

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

2025 NY Slip Op 33713(U)

September 25, 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

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AMERRA CAPITAL MANAGEMENT, LLC,

Plaintiff,

INDEX NO. 652101/2024

MOTION DATE 08/13/2025

- v -

BERKSHIRE HATHAWAY SPECIALTY
INSURANCE COMPANY, TRAVELERS
CASUALTY AND SURETY COMPANY OF
AMERICA,

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

Defendants.

-----X

HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 189–97, 199–208 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”). Non-party Selendy Gay PLLC (“Selendy”) seeks a review of Judicial Hearing Officer (“JHO”) Alan C. Marin’s August 4, 2025 ruling regarding document discovery (NYSCEF Doc. No. 183) (the “Report”). Defendants oppose the Motion.

As summarized by Selendy and Defendants, this litigation “concerns excess insurance policies that the Defendants issued to Plaintiff,” which cover “reasonable and necessary” “Defense Costs” (NYSCEF Doc. Nos. 197, 206). Plaintiff sought coverage under these policies (*see* NYSCEF Doc. Nos. 6, 10, 11) in relation to two underlying lawsuits, including, as relevant here, for bills paid to Selendy, which served as Plaintiff’s counsel in one of these lawsuits. Plaintiff filed this lawsuit after Defendants refused to cover those expenses.

Previously, Defendants issued a deposition notice to Plaintiff, setting forth several topics, including the following: “Any communications between AMERRA and Selendy concerning the billing rates charged by Selendy regarding the Lender Action” (NYSCEF Doc. No. 122 [Letter Requesting Pre-Motion Conference]). In response, Plaintiff submitted a pre-motion letter seeking to move for a protective order regarding these topics (*id.*). The Court held a pre-motion conference on March 25, 2025, at which Defendants’ counsel explained that they were “seeking discovery of whether” Plaintiff had challenged the rate Selendy had charged for contract attorneys (NYSCEF

Doc. No. 127 [Transcript] at 34:20–25). The Court granted Plaintiff’s request to remove this topic from the deposition notice, observing that Defendants have “an underlying record if [they] want to challenge the unreasonableness” of these rates (*id.* at 34:7–36:10).

Nevertheless, on April 17, 2025, Defendants issued a subpoena to Selendy, seeking several types of documents related to Selendy’s use of contract attorneys in connection with Selendy’s representation of Plaintiff in the underlying litigation (*see* NYSCEF Doc. No. 192 [Subpoenas]). Plaintiff submitted a pre-motion letter seeking to quash the subpoena (NYSCEF Doc. No. 155). Subsequently, on May 1, 2025, 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.*).

JHO Marin addressed Plaintiff’s letter at a conference on May 15, 2025, at which he instructed the parties to ask Selendy to “give us an average” of the rates it paid the contract attorneys, “subject to the confidential rules” established in this case (*see* NYSCEF Doc. No. 175 at 13:18–27:20). Selendy declined to do so, and ultimately served Defendants with responses and objections to the requests in the subpoena (NYSCEF Doc. Nos. 193, 195). Consequently, Defendants filed a motion to compel (NYSCEF Doc. No. 191), which Selendy opposed (NYSCEF Doc. No. 196).

JHO Marin issued a Report on Defendants’ motion on August 4, 2025 (NYSCEF Doc. No. 183). In the Report, JHO Marin found that three of the four requests in Defendants’ subpoena were “overly broad and inconsistent with” the Court’s direction at the March 25, 2025 conference regarding Defendants’ deposition notice (*id.* at 4). However, he determined that the remaining request should be applied, but modified to read as follows: “the hourly rates charged to or paid by Selendy for” the contract attorneys, to be specifically identified “by their two or three-digit identifiers” (*id.*). JHO Marin found that these rates (as distinguished from the rates that Selendy then charged *Plaintiff* for the work of these attorneys) were relevant to the ultimate analysis of the reasonableness of Selendy’s fees, citing Defendants’ argument that “the ratio of billing rate to compensation rate is materially greater for a contract lawyer” than for attorneys employed by a law firm (*id.* at 5).

JHO Marin therefore held that disclosure was appropriate given that a court “may consider its own familiarity with the prevailing hourly rates for comparable legal work,” but “the underlying salary or payment is more challenging for the outsider to pin down” (*id.*). In support of this determination, JHO Marin cited several federal cases establishing “precedent for disclosing sums paid to a contract lawyer” (*id.* at 5–6; *see In re Wells Fargo & Co. S’holder Derivative Litig.*, 445 F. Supp. 3d 508 (N.D. Cal. 2020), *aff’d*, 845 F. App’x 563 (9th Cir. 2021); *In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 CM, 2013 WL 2450960 (S.D.N.Y. May 9, 2013)). JHO Marin further held that the cases cited by Selendy in support of its argument in favor of treating the requested information as a trade secret “do not persuade” (*id.* at 6; *see Ferolito v. Arizona Beverages USA, LLC*, 119 A.D.3d 642 (2014); *Verizon New York, Inc. v. New York State Pub. Serv. Comm’n*, 137 A.D.3d 66, 73 (2016)).

On August 8, 2025, Selendy sought leave to file a motion pursuant to CPLR § 3104(d) for review of JHO Marin's Report, which this Court granted (NYSCEF Doc. Nos. 185, 186). Selendy subsequently filed the instant Motion.

Legal Analysis

Courts have the discretion to refer discovery matters to judicial hearing officers for resolution (*see Arkin Kaplan Rice LLP v Kaplan*, 107 A.D.3d 502, 502 [1st Dept. 2013]). "CPLR 3104(d) allows for review of an order made by a referee or special master as to whether it is 'clearly erroneous or contrary to law'" (*Discover Property & Cas. Co. v. Nat. Football League*, No. 652933/2012, 2019 WL 4899032, at *3 (N.Y. Sup. Ct. Oct. 04, 2019) (citation omitted)). Consequently, the Report "shall be confirmed" so long as "the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility, since the Special Referee is considered to be in the best position to determine the issues presented" (*Nager v. Panadis*, 238 A.D.2d 135, 135–36 (1st Dept. 1997); *see also Surgical Design Corp. v. Correa*, 21 A.D.3d 409, 411 (2d Dept. 2005)).

Relevance Under New York Law

First, Selendy argues that its cost structure, and the "markup" it sets on the fees it pays for contract attorneys when billing out the work of those attorneys to its clients, is not relevant under New York law. Selendy asserts that the inquiry into whether attorneys' fees are reasonable "turns on establishing the prevailing market rate for the work in question." Selendy claims that the "markup" that a firm charges for contract attorneys "is not relevant to any of the factors" considered in this "objective, market-based analysis," and the rates *Plaintiff* paid are "all [Defendants] need to challenge reasonableness." Consequently, Selendy claims that JHO Marin erred by failing to make "any finding" as to how fees paid to contract attorneys "fit into this standard analysis." Selendy further claims that this Court "already recognized" that this line of inquiry "is not relevant to any issue in dispute," referring to the March conference.

CPLR § 3101(a) establishes that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014)). "It is the burden of the party seeking disclosure 'to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims'" (*Quinones v. 9 E. 69th St., LLC*, 132 A.D.3d 750, 750 (2d Dept. 2015)). However, this burden is low: "[a]fter the subpoenaing party has established compliance with the CPLR 3101(a)(4) notice requirement, disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action" (*Bianchi v. Galster Mgmt. Corp.*, 131 A.D.3d 558, 559 (2d Dept. 2015); *see also Kapon*, 23 N.Y.3d at 38 ("[S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.")). Ultimately, courts "possess a wide discretion to decide whether information sought is 'material and necessary' to the prosecution or defense of an action" (*Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968)).

Courts in New York consider several factors in determining whether attorneys' fees are reasonable,¹ among these being "the customary fee charged for similar services" (*see, e.g., RMP Cap. Corp. v. Victory Jet, LLC*, 139 A.D.3d 836, 839 (2016) (quoting *Diaz v Audi of Am., Inc.*, 57 A.D.3d 828, 830 (2008))). Additionally, the final determination "must be based upon a demonstration of the hours reasonably expended on the litigation and what is reasonable compensation for the attorney based upon the prevailing rate for similar work in the community" (*Victory Jet*, 139 A.D.3d at 839). Ultimately, "[t]he determination of a reasonable attorney's fee is left to the sound discretion of the trial court" (*id.* at 839–40).

Selendy fails to explain how the rates that it pays contract attorneys are not relevant to the analysis of these factors. Selendy cites only one case in support for the proposition that "the general income of a lawyer is [not] relevant" to this analysis, that "[a]n attorney's standing and experience should be the test of his worth, not his checkbook" (*Booth, Lipton & Lipton v. Cassel*, 51 Misc. 2d 853, 855 (Sup. Ct. 1966), *aff'd*, 27 A.D.2d 706 (1st Dept. 1967)). But the information sought by Defendants is not "the general income" of the contract attorneys, but the fees Selendy negotiated for the attorneys' services *in the market*, in competition with other firms (as Selendy itself acknowledges; *see* NYSCEF Doc. No. 197 at 19–20). This information clearly has more bearing on the analysis of "customary fee[s] charged for similar services" or "the prevailing rate for similar work in the community" than an individual attorney's take-home pay.² Notwithstanding Selendy's argument to the contrary, the Court need not examine a firm's cost structure when incorporating contract attorneys' fees into its analysis. Because these rates—both those paid to the contract attorneys, and those charged to Plaintiff—were established in the market, it is appropriate, under the factors set out above, to examine both sets of rates in their relation to the market generally.

Defendants asserted as much in their motion to compel, by pointing to the gap between the rates contract attorneys are typically paid and the rates that Selendy in turn charged to Plaintiff, and by citing several cases in which courts considered the fees actually paid to contract attorneys in determining "reasonable" attorneys' fees (*see* NYSCEF Doc. No. 191 at 12). Selendy does not explain how this fails to constitute "a showing that the requested information is relevant to the prosecution" of Defendants' case. Consequently, JHO Marin's determination—predicated on this "ratio of billing rate to compensation rate" and the cited cases—is supported by the record.

Selendy's argument that the Court "already recognized" that this line of inquiry "is not relevant to any issue in dispute" fares no better. Selendy points to the Court's denial of Defendants' previous discovery request at the March conference, claiming that "[i]f Defendants

¹ Defendants frame the inquiry as to whether the fees in question are "reasonable and necessary," per the terms of the insurance policies at issue in this case. Under the present record, this appears to be a distinction without a difference, particularly as Defendants themselves cited to the "reasonable" fee analyses in *Wells Fargo* and *Beacon* in support of their motion to compel (*see* NYSCEF Doc. No. 191 at 7).

² This information is, therefore, also distinct from the "comparisons of partner and associate billing rates and their respective (highly sensitive) compensation" that Selendy poses as a hypothetical analogue. As Selendy itself observes, "what is relevant to a reasonable and necessary determination is what a firm sets as its rates and the hours worked": a notion that applies with equal force to contract attorneys as to more typical law firms (*see* NYSCEF Doc. No. 207 at 6).

are not entitled to testimony concerning negotiations about the Billing Rate, then neither are they entitled to documents on that subject generally or on the ‘markup’ on that billing rate specifically.” Selendy misinterprets the record. Information regarding fee negotiations, *i.e.*, information that might indicate whether *Plaintiff* found the rates to be reasonable, clearly has no bearing on what Selendy describes as an “objective, market-based” analysis. However, this conclusion does not extend to the underlying rates themselves—which, as discussed *supra*, are negotiated in and thus reflective of the market. The Court observed at the March conference that Defendants have the benefit of a substantial “underlying record” of cases addressing what constitutes reasonable rates in the New York area for contract attorneys. But this “underlying record” includes cases—like those cited by JHO Marin—that address the fees paid to contract attorneys as part of the reasonable fee analysis. Consequently, the rates that Selendy pays to contract attorneys will clearly be relevant to the application of this “underlying record” and the determination of reasonable fees.

Applicability of Federal Class Action Case Law

Second, then, Selendy attempts to distinguish the cases relied upon by JHO Marin. *Wells Fargo* and *Beacon* both address the reasonableness of attorneys’ fee awards in federal class action suits. Selendy argues that the “competing and otherwise unrepresented interests at play” in class action suits “render the reasonable fee analysis there entirely distinct” from the reasonable fee analysis in indemnification disputes, like that at bar, for fees “negotiated and paid by private, represented parties.” However, Selendy ultimately fails to explain how the conditions guiding courts’ evaluations of attorneys’ fees awards in class action suits are so inapplicable to the present dispute as to render the cases cited by JHO Marin inapposite.

Selendy observes that, in the class action context, “in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage” (*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002)). At that stage, the fact that plaintiffs’ recovery “could be diminished” by an excessive attorneys’ fee award produces a conflict of interest (*DeValerio v. Olinski*, 673 F. App’x 87, 92 (2d Cir. 2016)). This conflict is aggravated by the fact that plaintiffs in these cases typically “are not fully informed” nor “able to negotiate collectively, or at arm’s length” with their counsel (*Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). As a result, courts in these cases “have an independent obligation to ensure that the award . . . is reasonable, even if the parties have already agreed to an amount” (*Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1045 (S.D. Cal. 2015)).

Similar concerns apply here. Defendants’ liability under the insurance policies at issue would, necessarily, be increased by an excessive bill for attorneys’ fees in the litigation underlying this action. But nothing in the record suggests that Defendants had any opportunity to negotiate the fees Plaintiff paid for Selendy’s services, at arm’s length or otherwise. A similar conflict of interest therefore arises here, and in all cases in which “one party [is required] to pay another party’s attorneys’ fees” (*Solow Mgmt. Corp. v. Tanger*, 19 A.D.3d 225, 226 (1st Dept. 2005)). The fact that the fees in this case were, as Selendy argues, established by “a private client who directly negotiate[d]” the fees does not alter this analysis (*see RAD Ventures Corp. v. Artukmac*, 31 A.D.3d 412, 414 (2d Dept. 2006) (holding that even where a contract in dispute contains an agreement for

an award of attorneys' fees, the award "must be reasonable and not excessive").³ Consequently, in such cases, the court "always has the authority and responsibility to determine that the claim for fees is reasonable" (*Solow*, 19 A.D.3d at 226)—an obligation parallel to that binding courts in federal class action cases.

The parallels do not end there. Federal courts, when "determining a reasonable common fund fee," are guided by the following criteria: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations" (*Goldberger*, 209 F.3d at 50). Furthermore, the rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," *i.e.*, "the prevailing market rate" (*Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Compare these factors to those considered by New York courts in assessing whether attorneys' fees are reasonable:

[T]he difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; [and] the results obtained and the responsibility involved.

Bankers Fed. Sav. Bank FSB v. Off W. Broadway Devs., 224 A.D.2d 376, 377 (1st Dept. 1996). While not a one-to-one match, the factors to be examined in both cases are clearly parallel. Indeed, the Court of Appeals seems to have recognized as much, in observing that "[l]ong tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on" the factors set out above (*In re Freeman's Est.*, 34 N.Y.2d 1, 9 (1974) (emphasis added)).

Relevance of the Particular Cases Cited in the Report

Failing, then, to distinguish the cases relied upon by JHO Marin as a general matter, Selendy seeks to distinguish them individually. JHO Marin relied upon the following excerpt from *Wells Fargo*:

The courts have not spoken with one voice concerning the proper treatment of contract attorney costs in the calculation of a lodestar. Many courts hold that contract attorneys' hours should be billed at market rates and included in the lodestar without regard to the wage actually paid to the contract attorney.

Another approach is to allow the actual cost of the contract attorneys to Co-Lead Counsel only as a cost item and not to include it in their lodestar. . . . A third approach is to include in the lodestar the hourly rate actually paid to

³ Selendy appears to extend this argument further, suggesting that "the prevailing market rate . . . is the only appropriate and objective inquiry" (NYSCEF Doc. No. 197 at 16). While the prevailing market rate is certainly relevant, the analysis is not so constrained (*see Victory Jet*, 139 A.D.3d at 839 (setting out factors)).

contract attorneys, increasing that rate by a certain amount to account for overhead.

Wells Fargo, 445 F. Supp. 3d at 527–29. Selendy argues that the court in *Wells Fargo* only “defaulted to the rate actually paid” the contract attorneys because it determined that “class counsel failed to meet its burden” to establish the market rate, such that the court had no record allowing it to determine the appropriate market rate for the attorneys (NYSCEF Doc. No. 197 at 16–17; see *Wells Fargo*, 445 F.Supp.3d at 529–31). However, the burden of proof has no bearing on the present dispute, which concerns merely whether the rates paid to contract attorneys are *relevant* to the reasonableness analysis. The court in *Wells Fargo* indisputably found this to be the case, as it incorporated the contract attorneys’ time at the rate they were paid, rather than the rate at which they were billed out (*Wells Fargo*, 445 F.Supp.3d at 527–31).

JHO Marin also quoted the following passage from *Beacon*:

There is little excuse in this day and age for delegating document review (particularly primary review or first pass review) to anyone other than extremely low-cost, low-overhead temporary employees (read, contract attorneys)—and there is absolutely no excuse for paying those temporary, low-overhead employees \$40 or \$50 an hour and then marking up their pay ten times for billing purposes.

Beacon, 2013 WL 2450960, at *18. Selendy argues that the court in *Beacon* merely criticized the practice of “marking up” the pay of contract attorneys when billing clients, but did not actually adjust the fees for any contract attorneys based on the rate they were paid. Selendy’s characterization is accurate, but incomplete (*id.* at *18–19). The court in *Beacon* further stated that it only declined to reduce the fees charged for the attorneys involved (implicitly including contract attorneys) because it “did not include any . . . limitation” on hourly rates for document reviewers when appointing class counsel, and considered it “unfair to impose such a rule *ex post facto*” (*id.*). Thus, the court in *Beacon* clearly contemplated the prospect of reducing the markup on fees paid to contract attorneys, and only declined to do so for reasons that do not apply here.

Separately, Selendy cites several cases that reject proposals to examine the markup on fees paid to contract attorneys (see, e.g., *In re AOL Time Warner S’holder Derivative Litig.*, No. 02 CIV. 6302 (CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (“The Court should no more attempt to determine a correct spread between the contract attorney’s cost and his or her hourly rate than it should pass judgment on the differential between a regular associate’s hourly rate and his or her salary.”); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 395 (S.D.N.Y. 2013) (same); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn.), *aff’d*, 355 F. App’x 523 (2d Cir. 2009) (observing that “under ABA Formal Opinion No. 00–420, an attorney may bill the contract attorney’s charges to the client as fees rather than costs” where “the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own”). While persuasive, none of these cases are binding on this Court. Nor are they even uniformly in Selendy’s favor (see, e.g., *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *18–19 (N.D. Cal. Aug. 17, 2018) (commending “the practice of treating contract attorney work as a cost,” *i.e.*, without markup, and ultimately setting a rate far below the sought marked-up rate given “how striking the markup” was)).

In fact, the range of approaches identified in the cases cited herein serves to reinforce the observation of the court in *Wells Fargo* that “[t]he courts have not spoken with one voice concerning the proper treatment of contract attorney costs” when calculating reasonable attorneys’ fees (*Wells Fargo*, 447 F.Supp.3d at 527; *see also Anthem*, 2018 WL 3960068, at *18 (same)). In the absence of binding authority establishing that the fees paid to contact attorneys are *not* relevant to the reasonable fee analysis, and relevant case law justifying several approaches to the inclusion of these fees in the analysis, JHO Marin reasonably relied upon the scant authority available to support his determinations. This Court cannot find, under these circumstances, that JHO Marin’s determination is “clearly erroneous or contrary to law.”

Whether the Rates Warrant Trade Secret Protection

Finally, Selendy argues that JHO Marin erred in finding that the rates Selendy pays to contract attorneys, as well as the attendant contractual terms, are not trade secrets. “[T]here is only a minimal initial burden where a disclosure objectant asserts that the subject documents contain trade secrets” (*Linderman v. Pennsylvania Bldg. Co.*, 289 A.D.2d 77, 78 (1st Dept. 2001)). New York courts apply a “fact-intensive inquiry” in determining whether commercial information constitutes a trade secret: “First, it must be established that the information in question is a ‘formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it’” (*Verizon*, 137 A.D.3d at 73). Second, “if the information fits this general definition,” then courts consider the following factors in determining “whether the alleged trade secret is truly secret”:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the business to guard the secrecy of the information;
- (4) the value of the information to the business and its competitors;
- (5) the amount of effort or money expended by the business in developing the information; [and]
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 72–73. Selendy asserts that the rates it pays contract attorneys, as well as “attendant negotiations and contracts,” are a compilation of information; that the information is known only to Selendy, the contracted attorneys, and Selendy’s contracting counterparties; that the contracts are confidential, such that Selendy’s competitors could not obtain this information absent a breach of confidentiality provisions or through legal process; and the information is valuable, as competitors could use it to undercut Selendy when negotiating with contract agencies.

To be sure, JHO Marin’s treatment of the issue is brief: he merely observes that the two cases cited by Selendy in support of its claim for trade secret protection “do not persuade.” Nevertheless, his conclusion is accurate. In the first case, *Ferolito*, the Second Department found that a nonparty had “demonstrated” that certain discovery demands “sought documents that contained one or more trade secrets” (119 A.D.3d at 643). But the available record in *Ferolito* does not establish what the information in question was, let alone how the nonparty in question had established that such information constituted a trade secret. In the second case, *Verizon*, the Third Department denied disclosure on the basis that the information in question was a trade secret—but in the context of a Freedom of Information Law (FOIL) request, not a subpoena (137

A.D.3d at 72). Consequently, Selendy can, and does, only cite these cases for the general standards they assert.

Selendy's attempt to apply these standards to its contracting information also does not persuade. First, construing a concept as generic as "rates and attendant negotiations and contracts" as warranting trade secret protection would appear to entail "an overly expansive definition of 'trade secret' so as to encompass nearly all confidential business documents" (*Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 (3d Dept. 2003) (finding that "pricing data and market strategies . . . would not constitute trade secrets")). Second, even were the Court to construe this information as a "compilation of information" as Selendy proposes, Selendy fails to establish how, exactly, the alleged trade secret is truly secret. Selendy only sets forth a series of brief, conclusory assertions as to, *e.g.*, the extent to which the information in question is known outside of Selendy or the value of the information. Selendy makes no assertions at all regarding several of the factors set forth above: the extent to which the information is known by employees within Selendy; the extent of measures taken by Selendy to guard the secrecy of this information (such as specific confidentiality terms in its contracts); or the amount of effort or money expended in developing the information.

In sum, Selendy fails to present meaningful facts in support of its argument, despite its recognition that the determination of the existence of a trade secret is a "fact-intensive" inquiry. Consequently, there is nothing in the record to suggest that JHO Marin's determination that the information at issue does not warrant trade secret protection is erroneous (*see, e.g., Linderman*, 289 A.D.2d at 78 (declining to find that defendant had established the existence of trade secrets where defendant's claim was based solely on "the affidavit of defendant's general partner" which did "not include non-conclusory assertions"); *Mann ex rel. Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 31–32 (1st Dept. 2006) (finding that defendant's "conclusory assertion[s]" failed to establish "that the information at issue is in fact a trade secret"); *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 (3d Dept. 2003) (finding plaintiff's "self-serving, entirely conjectural" claims to be insufficient to establish that information in question constituted a trade secret)).⁴

In conclusion, the Court finds that JHO Marin's determination to grant the limited disclosure set out in the Report is supported by the record, and not clearly erroneous or contrary to law. Notwithstanding Selendy's concerns to the contrary, this does not mean that JHO Marin's determination, or this Order, requires that the Court set recovery for the contract attorneys' services at the rates Selendy itself paid. It also does not mean that the Court must examine the calculations underlying Selendy's markup, such as overhead or insurance costs, much less attempt to identify

⁴ JHO Marin further observed that the information in question "will be subject to" the confidentiality order entered in this proceeding (NYSCEF Doc. No. 183, at 6; NYSCEF Doc No. 82). Selendy acknowledges that relevant case law indicates that disclosure even of trade secrets may be appropriate where a protective order is in place "sufficient to protect the disclosing party" (NYSCEF Doc. No. 207 at 15; *see, e.g., AGH Distributors, Inc. v. Silvertone Fasteners, Inc.*, 105 A.D.2d 648, 650 (1st Dept. 1984); *In re Currency Conversion Fee Antitrust Litig.*, No. M 21-95, 2004 WL 848171, at *1 (S.D.N.Y. Apr. 21, 2004); *Lent v. Signature Truck Sys., Inc.*, No. 06CV569S, 2010 WL 1707998, at *5 n.5 (W.D.N.Y. Apr. 26, 2010)). Selendy's conclusory assertion that disclosure of its information "will cause harm notwithstanding any Protective Order," under the hypothesis that "the underlying information may likely become public," does not avail; Selendy altogether fails to explain how the confidentiality order here is insufficient (*see, e.g., Kiss Nail Prods., Inc. v. Lashify, Inc.*, No. 24 MISC. 25 (AT), 2024 WL 1466815, at *3 (S.D.N.Y. Apr. 4, 2024) ("Although a protective order is not a panacea against disclosure, 'a court should not lightly assume that parties will violate their obligations imposed on them by a duly entered protective order on the court's docket.'")).

an appropriate profit margin. The Report only establishes that the rates paid by Selendy for its contract attorneys are relevant in the ultimate evaluation of what fees are “reasonable and necessary” under the circumstances—not how they are to be applied in that evaluation. This application may ultimately entail some degree of markup, or it may not (*see, e.g., Wells Fargo*, 445 F.Supp.3d at 527–29 (identifying several approaches to the issue, including “increasing that rate” paid to contract attorneys “by a certain amount to account for overhead”); *Anthem*, 2018 WL 3960068, at *18–20 (setting a rate that included a limited markup, recognizing that “counsel may be entitled to a reasonable markup to cover costs such as supervision and overhead”)). The Court makes no determination at this time as to *how* these rates will be incorporated into the overall reasonableness analysis.⁵

Accordingly, it is

ORDERED that the Court confirms the Report of JHO Marin (NYSCEF Doc. No. 183); and it is further

ORDERED that non-party Selendy Gay PLLC’s Motion is denied for the reasons stated herein and in JHO Marin’s Report.



September 25, 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 checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

⁵ Given that the analysis of reasonable attorneys’ fees does turn, at least in part, on how the rates at issue compare to the market for similar services, the Court finds merit in Selendy’s contention that any information on the rates it pays to contract attorneys is meaningful primarily in the context of other firms’ comparable billing practices (*see* NYSCEF Doc. No. 207 at 10). However, the Court leaves that issue for the ultimate reasonableness analysis, which will be further framed by other concerns, such as burden of proof.