cocoa trading company. Plaintiff also facilitated additional financial agreements between Transmar and the Lenders, for a total of ~\$400 million.

Subsequently, Transmar filed for bankruptcy and the former head of the company was sentenced to prison for scheming to defraud its investors. The Lenders, believing that Plaintiff had conspired to commit the fraud, sued Plaintiff and its affiliates and co-founder. Plaintiff received insurance coverage, but Berkshire and Travelers denied Plaintiff’s request for excess coverage. In

[* 1]

this case, filed on April 23, 2024, Plaintiff sues Berkshire and Travelers for their failure to provide additional professional liability coverage under its excess policies.

This Court has addressed the parties' discovery disputes on prior occasions. Most recently, it considered Motion Sequence 004, in which Plaintiff sought (1) an *in camera* review of certain items in Defendants' privilege log, (2) production of Defendants' reserve information and any related communications, and (3) an order that precluded Defendants from making certain inquiries of Plaintiff's corporate representative (NYSCEF Doc. No. 135 [Notice of Motion]). The Court held oral argument on April 30, 2025 (NYSCEF Doc. No. 173 [Transcript]). The Court granted the second of Plaintiff's requests (*id.* at 11:17–25) and granted the third request in part (*id.* at 16:20–17:15).

With respect to the first request, however, the Court directed that Defendants produce for *in camera* review documents in categories identified at page 9 of Plaintiff's Memorandum of Law (NYSCEF Doc. No. 136), which generally include documents concerning insurance coverage determinations and claims investigations materials. The Court further ordered that said documents shall be produced to the Court-appointed Special Referee overseeing discovery pursuant to the Court's forthcoming order and pursuant to a date as set forth by the Special Referee (NYSCEF Doc. No. 161 [4/30/25 Decision and Order]). On May 1, 2024, the Court issued an order referring the case to JHO Alan C. Marin "for the purpose of supervising the remainder of discovery" (NYSCEF Doc. No. 164). This referral further provided that "the parties shall abide by any and all guidelines and/or procedures set by JHO Marin to be followed during the discovery process in this matter" and that "all discovery motions in this matter, except motions . . . [for] contempt, shall be returnable before JHO Marin" (*id.*).

Pursuant to the above directives, JHO Marin reviewed over 170 documents (*see* NYSCEF Doc. No. 175 at 6:18–25; 11:16–17). JHO Marin issued the Order concerning the documents on May 13, 2025 (NYSCEF Doc. No. 166). With respect to those documents that Berkshire had withheld, JHO Marin ordered that "Berkshire. . . shall withhold the following Bates-numbered files: 01719, 01742, 01755, 07140, 10449, 10455, 10460, 10465, 10515, 10520, 10521, 10527, 10531, 10538, 10541, 10542, 10545, 10547, 10549, 10550, 1057 8, 10579, 10580, 10581, 10584, 10590, 10595, 10596, 10601, 10602, 10608, 10610 and 10611." He ordered that Berkshire "shall disclose the following Bates-numbered files with its redactions: 01699, 05105, 05134, 05297, 05599, 05607, 07110, 07162, 07590, 08084, 08169, 09116, 09152, 10370, 10691, 10697, 10703, 10709, 10715 and 10721." Finally, he directed Berkshire "to disclose Bates-numbered documents 03892, 04755, 05110 and 05137 without redactions" (*id.*, *2).

With respect to the documents that Travelers withheld, JHO Marin ruled that Travelers "shall withhold the following Bates-numbered files: 00001, 05913, 05916, 05921, 05923, 05925, 07513, 20271, 20273, 20275, 20294, 20305, 20313, 20324, 20325, 20332, 20337, 20343, 20346, 20355, 20357, 20363, 20364, 20368, 20370, 20373, 20379, 20381, 20387, 20389, 20398, 20400, 20402, 20499, 20434, 20437, 20440, 20443, 20447, 20457, 20464, 20469, 20490, 20500, 20502, 20507, 20511, 20513, 20515, 20522, 20527, 20535 and 20537." Further, JHO Marin directed Travelers to "disclose the following Bates-numbered files with its redactions: 06168, 06851, 07056, 07713, 20327, 20330, 20419, 20422, 20426, 20459, 20467, 20497, and 20539," and to "disclose the following entries without redaction: 07520, 20319, 20471, 20477 and 20509" (*id.*, *2–3).

The Court observes that, when JHO Marin heard oral argument on other discovery matters on May 15, 2025, Plaintiff indicated that it had questions about the May 13 Order. Although counsel for both parties conferred and resolved some of the issues, “[i]t’s possible . . . we may be coming back to Your Honor for a clarification or some question about the implementation of your Honor’s Order” (NYSCEF Doc. No. 175 at 44;17–19). There is no indication in the record that Plaintiff sought such clarification. Instead, on May 16, 2025, Plaintiff’s counsel filed a letter, which served as a “notice of intent” to move for clarification by the Court so that Plaintiff can determine “whether it wishes to seek Justice Patel’s review of the May 13 Order (or not)” (NYSCEF Doc. No. 165).¹ On May 19, 2025, citing CPLR § 3104 (d), which gives parties five days to “apply [by motion] for review of an order made under this section by a referee” (NYSCEF Doc. No. 168 [Plaintiff’s Memorandum in Support], *2), Plaintiff initiated this Motion.

First, Plaintiff argues that clarification is necessary because of certain errors in the Order as it relates to Berkshire. Plaintiff states that JHO Marin ordered that Berkshire withhold its file numbers 01719, 01742, and 01755, although Berkshire already had produced redacted copies to Plaintiff. In addition, Plaintiff requests that this Court review the arguments in support of Motion Sequence 004 (NYSCEF Doc. Nos. 135–138) and, after such review, reject JHO Marin’s Order as to these documents and order full disclosure of these redacted materials.

According to Plaintiff, JHO Marin also withheld Berkshire Bates numbered file (Berkshire’s file number) 07140, which Berkshire mistakenly listed as “withheld” although it already had produced the document in redacted form. Plaintiff speculates that JHO Marin did not consider the document properly because of this error. Therefore, Plaintiff states that the JHO Marin’s ruling as to this document also is in doubt. Further, Plaintiff states that the Order does not rule on the discoverability of Berkshire’s file numbers 1739, 1741, and 1743, which Berkshire produced in redacted form, and it requests a determination by the Court as to the discoverability of these items.²

As a remedy for the next purported error, Plaintiff requests that this Court reconsider JHO Marin’s ruling with respect to the eight e-mails Berkshire withheld as “Communications with outside counsel and jointly-represented parties concerning settlement negotiations of disputed coverage issues with AMERRA” (NYSCEF Doc. No. 129, ¶ 3.a). JHO Marin’s Order allowed Berkshire to withhold the e-mails. According to Plaintiff, the e-mails constitute improper communications regarding the negotiations before Berkshire made its coverage ruling and transmitted it to Plaintiff, and therefore the Court should review NYSCEF Doc. Nos. 135–138, which Plaintiff submitted in its prior motion, and find the documents discoverable.

Second, Plaintiff seeks clarification as to portions of the Order relating to Travelers. According to Plaintiff, JHO Marin’s ruling withheld Travelers’ Bates numbered files (Travelers’ file number) 05913, 05915, 05916, 05918, 05921, 05923, and 05925, which allegedly comprise Travelers’ entire claim file. Further, Plaintiff contends that as part of the Order, JHO Marin allowed Travelers to withhold Travelers’ file numbers 05916, 05921, 05923, and 05925 from the above, although Travelers already produced these documents. Plaintiff states that ambiguity

¹ Both the Court and JHO Marin received copies of the letter.

² Plaintiff incorrectly contends that JHO Marin did not consider Travelers’ file number 1742.

therefore exists concerning this portion of the Order. Accordingly, Plaintiff asks this Court to review the documents it submitted in support of Motion Sequence 004 (NYSCEF Doc. Nos. 135–138) and demand that Travelers produce the claims file in unredacted form.

Plaintiff also contends that the Order allows Travelers to withhold Travelers' file number 20499. However, Travelers' list of the documents it submitted to JHO Marin for review does not reference a document or file with this number. Accordingly, Plaintiff requests clarification.

Additionally, Plaintiff points to Category 2.e in Travelers' Amended Privilege Log (NYSCEF Doc. No. 130). Plaintiff states that the description of the category is: "Documents and communications with outside counsel requesting, providing and discussing outside counsel's legal advice regarding arguments raised by AMERRA's counsel, potential litigation against Travelers threatened by AMERRA and settlement negotiations with AMERRA" between November 18, 2022 and December 6, 2022 (*id.*). Plaintiff indicates that the Order allows Travelers to withhold ten of these documents, and that Plaintiff "cannot . . . determine where JHO Marin 'drew the line' with respect to disclosure" (NYSCEF Doc. No. 168, *8). Plaintiff also challenges the decision to withhold all the documents in Category 3.b, which are "Communications with outside counsel and jointly-represented parties concerning settlement negotiations of disputed coverage issues with AMERRA" from the same time period (NYSCEF Doc. No. 130, *3). Plaintiff argues that this incorrectly relies on the idea that litigation protection exists for these documents. Plaintiff states that it fully argued its position in support of Motion Sequence 004 and seeks a determination by this Court for the reasons set forth in those papers.

For the reasons above, Plaintiff seeks a review of the Order, a ruling by this Court as to the discoverability of items based on the arguments it raised with respect to Motion Sequence 004, and permission to make another motion or otherwise seek review of JHO Marin's Order after it has received all the documents Berkshire and Travelers must produce.

Defendants oppose the Motion. They cite *Nager v Panadis* (238 AD2d 135, 135–136 [1st Dept 1997]) for the principle that courts should confirm a referee's report as long as the record contains support for the referee's determination and the report "clearly define[s] the issues and resolve[s] matters of credibility." Defendants contend that the Order satisfies this standard. First, they argue that although they provided Plaintiff with Berkshire file numbers 01719, 001742, and 01755, and with Travelers file number 00001, and the Order determined that these documents were to be withheld, the Order does not contradict itself on this basis. Instead, Defendants contend the Order implicitly concludes "that the redacted portions remain redacted" (NYSCEF Doc. No. 174 [Defendants' Mem. in Opp'n.], *2). Additionally, Defendants state that, regardless of JHO Marin's intention, they do not intend "to claw back the entire documents" (*id.*), and therefore there is no prejudice. For the same reason, they argue that the Order permitting Berkshire to withhold its file number 07140 is correct, especially as it was part of the JHO's determination with respect to Travelers' file numbers 07139–07143, and the remainder of the materials had been withheld in their entirety.

Second, on behalf of Travelers, Defendants argue that, contrary to Plaintiff's statement, Travelers did not provide its file numbers 05913, 05915, 05916, 05918, 05921, 05923, and 05925 to Plaintiff previously. Instead, Travelers asserts that when it prepared its materials for the *in camera* submission, it assigned these documents the same numbers they had given to earlier

documents. Moreover, they state that they explained this fact to Plaintiff, who did not find the explanation satisfactory. As a third point, Defendants state that the Order's reference to Travelers' file number 020499, a document that does not exist, was a typographical error and, as such, no review is necessary.

Defendants' fourth contention is that the Order as to the documents in Berkshire's privilege log Category 2.b (NYSCEF Doc. No. 129) and Category 3.b in Travelers' privilege log (NYSCEF Doc. No. 130) were correct. They reject Plaintiff's argument that Defendants had no right to negotiate with their policyholder before they made determinations as to coverage. Instead, they contend that these negotiations constituted a legitimate effort to resolve the parties' dispute, "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship and [the communication] must be primarily or predominantly of a legal character" (NYSCEF Doc. No. 179, *4, quoting *Certain Underwriters at Lloyd's, London v Selena Gil, Inc.* [2023 WL 6849577, *1, Sup Ct, NY County, Oct. 17, 2023, Masley, J., Index No. 651500/2022 (internal quotation marks and citation omitted)]). Defendants also stress that although Plaintiff challenges the rulings with respect to Travelers' privilege log, Category 2.e, it does not point to any basis for its position.

Fifth, Defendants argue that the Court must deny Plaintiff's request seeking further review of aspects of the Order after it receives any additional documents. In support, they point to the five-day limitations period in CPLR § 3104 (d). They argue that as Plaintiff has made its request for clarification and review here, it cannot bring additional objections now that the limitations period has expired. Further, they assert that Travelers produced discovery in a manner consistent with JHO Marin's Order, and Plaintiff cannot bring subsequent challenges as to those documents Travelers properly withheld.

Legal Analysis

Courts have the discretion to refer discovery matters, including *in camera* reviews, to judicial hearing officers for resolution (*see Arkin Kaplan Rice LLP v Kaplan*, 107 AD3d 502, 502 [1st Dept 2013]). Both at the April 30, 2025 hearing and in its written decision on Motion Sequence 004, the Court granted the application for an *in camera* review to the extent of referring the matter to JHO Marin. Also, as indicated, the Court's May 1, 2025 Order stated that, among other things, JHO Marin was to hear all discovery motions except motions for sanctions. Thus, Plaintiff should have proceeded before the JHO in accordance with these Orders, and in accordance with counsel's statement to JHO Marin (*see* NYSCEF Doc. No. 175, p 44 lines 13–24). This procedure is also set forth in Rule 6 (a) of the "Uniform Rules of the Judicial Hearing Officers . . . Regarding References . . ." (Uniform Rules of the Judicial Hearing Officers) ([available at Rules-Hear-Rept-Determine.pdf](#)), which states that motion practice should be made to the JHO where, as here, it falls within the scope of the order of reference. Not only is that procedure consistent with the Rule and the prior Court orders, but it is the more logical course of action. JHO Marin is in the best position to clarify aspects of his ruling and/or to indicate where he "drew the line." As the matter is currently in this Court, however, the Court briefly addresses the instant motion.

Plaintiff requests clarification concerning JHO Marin's ruling as to Berkshire file numbers 01719, 01742, and 01755 and Travelers file numbers 05916, 05921, 05923, and 05925, which Defendants produced in redacted form. Contrary to Defendants' contention, the Order did not

clearly state that the documents should be provided in redacted form. Instead, the Order expressly describes these as among the documents that Defendants “withheld in full” (NYSCEF Doc. No. 166, *2). Therefore, Plaintiff may request clarification of these portions of JHO Marin’s Order within five days of the date of this order. However, Plaintiff is not prejudiced by these rulings, as it already possesses redacted copies of the documents in question and Defendants intend that Plaintiff may retain the discovery with the redactions.

The same reasoning applies to Berkshire’s file number 07140, which Berkshire mistakenly listed as a withheld document although Berkshire had provided Plaintiff with a redacted copy. Plaintiff distinguishes this situation on the ground that the incorrect labeling may have misled JHO Marin and influenced his decision. Therefore, Plaintiff may request a review of this decision from JHO Marin within five days of this order.

Defendants do not counter Plaintiff’s statement that the Order did not address the discoverability of Berkshire’s file numbers 1739, 1741, and 1743. Moreover, they do not deny that these documents were before JHO Marin. Therefore, a determination as to these documents is necessary. Plaintiff also raises a legitimate concern regarding the portion of the Order that concludes Travelers may withhold its file number 20499. Defendants concede that there was no such document before the JHO, and their contention that the ruling was correct, and the numbering was merely a typographical error is speculative. Moreover, even if Defendants’ theory were correct, this would not resolve the question of what the actual determination was and what document was at issue. Therefore, the Court directs that JHO Marin clarify this portion of the Order.

The Court denies Plaintiff’s request that this Court reconsider the discoverability of the above documents considering Plaintiff’s arguments in support of Motion Sequence 004, and that the Court review JHO Marin’s rulings on Category 2.e in Traveler’s privilege log. When the Court referred the discoverability of these documents to JHO Marin, the JHO considered the legal arguments to which Plaintiff refers. Further, as stated, all discovery motions—and motions related to the JHO’s discovery rulings—should have been made to JHO Marin.

Finally, the Court denies Plaintiff’s request for permission to make a subsequent motion for clarification or review of JHO Marin’s May 13, 2025 Order after it has received all the documents to which it is entitled. The time period in “CPLR § 3104 (d) unequivocally provides that the five-day period runs from the date that the order was made,” not when an order was entered (*Nasir v Tait*, 128 AD3d 1033, 1034 [2d Dept 2015]; see *Oldcastle Precast, Inc. v Steiner Bldg. NYC, LLC*, 2023 NY Slip Op 50531 [U] [Sup Ct, NY County 2023], *aff’d* 224 AD3d 413 [1st Dept 2024]). Plaintiff provides no legal basis for its request for an extension of this time period based on the completion of the ordered discovery.


Upon the foregoing documents, it is

ORDERED that the Motion is granted to the extent that Plaintiff seeks rulings with respect to Berkshires’ file numbers 1739, 1741, and 1743, and the matter is referred to JHO Marin for rulings as to their discoverability; and it is further

ORDERED that the Motion is granted to the extent that Plaintiff seeks clarification of JHO Marin’s ruling as to Travelers’ file number 20499, and the matter is referred to JHO Marin for clarification; and it is further

ORDERED that the Motion also is granted to the extent that Plaintiff has five days from the date of this order to request clarification from JHO Marin as to his rulings on the discoverability of Berkshire file numbers 01719, 01742, and 01755, Travelers file numbers 05916, 05921, 05923, and 05925, and Berkshire’s file number 07140; and it is further

ORDERED that the remainder of the Motion is denied.

7/10/2025		
DATE		ANAR R. PATEL, A.J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE