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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Plaintiff,

-against-

BANK OF AMERICA, N.A.,

Defendant.

TRIAL/IAS PART: 25

NASSAU COUNTY

Index No: 020580-07
Motion Seq. Nos: 3 & 4
Submission Date: 10/9/09

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BANK OF AMERICA, N.A.,

Third-Party Plaintiff,

-against-

MICHAEL CICCARELLI,

Third-Party Defendant.

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The following papers have been read on these motions:

Notice of Motion.....x
Affidavit in Support (H. Albee).....x
Affidavit in Support (A. Einstein) and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support/Opposition.....x
Affirmation of M. Hannasch-Scott.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition/Reply..... x
Memorandum of Law in Further Support.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Travelers Casualty and Surety Company of America on July 20, 2009, and 2) the motion filed by Defendant Bank of America, N.A. on August 25, 2009, both of which were submitted on October 9, 2009. For the reasons set forth below, the Court 1) denies Plaintiff's motion to compel in its entirety; and 2) grants Defendant's motion for summary judgment in part and denies it in part. The Court denies Defendant's motion for summary judgment with respect to the first cause of action in the Complaint, sounding in negligence, and grants Defendant's motion for summary judgment and dismissal of the remaining causes of action in the Complaint.

BACKGROUND

A. Relief Sought

Plaintiff Travelers Casualty and Surety Company of America ("Travelers") moves for an Order, pursuant to CPLR § 3124, compelling Defendant Bank of America, N.A. ("BOA") to 1) supplement its responses to Travelers' First Request for Production of Documents; and 2) respond fully and completely to Travelers' Second Request for Production of Documents and Second Set of Interrogatories. Travelers also seeks an Order requiring BOA to pay Travelers' reasonable counsel fees associated with making this motion.

Defendant BOA opposes Travelers' motion, and cross moves, pursuant to CPLR § 3212, for an Order granting summary judgment and dismissing the Complaint. Travelers opposes BOA's motion.

B. The Parties' History

The Complaint alleges as follows:

Travelers is the insurer of Amana Tool Corp. ("Amana Tool") and its subsidiaries Austin Mini Storage, Necharon Realty Corp. and A.N. Glory Associates, L.L.C. ("A.N. Glory"). Amana Tool and its subsidiaries are corporations organized and existing under the laws of the State of New York.

At times relevant to this action, third-party Defendant Michael Ciccarelli ("Ciccarelli") was the controller of Amana Tool and Michelle Hannasch was the assistant controller. In that

capacity, Ciccarelli 1) reviewed Amana Tool's banking statements; 2) prepared checks to pay invoices or transfer funds between Amana Tool and its subsidiaries; and 3) interacted with BOA concerning bank transactions of Amana Tool and its subsidiaries.

Prior to November 2004, Amana Tool maintained its business checking accounts at BOA. One of those accounts was A.N. Glory's Small Business Simplified Checking Account bearing account number 9427-089893 ("A.N. Glory Account"). In or around November 2004, Amana Tool decided to close its three accounts at BOA ("Accounts") and transfer those funds to a different financial institution, and instructed Ciccarelli to complete that process. Ciccarelli contacted BOA and directed them to close those Accounts and complete a wire transfer of the funds in the Accounts to the new accounts. Plaintiff alleges that, "[t]hrough these instructions, Amana tool made clear to BOA that it had terminated its banking relationship with BOA" (Complaint at ¶ 12).

Plaintiff alleges that BOA properly closed two of the Accounts but failed properly to close the A.N. Glory Account. As a result, BOA improperly continued to charge service fees to the A.N. Glory Account, and obtained a benefit from those fees. Following the allegedly improper closing of the A.N. Glory Account, BOA sent a December 2004 bank statement ("Statement") regarding that Account to Amana Tool, which included an advertisement for BOA's on-line business banking service with free unlimited on-line bill payment. The Statement reflected a negative balance of $50 on the A.N. Glory Account, related to wire transfer and other fees associated with the closing of this Account.

Ciccarelli received the Statement and thereby learned that BOA had not closed the A.N. Glory Account. Ciccarelli allegedly developed an embezzlement scheme whereby he deposited checks into the A.N. Glory Account without the knowledge of Amana Tool or A.N. Glory. He then used those funds for his personal benefit. Plaintiff alleges that Ciccarelli was improperly able to convert these funds to his own use because of certain conduct by BOA, including the following:

BOA allegedly permitted Ciccarelli to establish on-line banking with on-line bill paying for the A.N. Glory Account without requiring him to obtain the authorization of the account signatories. BOA also issued an automated teller machine ("ATM") card to Ciccarelli for the

A.N. Glory Account, even though no authorized signatory had ever requested such a card. In addition, as part of the on-line banking service, BOA provided Ciccarelli with banking statements on-line, further preventing detection of Ciccarelli's alleged fraud. As a result, Ciccarelli was able to gain access to those funds which he used to pay his own personal expenses.

Plaintiff alleges, further, that BOA improperly accepted certain other checks for deposit, including three checks payable to Amana and two checks drawn by Amana and payable to Smith Barney Corp. totaling $255,379.37 ("Checks"). Ciccarelli allegedly received these Checks, forged the payees' endorsements, wrote endorsement restrictions ("For Deposit Only" and "Deposit Only") and the A.N. Glory Account number on the Checks and deposited those Checks into the A.N. Glory Account. Plaintiff alleges that it was not commercially reasonable for BOA to accept these Checks for deposit into the A.N. Glory Account in violation of the restrictive endorsements.

Upon discovering the loss, Amana Tool notified BOA of the alleged embezzlement scheme, the allegedly fraudulent deposits and withdrawals, and the Checks that BOA accepted in violation of the restrictive indorsements, and submitted a claim to Travelers pursuant to its fidelity bond. Travelers, upon Amana Tool's execution of a Release and Assignment, paid the sum of $536,703.50 in connection with that claim. Pursuant to the Release and Assignment, Travelers was the assignee of Amana Tool's rights and claims against any person or organization responsible for some or all of the loss that Amana Tool suffered as a result of the alleged embezzlement. By virtue of its payment to Amana, Travelers is subrogated to Amana Tool's claims against BOA.

The Complaint contains four causes of action [1] which are as follows: 1) negligence, 2) conversion (related to Amana Tool as payee of certain checks), 3) money had and received (related to Amana Tool as payee of certain checks), 4) conversion, and money had and received (related to Amana Tool as the drawer of certain checks), and 5) breach of fiduciary duty, and aiding and abetting the breach of fiduciary duty (related to BOA's breach of its fiduciary duty to

[1] Both the fourth and fifth causes of action in the Complaint allege two theories in the same cause of action.

Amana Tool, and BOA's alleged aiding and abetting of Ciccarelli's breach of his fiduciary duty to Amana tool).

BOA thereafter filed a Third-Party Complaint against Ciccarelli in which it alleges that Ciccarelli only requested that BOA close two accounts, and did not request that the A.N. Glory Account be closed. The Third-Party Complaint contains four third-party claims in which BOA contends that 1) if BOA is liable to Travelers, then it is entitled to indemnification from Ciccarelli; 2) if liability is apportioned, then Ciccarelli is liable to BOA for the amount in excess of BOA's share of the judgment; and 3) BOA is entitled to judgment against Ciccarelli for breaches of warranties on presentment and transfer, and breach of his contract with BOA.

With respect to Amana Tool's request that BOA close the Accounts, BOA's Cross Motion includes as an exhibit its Response to Plaintiff's First Request for Production of Documents (Ex. D to the Cross Motion). That Response includes a copy of a letter dated November 4, 2004 on A.N. Glory letterhead ("Letter"). That Letter, addressed to BOA, 1) requested BOA to wire the remaining balance in A.N. Glory's checking account to an account at JP Morgan Chase Bank; 2) directed the recipient to contact Ciccarelli regarding any questions; and 3) contained the signature of Aaron Einstein, the President of A.N. Glory ("Einstein"). The letter also contained handwritten notes which appear to read "Done the wire transfer..WT Form signed and filed," as well as handwritten numbers.

In opposition to BOA's motion for summary judgment, Travelers provides an Affidavit in Support of Einstein. Einstein affirms that he sent the Letter to BOA for the purpose of closing the A.N. Glory Account, and that he does not recognize the handwritten notes on the Letter. He affirms, further, that on November 17, 2004, all funds were transferred out of the A.N. Glory Account, resulting in a balance of negative $50.00, and provides a copy of the corresponding November 30, 2004 account statement. BOA, however, failed to close the A.N. Glory Account.

Einstein affirms, further, that the December 2004 bank statement for the A.N. Glory Account continued to show a negative balance of $50.00, and provides a copy of that bank statement. Einstein submits that BOA, in light of its ongoing business relationship with Amana Tool, should have known that Amana Tool and its subsidiaries would not have maintained a business checking account with a very low, or negative, balance. Moreover, with respect to

BOA's providing Ciccarelli with on-line banking services, Einstein affirms that A.N. Glory never had on-line services at BOA, and never requested such a service. Einstein also affirms that, on or about November 17, 2004, Amana Tool asked BOA to close its other two Accounts, and that BOA properly closed those accounts. Thus, Einstein believed that BOA had properly closed all three Amana Tool Accounts.

Travelers also provides an Affirmation of Michele Hannasch-Scott ("Hannasch"), the current Controller of Amana Tool. Scott affirms that, during the 2004-2007 embezzlement period, she was the Assistant Controller for Amana Tool. In that capacity, she was aware that neither Amana Tool nor its related entities had credit cards, loans or lines of credit with BOA that would have been paid through the A.N. Glory Account. She also knew that neither Amana Tool nor its related entities, including A.N. Glory, had any on-line banking services, including on-line bill paying, with BOA. Finally, she is aware that BOA closed the other two Accounts at or about November 17, 2004, as Einstein requested. Thus, she also believed that BOA had closed the A.N. Glory Account, as Einstein requested.

Also in support of its motion to compel, Travelers provides an Affidavit of counsel ("Counsel") who submits that BOA has not fully responded to Travelers' First Request for the Production of Documents on BOA ("First Request"), Second Request for the Production of Documents ("Second Request") and Second Set of Interrogatories (Second Interrogatories). Counsel's objections are essentially the following: 1) BOA has produced no documents or specific information relating to on-line banking, on-line bill payments or on-line statements for the A.N. Glory Account, which are relevant to Travlers' claims regarding BOA's improper establishment of on-line services for the A.N. Glory Account; and 2) BOA has produced no documents or specific information relating to the closure of the other two Accounts, which Counsel argues is relevant to Travelers' assertion that BOA was asked to close the A.N. Glory Account but negligently failed to do so.

BOA submits that it is entitled to summary judgment dismissing the Complaint and, therefore, the Court should deny Travelers' motion to compel as moot. BOA also submits that it has complied with all appropriate discovery demands.

BOA notes, preliminarily, that Counsel failed to annexed the discovery demands at issue

to Travelers' motion to compel. BOA submits that these demands seek information that is overbroad, proprietary, confidential and not discoverable (Aff. in Support of Cross Motion). For example, with respect to Travelers' request for information relating to BOA's customer relationship with Ciccarelli, BOA submits that the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. § 6801, *et seq.*, prohibits the distribution of that information. BOA's counsel affirms that she advised Counsel of these restrictions, who nonetheless made additional requests for similar information whose disclosure was similarly prohibited. BOA provides its Response to the First Request, in which BOA made specific reference, in ¶ 18 of the Response, to governmental prohibitions on the disclosure of a Suspicious Activity Report ("SAR").

In its Response to the First Request, BOA provided responses to each request, as well as supporting documentation including the Letter, redacted bank documents and copies of relevant checks. BOA submits that Travelers' request for information related to accounts of other non-party subsidiaries of Amana Tool is unduly burdensome.

The Court has also reviewed BOA's Response to the First Interrogatories, which lists every interrogatory as well as its response. That Response contains information that is responsive to the Interrogatories, as well as objections based on the particular interrogatory being overbroad, unduly burdensome, vague and ambiguous and requesting confidential and proprietary material not calculated to lead to admissible evidence.

C. The Parties' Positions

BOA submits that it is entitled to summary judgment dismissing the Complaint because 1) there is no basis to hold BOA responsible for Amana's negligence in light of the facts that a) Ciccarelli's actions were authorized; and b) $428,000 of the sums he allegedly diverted were checks made payable to A.N. Glory and deposited into a legitimate A.N. Glory bank account; 2) Travelers may not assert a claim for conversion as to bank funds; 3) the claim for money had and received cannot be sustained because BOA did not retain the funds at issue; and 4) BOA did not owe a fiduciary duty to A.N. Glory as the relationship between BOA and its customer was purely contractual.

BOA also argues that, even if the Court were to entertain Travelers' motion to compel, it must deny that motion. BOA submits that it provided appropriate responses to Travelers'

discovery demands, and that their additional demands are burdensome, irrelevant and/or seek privileged material.

Travelers submits that BOA has not fully responded to Travelers' discovery requests, and has failed to establish an applicable privilege or to produce a privilege log to support its withholding of documents that, Travelers submits, are material and necessary to the instant action.

RULING OF THE COURT

A. The Court Will Address BOA's Cross Motion for Summary Judgment.

Travelers submits that BOA has not fully complied with Travelers' discovery requests. While the court has discretion to delay determination of a summary judgment motion to permit further discovery where evidence necessary to justify opposition is unavailable, CPLR § 3212(f); *Lambert v. Bracco*, 18 A.D.3d 619 (2d Dept. 2005); *Stoian v. Reed*, 66 A.D.3d 1276 (3d Dept. 2009); *Clochessy v. Gagnon*, 58 A.D.3d 1008, 1010 (3d Dept. 2009), the non-moving party must produce some evidentiary basis establishing that further discovery may lead to relevant evidence. *Ruttura & Sons Const. Co. v. J. Petrocelli & Sons Const., Inc.*, 257 A.D.2d 614, 615 (2d Dept. 1999), *lv. app. dism. in part, den. in part* 93 N.Y.2d 956 (1999); *Wyllie v. District Attorney of County of Kings*, 2 A.D.3d 714 (2d Dept. 2003). A party's "mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered" during discovery is insufficient to delay determination on the issue of summary judgment. *Simpson v. City of New York Transit Authority*, 44 A.D.3d 930 (2d Dept. 2007), quoting *Anderson v. Rehabilitation Programs Foundation, Inc.*, 240 A.D.2d 524 (2d Dept. 1997), *lv. app. den.* 90 N.Y.2d 810 (1997). Here, Travelers has not provided an evidentiary basis suggesting, much less establishing, that additional disclosure might lead to relevant evidence. Thus, no basis exists to delay determination of the summary judgment motion.

B. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant

tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Issue finding, as opposed to issue determination, is the key to summary judgment. *Kris v. Schum*, 75 N.Y.2d 25 (1989). Even the color of a triable issue forecloses the remedy of summary judgment. *Rudnitsky v. Robbins*, 191 A.D.2d 488, 489 (2d Dept. 1993).

C. BOA is not Entitled to Summary Judgment on the Negligence Claim

Applying these principles to the case at bar, the Court concludes that BOA is not entitled to summary judgment on its cause of action based upon negligence.

BOA asserts that it was never directed to close the A.N. Glory account as evidenced by Einstein's November 4, 2004 Letter. The Letter does not specifically ask or direct BOA to close that Account, and there was no indication that Amana Tool intended to terminate its banking relationship with BOA. BOA further claims that, had it not been for the negligence of Amana and its subsidiaries in supervising their employees and reviewing their financial information, the alleged scheme would not have occurred.

In opposition, Travelers submits that, by not closing the A.N. Glory Account, BOA knowingly participated in Ciccarelli's breach of his fiduciary duty to Amana Tool. Travelers asserts that the A.N. Glory Account held at BOA was no longer a valid company account as account funds should have been transferred out of BOA and wired to JPMorgan Chase Bank; and the "negative" balance of the A.N. Glory account evidences A.N. Glory's intent to close this account. In addition, Einstein maintains that Ciccarelli was never given any authority to initiate on-line bill payments, on-line statements or any other interest based services in relation to any account held by Amana or its related entities at BOA. Travelers alleges that BOA was aware that Ciccarelli was never an authorized signer on the A.N. Glory Account due to the fact that BOA maintained the original signature cards and any updates thereto and the A.N. Glory Account was never set up for on-line banking services.

Travelers further alleges that BOA improperly accepted checks made payable to A.N. Glory for deposit into an account which it failed to close, and which were not payable to A.N. Glory and which bore only the restrictive, albeit forged, indorsements of the named payees. As a result of BOA's improper and unauthorized actions, Amana suffered losses in excess of

$500,000.00.

The Court's decision is governed by *B.D.G.S. v. Balio*, 8 N.Y.3d 106, 113 (2006). There, the Court of Appeals held that compliance with restrictive endorsements cannot be considered commercially reasonable as a matter of law under all circumstances. Based upon the record submitted, the Court concludes that an issue of fact exists as to whether BOA complied with reasonable commercial standards as a matter of law, and denies BOA's motion for summary judgment on the cause of action for negligence.

D. BOA is Entitled to Summary Judgment on the Remaining Causes of Action

To establish a conversion claim, a plaintiff must demonstrate that it had an immediate superior right of possession to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff's rights. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dept. 1992). Because BOA's possession of the funds was authorized, Travelers has not made this showing. Accordingly, the Court grants summary judgment as to the conversion cause of action.

An action for money had and received requires a showing that: (1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of the money; and (3) under principles of good conscience defendant should not be allowed to retain that money. *Board of Education of Cold Spring Harbor Cent. School Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 (1991), *app. dism.* 82 N.Y.2d 653 (1993). Further, a cause of action for money had and received does not lie where there is an express contract between the parties. *Phoenix Garden Rest., Inc. v. Chu*, 245 A.D.2d 164 (1st Dept. 1997). The Court concludes that this cause of action does not survive because, *inter alia*, there is no showing that BOA benefitted from the receipt of the money. Moreover, the contractual debtor-creditor relationship between Amana Tool and BOA necessitates dismissal of plaintiff's claims for conversion and money had and received. *See Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 643 (E.D.N.Y. 2000); *Fesseha v. TD Waterhouse Investor Serv., Inc.*, 305 A.D.2d 268 (1st Dept. 2003); *Bank Leumi Trust Co. of N.Y. v. Block 3102 Corp.*, 180 A.D.2d 588 (1st Dept. 1992).

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by defendant, and damages directly caused by that misconduct. *Barrett v. Freifeld*, 64 A.D.3d 736 (2d Dept. 2009); *Kurtzman v. Bergstol*, 40 A.D.3d 588 (2d Dept. 2007). A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms length business relationship does not give rise to a fiduciary obligation. *WIT Holding Corp. v. Klein*, 282 A.D.2d 527 (2d Dept. 2001); *AHA Sales, Inc v. Creative Bath*, 58 A.D.3d 6, (2d Dept. 2008). Here, there is no evidence that the transactions in question took place in any context other than an arms length business relationship. Therefore, no fiduciary relationship existed and summary judgment is warranted on that claim.

Plaintiff's cause of action for aiding and abetting a breach of fiduciary duty is also insufficient. A cause of action for aiding and abetting a breach of fiduciary duty requires proof that: (1) there was a breach by a fiduciary of obligations to another; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered damage as a result of the breach. *AHA Sales, Inc. v. Creative Bath, supra*, quoting *Kaufman v Cohen,* 307 A.D.2d 113 (1st Dept. 2003). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *Id.* The Court concludes that this cause of action fails because the facts alleged do not demonstrate BOA's knowledge of Ciccarelli's breach of his fiduciary duty to Amana Tool.

In view of the foregoing, the Court dismisses Plaintiff's causes of action for conversion, money had and received, and breach of, and aiding and abetting breach of, fiduciary duty.

E. Travelers has not Demonstrated the Inadequacy of BOA's Discovery Responses

CPLR § 3101(a) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406-407 (1968). The scope of disclosure is "open and far-reaching," *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954 (1998); *Allen v. Crowell-Collier Pub. co.*, 21 N.Y.2d 403, 406 (1968), and the resisting party must establish its

immunity from the discovery request, *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

Nevertheless, "unlimited disclosure is not required," *Smith v. Moore*, 31 A.D.3d 628 (2d Dept. 2006); *Auerbach v. Klein*, 30 A.D.3d 451 (2d Dept. 2006), nor will "*carte blanche* demands" be honored, *European American Bank v. Competition Motors, Ltd.*, 186 A.D.2d 784, 785 (2d Dept. 1992); *Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d 531 (2d Dept. 2007), particularly where the demands at issue would attach "undue attention" to collateral matters, *Blittner v. Berg and Dorf*, 138 A.D.2d 439, 440-441 (2d Dept. 1988), or where they are overly broad, unduly burdensome, or lacking in specificity, *Paradis v. F.L. Smithe Machine Co., Inc.*, 25 A.D.3d 594, 595 (2d Dept. 2006); *Brandes v. North Shore University Hosp.*, 1 A.D.3d 550 (2d Dept. 2003]; *Bettan v. Geico Gen. Ins. Co.*, 296 A.D.2d 469, 471 (2d Dept. 2002), *lv. app. dism.* 99 N.Y.2d 552 (2002). Significantly, the court possesses broad discretion to limit discovery in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, and also to determine what is material and necessary as that phrase is used in CPLR § 3010(a). *Auerbach v. Klein*, 30 A.D.3d 451, 452 (2d Dept. 2006).

Moreover, although the failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by CPLR § 3122 forecloses inquiry into the propriety of the requests made, *Saratoga Harness Racing Inc. v. Roemer*, 274 A.D.2d 887 (3d Dept. 2000); *Otto v. Triangle Aviation Services, Inc.*, 258 A.D.2d 448 (2d Dept. 1999), a party need not provide responses to demands that are, *inter alia*, palpably improper. *Saratoga Harness Racing, Inc. v. Roemer, supra; Holness v. Chrysler Corp.*, 220 A.D.2d 721 (2d Dept. 1995); *Zambelis v. Nicholas*, 92 A.D.2d 936 (2d Dept. 1983). Material is palpably improper if it is of a confidential and private nature, irrelevant to the issues in the case, or overbroad. *Shapiro v. Central General Hosp., Inc.*, 171 A.D.2d 786, 787-8 (2d Dept. 1991).

Generally, BOA's objections to the discovery demands rest upon the assertion that Travelers' notice for discovery and inspection is palpably improper and overbroad in that it seeks privileged and/or irrelevant materials. Judge Demarest's decision in *Alpha Funding v. Continental Funding*, 17 Misc. 3d 959, 960 (Sup. Ct. Kings Cty., 2007) provides some guidance for this Court in addressing BOA's objections. In *Alpha Funding*, the court addressed plaintiff

and third-party defendant's motion to impose sanctions on defendants for their refusal or failure to respond to certain discovery requests. The defendants argued that the GLBA, and corresponding regulations, prohibited them from disclosing the information in question. *Id.* at 964. The court noted that the GLBA requires a financial institution to give its customers notice and an opportunity to opt out of disclosure before releasing any customer's "nonpublic personal information to a nonaffiliated third party." *Id.*, citing 15 U.S.C. § 6802(b)(1). Judge Demarest noted that "[w]hile no New York court has yet addressed the issue of whether the disclosure of nonpublic personal information to a nonaffiliated third party to comply with civil discovery is permitted by [the GLBA], the courts that have addressed it have concluded that the GLBA should not bar a proper discovery request so long as the disclosure is made subject to an appropriate protective order [citations omitted]." *Id.* at 966. The court adopted the reasoning of those authorities holding that there is a "judicial process" exception to the GLBA, and concluded that the GLBA permits the use of judicial process expressly authorized by statute, such as the CPLR. *Id.* at 966-967. Of particular importance to the present case, Judge Demarest nevertheless held that her finding that the GLBA did not preclude disclosure did not permit plaintiff and third party defendant to obtain discovery that is improper under the CPLR, such as requests that are overbroad, burdensome, lacking in specificity or irrelevant. *Id.* at 968-969.

Turning to the disputed demands in the matter at bar, the Court notes that they are often prefaced by the disfavored, overly general language such as, "all, "any and all" or "each and every." *See Haroian v. Nusbaum*, 84 A.D.2d 532, 533 (2d Dept. 1981); *MacKinnon v. MacKinnon*, 245 A.D.2d 690, 691 (3d Dept. 1997); *Benzenberg v. Telecom Plus of Upstate New York, Inc.*, 119 A.D.2d 717 (2d Dept. 1986); *Hudson Val. Tree v. Barcana*, 114 A.D.2d 400, 401 (2d Dept. 1985); *Zambelis v. Nicholas*, 92 A.D.2d 936 (2d Dept. 1983). Moreover, many of the requests are open-ended, overbroad and/or lacking in ostensible materiality and relevance. To the extent that some of the demands at issue may be proper and a more narrowly crafted request might reasonably elicit discoverable matter, courts are not obligated to prune defective demands or requests. S*ee Village of Mamaroneck v. State*, 16 A.D.3d 674 (2d Dept. 2005).

The Court's denial of the motion to compel is also based on its conclusion, as outlined above, that some of the causes of action may not be sustained for legal reasons, such as the

absence of a fiduciary relationship between BOA and Amana Tool. Thus, under the circumstances of this case, it appears that additional discovery would not likely result in the disclosure of information that would alter the Court's determination as to the viability of particular causes of action. Nevertheless, given the complexities attendant to the motion to compel, the Court also denies Travelers' application for counsel fees that it has incurred in the making of this motion.

Accordingly, the Court 1) denies Plaintiff's motion to compel; 2) denies Defendant's motion for summary judgment and dismissal of the first cause of action sounding in negligence; and 3) grants Defendant's motion for summary judgment and dismissal of the remaining causes of action in the Complaint.

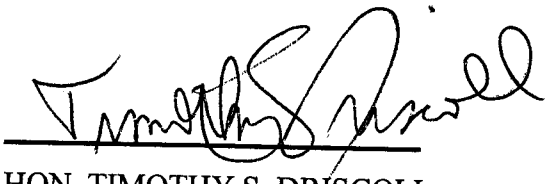
All matters not decided herein are hereby denied.

This constitutes the order and judgment of this Court.

The Court directs counsel for all parties to appear before the Court for a Preliminary Conference on January 14, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 8, 2009



HON. TIMOTHY S. DRISCOLL
J.S.C.