S.A. De Obras Y Servicios, Copasa v Bank of Nova Scotia
2018 NY Slip Op 31371(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 651649/2013
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

S.A. de OBRAS Y SERVICIOS, COPASA,

Plaintiff,

- against -

THE BANK OF NOVA SCOTIA AND SCOTIABANK GLOBAL BANKING AND MARKETS f/k/a SCOTIA CAPTIAL INC.,

Defendants.

DECISION AND ORDER
Index No. 651649/2013
Motion Seq. No. 002

----------X

COINTER CHILE, S.A. AND AZVI CHILE, S.A. AGENCIA EN CHILE,

Plaintiffs,

-against-

THE BANK OF NOVA SCOTIA AND SCOTIABANK GLOBAL BANKING AND MARKETS f/k/a SCOTIA CAPITAL INC.,

Defendants.

DECISION AND ORDER
Index No. 651555/2012
Motion Seq. No. 003

----------X

O. PETER SHERWOOD, J.:

On June 12, 2014 this court rendered a Decision and Order dismissing the first cause of action of plaintiff, S.A. de Obras y Servicios, Copasa ("Copasa") and plaintiff Cointer Chile S.A. ("Cointer") alleging gross negligence in connection with plaintiffs' bid for a major toll road construction project in Chile and denying the motion of defendant, the Bank of Nova Scotia ("Scotia") to dismiss Cointer's Sixth Cause of Action which alleges breach of an October 2011 agreement (October Agreement).

On appeal, the First Department reversed this court's dismissal of the gross negligence claims, stating in a two sentence decision that "[a]t this stage of the litigation, prior to key depositions being held, it cannot be determined whether any 'outrageous acts of folly' were involved (*see Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 528 [1st Dept 1998]).

Accordingly, the contract-based claims for gross negligence should not have been dismissed." (NYSCEF Doc. No. 149). Otherwise, the court affirmed, including as to sixth cause of action where this court concluded that issues of fact exist as to whether the parties reached a binding preliminary contract giving rise to a duty to negotiate in good faith, and, if so, whether Scotiabank breached it.

The parties having completed discovery, Scotia now moves for summary judgment under motion sequence 003 in the case bearing index number 651555/2012 (the "Cointer Action") and motion sequence number 002 in the case bearing index number 651649/2013 (the "Copasa Action") dismissing all remaining claims.[1] With the benefit of a fuller record, once again the court grants the motion to dismiss the gross negligence claims, and denies Scotia's motion to dismiss the Sixth Cause of Action alleging breach of the October Agreement.

I. BACKGROUND

On March 26, 2010, plaintiffs Cointer, its parent company, Azvi Chile, S.A. Agencia en Chile (collectively, "Cointer Plaintiffs"), and S.A. de Obras Y Servicios, COPASA ("Copasa") (together with Cointer Plaintiffs "Sponsors" or "plaintiffs"), executed an Engagement Letter the parties entered into a contingency fee contract with Scotia in connection with a public works toll-road concession project for the construction, operation and maintenance of a section of Ruta 5 highway between the Chilean cities of La Serena and Vallenar (the "Project" or the "Ruta 5 Project") (NYSCEF Doc. Nos. 178 ["DSUMF"] 259 ["PSUMF"], collectively 259 ["SUMF"] ¶ 1). The engagement letter contains a "Special Damages and Limitation of Liability" provision which limits Soctia's aggregate liability in contract or tort "to 50% of the amount of the Success Fee actually received . . ." (NYSCEF Doc. No. 206, § 20).

Pursuant to the Engagement Letter, Scotia's "proposed core team" was to include: "Mr. Conor Kelly, Managing Director, who will oversee the engagement and relationship with [plaintiffs]. Mr. Kelly will be assisted by Joao Carneiro, Director; Yann Mégret, Associate Director; and Cesar Bodden, Associate" (*id.* § 22). Among the tasks Scotia was to perform was to "Develop and manage detailed financial models for the Sponsors . . . and to be submitted with the bid" (the "Bid Model") (*id.* at BNS00000006). This model was to be "prepared in accordance with the tender requirements" (*id.*).

A. *Development of the Bid Model*

[1] Unless otherwise noted, all citations to NYSCEF are to documents filed under index number 651555/2012.

The parties agree that Bodden was the primary person responsible for preparing the Bid Model and that Carneiro, the "Team Leader" had at least some involvement in the development process (*see* PSUMF ¶¶ 6-9). The parties dispute whether Bodden was sufficiently qualified to take on this role, and the extent to which Carneiro supervised Bodden. Bodden's qualifications included an MBA from the Stern School of Business at NYU, a CPA license, and at least 36 months in post-graduate experience (*id.* ¶ 6). Plaintiffs assert that before joining Scotia, Bodden had never worked on financial models for infrastructure finance projects in particular (NYSCEF Doc. No. 263 Bodden Tr. 15:5-13), and described himself as "a junior guy" on the team (*id.* 26:19). However, he had worked on numerous other financial models. Of particular relevance here, after joining Scotia, Bodden served as the primary modeler on a similar road construction project for plaintiffs, referred to as the Antofagasta Project (NYSCEF Doc. Nos. 262, Carneiro Tr. at 117:17-19 and 272, Mégret Tr. 65:2-4).

Regarding the extent of Carneiro's supervision of Bodden's work, Scotia notes that both Bodden and Carneiro testified that they discussed the Project and the Bid Model frequently leading up to the October 2010 bid date (NYSCEF Doc. No. 263 Bodden Tr. at 77:4-11; 262 Carneiro Tr. at 92:25- 93:17). Carneiro testified that he spent approximately twenty hours working with Bodden on the Bid Model (*id.*, Carneiro Tr. at 240:4-23)[2]. Plaintiffs dispute this account to the extent it suggests Carneiro was working on the Bid Model during the period just before the bid date, as Carneiro was travelling in the four weeks leading up to the bid date (PSUMF ¶ 8). Plaintiffs also note that Carneiro testified that he was not responsible for reviewing the Bid Model (Carneiro Tr. at 33:4-14, 39:12-14 ("Q. Were you responsible for reviewing the bid model? A. No."), that his work on the model was limited to "plac[ing] sensitivities in the model" and "understand[ing] the model" (*id.* at 33:15-21, 39:24-40:2), and that he did not "inquire[] of the model audit process" before Bodden sent the model to plaintiffs (*id.* at 55:9-19). Carneiro's work was not "limited" in the sense plaintiffs assert (PSUMF ¶ 7). He explained that as team leader he was responsible for making sure that everything runs smoothly and reviewing the bid requirements (*see id.* at 32:9- 40:6). The task of reviewing the Bid Model was assigned to the modelers (*see id.* at 37:14-19; 119:2-4). Carneiro supervised their work (*see id* 32:9- 18).

[2] Yann Mégret, another modeler, testified similarly (*see* NYSCEF Doc. No. 272, Mégret Tr. at 196:16-24 ["[Carneiro] did spend a lot of time on [the Bid Model] working with [Bodden]"]).

After clearing it with Carneiro, Bodden sent a draft of the Bid Model to plaintiffs on September 7, 2010 (SUMF ¶ 9). Jesús Martinez of Cointer ("Martinez") and Juan Ruíz de Velasco of Copasa ("Velasco"), reviewed certain aspects of the Bid Model, asked questions, and provided their input (*id.* ¶ 13). On September 10, 2010, Bodden asked plaintiffs to review the VPI tab, which the plaintiffs did thereafter (*id.* ¶ 14).

B. *The Error*

The Bid Model was comprised 29 excel worksheets, with one tab dedicated for the VPI (*id.* ¶ 5). The "VPI" calculation, which was based on a discounted cash flow formula provided by the MOP, was meant to indicate the present value of projected revenues from the toll road (*id.* ¶ 10). The VPI was to play a critical role in the bidding process. Where bidders were to provide the lowest VPI they would accept in return for building and operating the toll road. The bidder with the lowest VPI would win the bid (*id.*). If the bid winner then formed a concession company and built and operated the toll road pursuant to the MOP's requirements, it would be entitled to receive the revenues from the toll road until such revenues reached the VPI bid, or for 35 years, whichever came first (*id.*).

If operating correctly, the VPI calculation would begin discounting projected revenues when the project began generating revenues, *i.e.*, the date of completion and opening of the first section of the toll road (*id.* ¶ 10). That date was correctly entered in cell C12 of the VPI calculation sheet, but the Bid Model Scotia sent plaintiffs on or around September 7, 2010, incorporated an error in cell C19 such that it referred to cell C13, which contained the date the concession was projected to be granted to plaintiffs, instead of C12, the date it was projected to begin generating revenue (*id.*). The error caused the VPI calculation to begin discounting at too early a date, which in turn artificially lowered the VPI (*id.*).[3] If the formula in cell C19 had referenced cell C12 instead of C13, the formula would have produced the intended VPI, and the Bid Model would have performed exactly as intended (*id.* ¶ 12).

The parties dispute the extent to which the error was visible to those reviewing the Bid Model. Scotia contends that this error was visible on the face of the VPI calculation spreadsheet (DSUMF ¶ 14), whereas plaintiffs note that both Mégret of Scotia and Velasco ("Velasco") of

[3] The precise error is undisputed. As was the case on the previous motions before this court, the parties dispute whether the error is more accurately described as a "typo" limited to one cell, or a "fundamental" error arising from an interpretation of the tender documents that found its way into multiple cells in column C (*see* SUMF 10-11).

Copasa indicated there might be some difficulty in detecting the error on the face of the spreadsheet (PSUMF ¶ 14)[4]. The court having examined the VPI calculation spreadsheet, observes that while the VPI calculation formula was imbedded in the Bid Model and may have been difficult to detect, the effects of the error was plainly visible on the spreadsheet. It shows the Discount Factor being applied beginning on the Concession Date of January 1, 2011, years before the Projected Completion Date of the first section of the toll road and opening the toll road to fee generating traffic.

Plaintiffs used the Bid Model to calculate their bid, and on October 26, 2010, tendered a bid of UF 5,973,001, which after release of the results of the bidding process around November 23, 2010, were discovered to be approximately 27 percent below that of the next lowest bid (*id.* ¶¶ 16, 20). Roughly two weeks later, Velasco identified the error in the Bid Model (*id.* ¶ 21).

C. *The October Agreement*

Thereafter, Scotia, Cointer, and Copasa began to assess possible ways to proceed with the project (*id.* ¶ 22). In or around February 2011, Copasa withdrew from negotiations while Scotia and Cointer continued pursue options for moving forward (*id.* ¶ 23). In June 2011, Scotia represented to plaintiffs that SNC-Lavalin ("SNC"), a Canadian engineering and construction company with an established presence in Chile, expressed interest in joining the Project as a partner (*id.* ¶ 24).

In October, 2011, the parties negotiated an agreement to form a concession company (the "October Agreement") (*id.* ¶ 25). Scotia maintains, as it has previously in this action, that the document was merely a "proposal to outline the understandings between the parties," and is not a binding contract (*see* DSUMF ¶ 25). The October Agreement was conditioned on (i) "SNC's final due diligence on the Project's construction as well as SNC's commitment to [purchase] 25% of

[4] Mr. Mégret disagreed that the average person with "a basic understanding of finance infrastructure in general would not be able to detect the error if they read the tender documents," because he didn't think "an average person could [read the tender] document and be able to tell that the formula was wrong. I don't think it is as simple as that." (NYSCEF Doc. No. 272, Mégret Tr. at 179:10-23). The inability of a non-expert to know the cause of an error, would not prevent the non-expert from noticing the existence of an error simply by observing that the VPI spreadsheet shows the Discount Factor being applied during a period when no revenue was being generated to support it.

The testimony of Mr. Velasco that the column containing the Discount Factor was not visible on the electronic version of the VPI chart he received, was simply the result of settings made on his Excel software that caused the Date and Discount Factor columns to be hidden so as to allow him to view *two* other columns to the right on his computer monitor (see NYSCEF Doc. No. 301, Velasco Tr. at 244:6-245:16). His election to hide the Date and Discount Factor columns does not explain away his failure to see an obvious error.

the equity for the Project," and (ii) receipt of "EUR 3 MM from . . . COPASA . . . payable upon the creation of the" concession company (SUMF ¶ 26).

Scotia contends that neither of these conditions could have been met. Regarding SNC's commitment, Scotia states that SNC and Scotiabank received an engineer's report analyzing the Project on or around October 26, 2011 (the "RyQ Report"), that warned that plaintiffs had budgeted for costs that were approximately 30% below the level comparable projects indicated was realistic (DSUMF ¶ 27). Around that same date, it learned that SNC would no longer participate in the Project. Thereafter, Scotia advised Cointer that it was no longer willing to participate as well (*id.* ¶ 30). Cointer contends the RyQ Report was merely a preliminary assessment that did not draw any "formal or final conclusions" but requested further information to add to its analysis (PSUMF ¶ 27). Cointer adds there is no admissible evidence that SNC decided to withdraw before Scotia withdrew. It contends that instead, during a call between Scotia and Cointer representatives on the day the RyQ Report was issued, Scotia gave two reasons for its decision neither of which was related to SNC (*id.* ¶ 30).

Regarding Copasa's contribution of 3 million euros, Scotia contends that testimony by Copasa's general manager, José Luis Saravia, and a letter sent by Copasa on November 2, 2011, demonstrate that Copasa would have never contributed 3 million euros (DSUMF ¶ 28, citing NYSCEF Doc. No. 217, Saravia Tr. at 257:14- 258:22, 270:11-271:8 [stating that "Copasa was not in agreement to inject 3 million euros" and that the October Agreement was an "agreement in which Copasa had not participated in, and in any event . . . Copasa's position has always remained the same: not to contribute anything or not to apportion anything"]; and NYSCEF Doc. No. 243 [Letter from Copasa to Cointer, Nov. 2, 2011, substantiating the same]). Cointer disputes this, directing the court's attention to notes from a September 29, 2011 meeting at the MOP attended by representatives of Scotia, Cointer, and Copasa, where Copasa stated that "[t]hey asked me to formally pronounce on whether COPASA was willing to put up this money and I told them that J.L. Suarez had spoken to [Alfonso] and told him that if this money was a solution to the problem, it would not be an obstacle to its resolution" (NYSCEF Doc. No. 326 at COPASA0014830). All parties agree that Copasa had not paid the requisite 3 million euros at the point Scotia withdrew from the project (SUMF ¶ 28).

During the negotiation process between Cointer and Scotia, Scotia requested that Cointer provide standby letters of credit, which Cointer refused (*id.* ¶ 29). Scotia contends this request

was made in good faith in order to protect Scotia from the possibility it might be forced to contribute funds in excess of 14.5 million euros if Cointer could not supply such funds when necessary under the terms of the Project (DSUMF ¶ 29).

On October 28, 2011, Scotia informed Cointer that it would no longer be participating in the project (SUMF ¶ 30). Pursuant to the October Agreement, the deadline to satisfy the third party conditions was to occur on November 4, 2011 (NYSCEF Doc. No. 236 at CA00003179). Thereafter, Cointer reached out to Copasa in an attempt to salvage the project, but was unsuccessful (SUMF ¶ 31). Cointer formally withdrew its bid on November 3, 2011 (*id.* ¶ 32).

II. ARGUMENTS

A. *Gross Negligence*

1. Scotia's Memorandum in Support

Scotia notes that courts have found no gross negligence from allegations of "negligent understaffing" (*Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 528 [1st Dept 1998]), "the overlooking of a few articles in an otherwise massive and fruitful search" (*Platinum Partners Value Arbitrage Fund LP v Kroll Assoc., Inc.*, 102 AD3d 483 [1st Dept 2013]), or "a series of mistakes alone, without a showing of recklessness" (*Am. Tel. & Tel. Co. v City of New York*, 83 F3d 549, 556 [2d Cir 1996]). (NYSCEF Doc. No. 179 ["defs' mem"] at 20).

Scotia contends that the following facts are undisputed and, considering the high standard for gross negligence, dispositive:

- Scotia spent months working on the Bid Model;
- Bodden was qualified to build the Bid Model;
- Bodden collaborated with Carneiro in building the Bid Model and working on the Project more generally;
- Carneiro checked and "played with" the Model prior to Scotiabank sending it to plaintiffs;
- Scotia worked with plaintiffs to revise the Bid Model more than a dozen times,
- Bodden asked plaintiffs to review the sheet that contained the mistake; and
- all of the 28 other sub-sheets of the Bid Model worked exactly as required

(defs' mem at 21-22). Scotia further contends that, even if Bodden were neither qualified to build the Bid Model nor properly supervised, such facts would not rise to the level of gross negligence (*id.* at 22, citing *e.g. Calisch Assoc., Inc. v Manufacturers Hanover Tr. Co.*, 151 AD2d 446, 448 [1st Dept 1989] [finding that allegations that bank had failed to detect fraud by "not adequately training and supervising its employees regarding proper bank procedures . . . at most . . . amount to a claim that defendant . . . was negligent" and dismissing cause of action for gross negligence]

and *Hartford Ins. Co.*, 250 AD2d at 528 [dismissing cause of action for gross negligence based primarily on allegations of "negligent understaffing"]).

Anticipating that plaintiffs' attempt to show Scotia failed to abide by internal policies and industry standards, Scotia offers three arguments why such an attempt fails to show gross negligence (defs' mem at 23-26). First, plaintiffs already made these allegations in their complaints, and the First Department implicitly recognized these allegations as insufficient when it reversed to allow for "key depositions . . . [to] determine [] whether any 'outrageous acts of folly'" occurred, as opposed to allow for plaintiffs to substantiate these specific allegations (NYSCEF Doc. No. 250).

Second, industry standards are irrelevant to plaintiffs' gross negligence claims since, "industry standards are relevant . . . when evaluating professional malpractice" and since Scotia's work does not qualify as "professional" for the purposes of a malpractice claim (defs' mem at 24). The court notes that this argument fails in that, while Scotia offers support for its contention that industry standards are relevant to malpractice claims, it offers no support for the proposition that industry standards are relevant *only* to malpractice claims.

Third, there is no evidence that shows its actions did not comport with industry standards. Although plaintiffs' expert, Todd Antonelli, concludes that Scotia's conduct constituted an extreme departure from industry standards, Scotia contends Antonelli used the standards for an industry "far broader than infrastructure modeling," and was rooted in Sarbanes-Oxley legislation and guidance, which has "no bearing on the standards for a model created to support a bid submission" (*id.* at 25-26).

2. Plaintiffs' Memorandum in Opposition

In opposition, plaintiffs argue that Scotia makes certain factual presumptions in their moving papers that are not appropriate on a motion for summary judgment. First, Scotia presumes the credibility of Bodden's testimony, despite evidence that plaintiffs say "raise[] serious questions" about his credibility (NYSCEF Doc. No. 258 ["pls' mem"] at 18). In particular, plaintiffs note that, while Bodden testified that Mégret "was the secondary modeler" (NYSCEF Doc. No. 263 Bodden Tr., 67:14-15), Mégret testified that he was not the secondary modeler (NYSCEF Doc. No. 272 Mégret Tr., 65:7-17).[5] Plaintiffs also note that the issue of whether the

[5]Mégret was identified in the Engagement Letter as a member of the Project team (*see* NYSCEF Doc. No. 206, ¶ 22). Although he was not a designated "secondary modeler," Bodden was not the only member of the team who

error was merely the result of a typo, as Scotia argues, or a fundamental error of interpretation of the tender documents, as plaintiffs contend, is within Bodden's exclusive knowledge (pls' mem at 18-19). Plaintiffs contend that this too precludes finding in Scotia's favor since "self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court" on a motion for summary judgment (*id.*, quoting *Quiroz v 176 N. Main*, LLC, 125 AD3d 628, 631 [2d Dept 2015]).

Second, plaintiffs contend Scotia has wrongly presumed the following disputed facts are undisputed when they are actually under dispute (pls' mem at 19-22):

- that Bodden worked on the model over six months: plaintiffs note an email from Bodden states he had only two months to work on the model (NYSCEF Doc. No. 296 at BNS00067071);
- that Carneiro provided extensive assistance to Bodden: plaintiffs argue Carneiro's involvement was far more limited than Scotia describes, and that Carneiro did not conduct an audit of the model or check to confirm it followed tender requirements;
- that the error in the model was merely a "typo": plaintiffs contend contemporaneous emails show that, after discovering the error, Bodden used similar attributions in order to "minimize our liability" for the error, and that Carneiro rejected this description as inaccurate and described the error as an "error of interpretation" that was "not related to formulas or calculations" (NYSCEF Doc. No. 292 at BNS00058349 to BNS00058350).
- that the model contained only a single erroneous cell: as noted above, plaintiffs contend the error was contained in multiple cells in column C;
- that plaintiffs had the ability to find the error, or should have been expected to: plaintiffs note various testimony supporting their contention that the error would have been difficult to detect (pls' mem at 21-22, citing *e.g.* Mégret Tr. 179:20-23, 181:17-183:12) and argues that, under the Agreement, Scotia was solely responsible with ensuring the model was prepared in accordance with the tender requirements; and
- that, under the circumstances, Scotia was not required to conduct an external audit: plaintiffs contend that the failure to do so is relevant to whether Scotia committed gross negligence since, both plaintiffs' expert and Mégret indicated that, in the absence of an internal audit, an external audit would be common practice (*id.* at 22, citing Godwin aff, ehixibt 60 ["Antonelli Report"]

---

held the view that Mégret played that role. Under questioning by counsel for Cointer, team leader, Carneiro testified that Bodden was responsible for ensuring that the Bid Model was prepared in accordance with the tender requirements (Carneiro Tr. at 37:14 – 38:3). Counsel then asked and got the following response: "Q. And Yann Mégret? A. And Yann was also like a secondary modeler. But like I said the person that was mostly responsible for model preparation was Cesar. (*id* at 37:23 – 38:3). And later: Q. Other than Cesar Bodden do you know if anyone else formally reviewed the financial model to ensure that it complied with the tender requirements? A. I know or I . . . I . . . I think I can say that I know that Yann also worked on at least parts of the model. But I don't think Yann formally reviewed the financial model the final financial model. Q. Do you know which part of the financial model Yann reviewed? A. No, I don't but Yann was someone that Cesar would consult with some frequency and would also seek his advice for help when he felt he needed. They sat very close so they would talk between themselves frequently" (*id* at 40:7 – 23). Similarly, Matthew Giffen testified that "it was [his] belief that Yann had indeed performed the secondary check" (Giffen Tr. at 101:19-20).

¶ 21 and Mégret Tr. 23:25-24:5 [stating that, while he worked at Depfa Bank, "there was an external audit performed on each model"]).

Finally, plaintiffs argue Scotia dismisses certain factual disputes as immaterial, when they in fact preclude summary judgment (pls' mem at 23-28). The first of these disputes involves Mégret's testimony that he did not perform the duties of the secondary modeler. Plaintiffs contend this fact is material as it relates to whether Scotia complied with its own audit protocol and whether anyone other than Bodden checked the model to ensure it complied with tender requirements (*id.* at 23-24).

The second is whether Scotia failed to follow its internal protocol. Plaintiffs cite to a number of cases that took some form of preexisting protocol into account in evaluating a claim of gross negligence.[6] Plaintiffs also argue that the fact that Scotia had any such protocol demonstrates that Scotia was aware of the risk of "precisely the type of error that occurred here," which plaintiffs argue bears directly on the issue of Scotia's recklessness (pls' mem at 24-25, citing *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Tr. Co.*, 261 AD2d 117, 122 [1st Dept 1999] [noting that the "[f]ailure to keep accurate records has been considered evidence of gross negligence where . . . the defendant was aware that significant losses could result from inaccurate records"]).

The third is whether Scotia's conduct constituted an "extreme departure" from the standard of care in the industry (*id.* at 25-27). Plaintiffs note that "the particular standard of care which a defendant is judged against in a given case is a factual matter for the jury" (*id.*, quoting *Food Pageant, Inc.*, 54 NY2d at 172), and argue that the issue of whether a defendant's conduct constitutes an extreme departure from the applicable standard of care is relevant to a determination of gross negligence (*id.* citing *Bayerische Landesbank, New York Branch v Aladdin Capital Mgt. LLC*, 692 F3d 42, 61 [2d Cir 2012] [recklessness in the context of a gross negligence claim means "an extreme departure from the standards of ordinary care, such that the danger was either known

[6] Pls' mem at 24 n 117, citing *Food Pageant, Inc. v Consol. Edison Co., Inc.* (54 NY2d 167, 173–174 [1981] [affirming jury verdict for gross negligence where defendant power company failed to adhere to protocol provided for in agreement between defendant and other utilities in the New York Power Pool]), *Foothill Capital Corp. v Grant Thornton LLP* (276 AD2d 437 [1st Dept 2000] [finding plaintiffs states a cause of action for gross negligence where complaint alleged, among other failures, that defendant determined that additional auditing procedures were necessary but never performed them]), *Baidu, Inc. v Register.com, Inc.* (760 F Supp 2d 312, 319 [SD NY 2010] [finding the same where complaint alleged that defendant "failed to follow its own security protocols and essentially handed over control of [plaintiff's] account to an unauthorized Intruder, who engaged in cyber vandalism"]), and *Estate of Hammond v Brunswick Hosp. Ctr., Inc.* (38 Misc 3d 1214[A] [Sup Ct, Suffolk County 2013] [denying motion for summary judgment in medical malpractice action where there were issue of fact as to "whether the defendants appropriately followed protocol, and whether their actions, and alleged failures to act, rose to the level of gross negligence, thus precluding summary judgment"]).

to the defendant or so obvious that the defendant must have been aware of it"] and *Morgan Stanley Mortg. Loan Tr. 2006-13ARX v Morgan Stanley Mortg. Capital Holdings LLC*, 143 AD3d 1, 8 [1st Dept 2016] [sustaining claim for gross negligence where, among other allegations, defendant "failed to adhere to even minimal underwriting standards"]).

The last is whether Scotia failed to adequately supervise Bodden (*id.* at 27-28, citing *e.g. Sommer v Fed. Signal Corp.*, 79 NY2d 540, 548–49 [1992] [finding triable issue of fact for gross negligent claim relating to an "allegedly . . . untrained, inexperienced substitute" dispatcher ignored fire alarms from a building that caused that fire to develop into a four-alarm fire]).

Plaintiffs argue that, granting them all requisite inferences on a motion for summary judgment, the facts in this case are enough to constitute gross negligence under New York law (pls' mem at 15-18). In particular, plaintiffs note that courts have held that instances involving a defendant who committed "several careless acts," failed to properly supervise an employee (*Food Pageant*, 54 NY2d at 171) or "clos[ed] its eyes to known risks (*Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 11 [1st Dept 2011]) were sufficient to constitute gross negligence. Plaintiffs further contend that "misconduct considerably less outrageous than Scotia's can constitute gross negligence" (*id.* at 17-18, citing *e.g. Internationale Nederlanden*, 261 AD2d at 122-123; *S. Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 104 AD3d 613, 614 [1st Dept 2013] [finding allegations that defendant failed to disclose "the presence of 38 dry wells, containing potential contaminants, on plaintiffs' property, despite the availability of this information in the public records" raised an issue of fact as to gross negligence]; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 903 [2d Dept 2014] [finding issue of fact where defendant allegedly "failed to exercise even slight care by, among other things, placing two valuable works in close proximity to each other, in violation of the defendant's own policy and practice" causing more than $1 million in damage]).

3. Scotia's Reply

In reply, Scotia first examines the concessions of plaintiffs' responsive 19-a statement and argue that, despite plaintiffs' hair-splitting, the same dispositive facts defendants listed in their moving papers remain undisturbed (NYSCEF Doc. No. 328 ["defs' reply"] at 1-3). Scotia also disputes plaintiffs' characterizations of relevant caselaw – specifically that no case has determined the conduct involved in this case is neither grossly negligent or willful, that "several acts of negligence" can constitute gross negligence, and that cases have found gross negligence arising

out of less extreme conduct (defs' reply at 7-9). Scotia further argues that the factual disputes plaintiffs highlight are either misattributions (*i.e.* Scotia does not dispute plaintiffs' position), or immaterial under the correct standard of law (*id.* at 9-11). Finally, Scotia reiterates its argument that the failure to follow internal protocol, to conduct an external audit, and purported departure from industry standards have no bearing on whether Scotia's actions rose to the level of gross negligence (*id.* at 11-13).

B. *Whether Scotia Properly Withdrew from the October Agreement*

1. Scotia's Memorandum in Support

Scotia contends that the record conclusively demonstrates the failure of conditions precedent to the October Agreement – that is, that Copasa would have never agreed to pay Scotia three million euros, and that SNC would not participate after seeing the RyQ Report (defs' mem at 29-31). Scotia contends that the fact that it withdrew from negotiations roughly one week before the deadline for the conditions precedent to be met is immaterial since the conditions precedent had failed before Scotia's withdrawal and since Cointer cannot meet its burden of showing the conditions failed because of Scotia's conduct (*id.* at 31-32, citing *e.g. Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532 [2012] [finding that a buyer in a damages suit must show that a transaction would have closed but for the seller's repudiation since, "is axiomatic that damages for breach of contract are not recoverable where they were not actually caused by the breach—i.e., where the transaction would have failed, and the damage would have been suffered, even if no breach occurred"]).

In the event the court finds there exists a question of fact regarding the conditions precedent, Scotia further contends the record conclusively shows it did not violate a duty to negotiate in good faith (*id.* at 32-34). Scotia notes that Alfonso Budiño General Manager of Cointer testified that negotiations failed because of Scotia's demand for standby letters of credit (NYSCEF Doc. No. 190, Budiño Tr. at 394:7-396:2).[7] Scotia also notes that Budiño further testified that once Scotia became a shareholder of the concession company, Scotia might be held responsible for additional equity contributions if Cointer did not contribute its share of funds when required, which could in turn "take Scotiabank above its 14.5 million euro maximum contribution"

[7] Scotia also contends Budiño stated that negotiations also failed because due diligence was not successfully completed, but the portion of the transcript cited states only that the October Agreement was subject to SNC's completion of due diligence (defs' mem at 33, citing Budiño Tr. at 371:15-20).

(*id.* at 397:5-399:19). Scotia argues that its demand for standby letters of credit was done to protect the terms of the October Proposal, which provided that Scotia would not be required to invest more than 14.5 million euros and that Cointer would provide all necessary guarantees. Although Budiño testified that Cointer felt it was unfair for Scotia to make such a demand without offering to provide standby letters of credit itself, Scotia argues that seeking the additional protection was not unreasonable in light of the different financial positions of the two entities and the unilateral obligations of Cointer to invest and provide all necessary guarentees.

Scotia also argues the record demonstrates it withdrew from the Project only "after it learned . . . SNC would not participate because due diligence had uncovered significant concerns relating to the Project," (*id.* at 30, citing Garcia Tr. and at 111:24-112:24 [stating that Scotia withdrew from negotiations because of the RyQ Report]; and Giffen Tr. at 197:7-14, 273:15-274:17 [stating that SNC indicated it was not prepared to continue with the Project in light of the RyQ Report]).

2. Cointer's Memorandum in Opposition

In opposition, Cointer argues that there are material issues of fact regarding whether either condition precedent would have been realized. Regarding the condition that Copasa contribute three million euros, Cointer asserts that it would have been "economically irrational" for Copasa to refuse to agree to pay the three million in order to avoid (a) forfeiture of its 50% share of the approximately $10 million bid bond, and (b) the "reputational consequences that would result if the Sponsors did not follow through on their bid" (NYSCEF Doc. No. 313 ["Cointer opp"] at 6-7). Cointer also argues there is "ample evidence" that Copasa would have agreed to make the payment which, at minimum, raises an issue of fact when viewed next to Scotia's evidence (*id.* at 7-8, citing *e.g.* NYSCEF Doc. No. 313).[8]

Regarding whether Scotia and SNC withdrew as a result of the RyQ Report, Cointer argues Scotia made its decision to withdraw at some point on October 25, 2011 (*id.* at 4). It bases this

[8] Other exhibits that Cointer relies on are Budiño Tr. at 165:15-166:11(testifying to a telephone conversation with Saravia of Copasa: "I explained to him the October agreement and the need of the funding that Copasa had to do for this to be viable, because of the Scotia requirements, he said he was willing to help us injecting about 2 to 2.5 million euros"); at 314:17-316:14 ("Saravia told me without a doubt that he was willing to help so that they wouldn't execute on their guaranties, their own guaranties . . . . I am sure that if we had actually reached agreement, Copasa would have collaborated."); NYSCEF Doc. No. 327, Lacassie Tr. at 178:17-179:24 (recalling a meeting with MOP where Saravia stated that Copasa was "not going to do anything to block the deal with Scotiabank, and they were also talking about zero cost. And zero cost for them was not spending more money than the amount of the bid bond").

assertion on the deposition testimony of a Scotia Managing Director, Pablo Garcia, who testified that Scotia had decided to withdraw before Garcia had sent an email at 12:25 AM on October 26, 2011, to Matt Giffen, another Scotia Managing Director, reporting that he spoke to a public relations firm (presumably during business hours on the 25th) that specialized in corporate communications emergency management. The 25th was a day before the RyQ Report was purportedly sent to SNC and Scotia and before SNC told Scotia that it would no longer proceed (*id.* at 4 n 18, citing NYSCEF Doc. No. 317, Garcia Tr. at 121:9-122:4; and NYSCEF Doc. No. 325, email sent October 26, 2011, 6:27 AM attaching RyQ Report). In addition, Budiño states in his affidavit that during the call in which Scotia stated it decided to withdraw, the stated reason for the decision was due to Cointer's refusal to agree to Scotia's demands and concerns regarding the Project's profitability (NYSCEF Doc. No. 315, Budiño aff., ¶ 26). Cointer also argues that the only evidence Scotia relies on – deposition testimony regarding what SNC allegedly told Scotia – is inadmissible hearsay which cannot be relied upon at summary judgment (*id.* at 8, citing *Wen Ying Ji v Rockrose Dev. Corp.*, 34 AD3d 253, 254 [1st Dept 2006] [finding that an "affidavit was, in important respects, hearsay evidence, and as such was insufficient to satisfy the movant's burden of establishing a prima facie showing of entitlement to an award of summary judgment"]).

Cointer also contends that whether Scotia acted in good faith raises a question of fact (*id.* at 9). It notes that the "obligation to negotiate in good faith bars a party from insisting on conditions that are materially at odds with an already established preliminary agreement" (*id.*, quoting *IDT Corp. v Tyco Group, S.A.R.L.*, 104 AD3d 170, 177 [1st Dept 2012], *revd.* 23 NY3d 497 [2014]; *see also CanWest Glob. Communications Corp. v Mirkaei Tikshoret Ltd.*, 9 Misc 3d 845, 871 [Sup Ct 2005] ["The obligation of good faith requires parties to refrain from insisting on terms that do not conform to the preliminary agreement"]). Cointer contends that Scotia's demand for non-reciprocal standby letters of credit violated this principle, and notes that Scotia's employees stated that the demand was "a hard ask," (NYSCEF Doc. No. 320), that Azvi's rejection of Scotia's proposal was "not unreasonable," and that the demand based on a belief "that Azvi will go under [in] the next 3 months," which was "very unlikely" (NYSCEF Doc. No. 322).

3. Scotia's Reply

In reply, Scotia argues that Cointer has offered no evidence showing that Scotia's withdrawal caused the failure of the conditions precedent, or to rebut Scotia's argument that these conditions would not have occurred, regardless of Scotia's withdrawal (defs' reply at 16-17).

Scotia further argues that the evidence shows its withdrawal was done in good faith (*id.* at 14-16). Regarding the RyQ Report, Scotia argues that the record establishes, without contradiction, that when Scotia withdrew on October 26, 2011, it had already received the RyQ Report. While this account may be technically correct, it does not address Cointer's evidence showing Scotia's *decision* to withdraw came before receipt of the RyQ Report. Scotia also argues the evidence it relies on is not hearsay (*id.* at 15 n 15, citing *Stern v Waldbaum, Inc.*, 234 AD2d 534, 535 [2d Dept 1996] [holding out-of-court statement admissible to establish notice since the truth of the statement is not at issue]).

Regarding Scotia's demand for standby letters of credit, Scotia argues that the employee who referred to this demand as a "hard ask" was not familiar with the details of October Agreement and did not suggest the ask was inconsistent with the October Agreement. Scotia further argues that this evidence demonstrates Scotia's good faith by seriously considering Cointer's opposition. Scotia also argues that its request for standby letters of credit do not violate the terms of the October Agreement and that Cointer offers nothing more than "bald conclusions, contradicted by the only relevant document referred to, that [Scotia] insisted 'on terms that conflicted with the [October] Agreement'" (*id.* at 16, quoting *IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 504 [2014]).

III. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light

most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

A. *Gross Negligence*

In this court's Decision and Order dated June 12, 2014, the court held that, affording plaintiffs the inferences required on a motion to dismiss, the specific conduct plaintiffs alleged did "not rise to the exacting standard of gross negligence that must be met where, as here, sophisticated parties have entered into a limitation of liability agreement" (NYSCEF Doc. No. 133 ["June 2014 Decision"] at 17-18). The First Department's decision took no stance on whether the facts as alleged rose to the level of gross negligence. It held simply that at that "stage of the litigation, prior to key depositions being held, it [could not] be determined whether any 'outrageous acts of folly' were involved" (NYSCEF Doc. No. 149, quoting *Hartford Ins. Co.*, 250 AD2d at 528).

Significantly, the facts plaintiffs now ask the court to adopt for the purposes of this motion are precisely the same as those the court rejected on the motion to dismiss. In relevant portion, this court held that:

> "the conduct alleged does not rise to the exacting standard of gross negligence that must be met where, as here, sophisticated parties have entered into a limitation of liability agreement. Whether the error is characterized as a "fundamental misinterpretation" of tender documents (as alleged by plaintiffs, . . .) or a "single cell error" (as alleged by Scotia. . .), the damage alleged is the result of a single error in a complex of twenty-seven (sic) spreadsheets that, according to the plaintiffs, was not detected for many months due to 'repeated, fundamental and completely avoidable lapses in supervision, cross-checks, audits and financial modeling' . . . . The error resulted in the forfeiture of a $10 million bid bond, a relatively modest sum when measured against the amount of plaintiffs' bid of approximately $278 million . . . . The conduct alleged, including the alleged failure to provide adequate supervision (*see, e.g., Hartford Ins. Co. v Holmes Protection Grp.*, 250 AD2d 526, 527-528 [1st Dept 1998]), is not the type of conduct that "smack of intentional

> wrongdoing". Nor does it "evince[ ] a reckless indifference to the rights of others" (*Abacus*, 18 NY3d at 683). As the Complaints do not make "a compelling demonstration of egregious intentional misbehavior evincing extreme culpability: malice, recklessness, deliberate or callous indifference to the rights of others, or an extensive pattern of wanton acts" necessary to nullify the limitation of liability provision of the Engagement Letter, they do not state a cause of action for gross negligence (*see, Net2Globe Intl*, 273 F Supp 2d at 454; *Platinum Partners*, 102 AD3d at 483).

(June 2014 Decision at 18). This court also rejected plaintiff's allegations "regarding Scotia's alleged failure to supervise Bodden, specifically that Bodden was left to prepare the Bid Model with no or only minimal supervision in violation of professional standards and Scotia's own protocol for managing risk" and held that plaintiffs allegations "to the effect that Scotia failed to follow its internal policies and to conform to industry standards do not 'smack of intentional wrongdoing' as is required to state a claim for gross negligence involving sophisticated parties who contract to limit their risk" (*id.* at 17).

Plaintiffs have advanced neither new factual considerations, nor new points of law, that arguably should alter the court's previous determination. Rather, plaintiffs principally rely on the same legal arguments this court rejected previously (*compare* pls' mem at 28 [arguing that "courts have frequently taken into account allegations that a defendant improperly staffed a project, or inadequately supervised an employee, in determining that plaintiffs sufficiently alleged or demonstrated gross negligence" and citing *e.g. Sommer*, 79 NY2d at 548-49] *with* June 2014 Decision at 18-19 [distinguishing *Sommer* from the same facts plaintiffs rely on in this motion]). Accordingly, the parties having concluded all discovery, including "key depositions," plaintiffs have failed to identify material issues of fact sufficient to warrant a trail because plaintiffs have not met the exacting legal standards applicable here.

Moreover, the fact record now before the court reveals a picture of the circumstances that is not nearly as stark as that portrayed in the complaints, thereby making the case for dismissal on this motion for summary judgment more compelling than that presented in the motion to dismiss. For example, the record shows that the Bid Model was reviewed at length by at least four people involved in the Project other than Bodden: Carneiro who sat with Bodden working on the Bid Model for over 20 hours prior to its initial release; Mégret who also spent time with Bodden working on the Bid Model and Martinez of Cointer and Velasco of Compasa who studied the Bid Model for over one and a half months prior to submission and who made over twelve inquiries of

Scotia during that time. Neither these individuals, nor several other involved with the Project noticed the anomaly on the VPI spreadsheet (*see* pp 4-5 and n. 4, *supra*).

Alfonso Budiño, General Director of Cointer confirmed that, but for the one mistake, the Bid Model Bodden prepared "worked fine", albeit that the mistake was a "very serious error" (NYSCEF Doc. No. 190 at 184). And although the parties spar over whether the error was properly characterized as a "typo" or a "fundamental …error of interpretation" (SUMF ¶ 11 and Opp. Br. at 20) which could not be detected readily (PSUMF ¶ 14 and Opp. Br. at 21), discovery confirmed that the *effect* of the error was apparent on the face of the VPI spreadsheet to anyone familiar with the tender requirements (*see* pp 4-5, supra).

Similarly, Bodden was more experienced than plaintiffs contend (PSUMF ¶ 7). The Ruta 5 Toll Road project was not his first such project. He was the "primary" modeler for the successful Antofagasta project (Carneiro Tr. at 117:7 – 19), an earlier project involving the same sponsor as the sponsor of the Ruta 5 project (Carneiro Tr. at 114:24 – 115:12). We know too that Antofagasta bid model accounted for 95 percent of the work needed for the Ruta 5 model, although the VPI was a new and important area for the later model (*id* at 111:8 – 21).

B. *Scotia's Alleged Breach of the October Agreement*

There remains an issue of fact regarding whether both conditions precedent to the October Agreement would have occurred, but for Scotia's withdrawal from negotiations. Scotia has failed to make a prima facie showing that, as it contends, SNC would not have participated because of the conclusions of the RyQ Report. The only evidence Scotia offers in support of this point are hearsay statements regarding what SNC purportedly represented to Scotia, which Scotia relies on for the truth of the matter asserted (*see e.g.* defs' mem at 15, citing Giffen Tr. at 273:15-274:17; former Scotia Managing Director Pablo Garcia Tr. 198:6-20). This evidence is "insufficient to satisfy the movant's burden of establishing a prima facie showing of entitlement to an award of summary judgment" as a matter of law (*Wen Ying Ji*, 34 AD3d at 254).

Scotia has made a prima facie showing that Copasa would have never agreed to pay the three million euros in the form of Saravia's testimony stating the same. However, Cointer presents contrary evidence that raises an issue of fact on this point (*see* Baker aff, exhibit 12 at COPASA0014830 [meeting notes reflecting that Copasa stated that "[t]hey asked me to formally pronounce on whether COPASA was willing to put up this money and I told them that J.L. Suarez

had spoke to [Alfonso] and told him that if this money was a solution to the problem, it would not be an obstacle to its resolution"]; *see also* n. 8, *supra*).

Moving to whether Scotia satisfied its duty to negotiate in good faith, there is an issue of fact regarding whether Scotia withdrew as a result of SNC's withdrawal and the RyQ Report. As Cointer notes, Garcia's deposition provides evidence supporting Cointer's theory that Scotia had decided to withdraw before the RyQ Report was sent. Budiño also states in his affidavit that Scotia initially represented that its decision was due to Cointer's refusal to agree to Scotia's demands and concerns regarding the Project's profitability (NYSCEF Doc. No. 315 ¶ 26).

There also remain issues of fact regarding Scotia's demand for standby letters of credit. Neither Scotia nor Cointer dispute that negotiations broke down due to Scotia's demand for standby letters of credit among other reasons. Although the October Agreement did not provide Scotia with the right to demand standby letters of credit, Scotia contends the request did not contradict the terms of that agreement but rather was made in furtherance of the provision providing that Azvi to provide all construction guarantees, and that Scotia would contribute only no more than 14.5 million euros.

Credit Suisse First Boston v Utrecht-Am. Fin. Co. (80 AD3d 485, 487–488 [1st Dept 2011]) is directly on point and controls the outcome here. In that case, the parties disputed whether plaintiff had negotiated in good faith in requesting that defendants supply certain information that, under the parties' preliminary agreement, defendants "were under no obligation to supply" (*id.*). Noting first that the "obligation to negotiate in good faith bars a party from insisting on conditions that do not conform to the preliminary agreement," the First Department held that, while the information plaintiff had requested might have fallen under the category of "any other . . . documentation [related to the Credit Agreement] reasonably requested by Buyer," which defendants would have been obligated to provide, "the issue of whether plaintiff's request for the same was reasonable, presents a question of fact not amenable to summary resolution" (*id.*). While the plaintiff's request in that case was more consistent with the terms of the parties' preliminary agreement than Scotia's demand is here, the First Department still found an issue of fact as to whether the request was consistent with such terms. Accordingly, whether Scotia's demand for standby letters of credit were reasonably conformed to the terms of the preliminary agreement raises an issue of fact that cannot be resolved on a motion for summary judgment.

Scotia's reliance on *IDT Corp. v Tyco Grp., S.A.R.L.* (23 NY3d 497, 504 [2014]) does not warrant a different result. In that case, the Court of Appeals found that the complaint did not sufficiently allege breach of the obligation to negotiate in good faith in light of the fact that, as the First Department described, "neither the complaint nor the record [were] specific as to the 10 inconsistencies" plaintiffs had alleged between defendants' proposal and the terms of the preliminary agreement (*IDT Corp. v Tyco Group, S.A.R.L.*, 104 AD3d 170, 177 [1st Dept 2012], *revd.* 23 NY3d 497 [2014]). Such is not the case here, where Cointer specifically identifies the demand that purportedly violated the terms of the preliminary agreement.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Scotia to dismiss the complaint in the case bearing index number 651649/2013, is GRANTED and the complaint in that case is hereby DISMISSED in its entirety; and it is hereby

ORDERED that the motion for summary judgment of defendants Scotia to dismiss the Sixth Cause of Action in the case bearing index number 651555/2012 ("Cointer Matter") is DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in the case bearing index number 651649/2013 dismissing the case in its entirety together with costs against plaintiff, S.A. de Obras y Servicios, COPASA upon submission of a proper bill of costs; and it is further

ORDERED that counsel for the parties in the Cointer Matter shall appear at an initial pre-trial conference on February 13, 2018 at 9:30 AM.

This constitutes the decision and order of the court.

DATED: January 12, 2018

ENTER,

O. PETER SHERWOOD J.S.C.