# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

***Justice***

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International Pathways Inc.,

Plaintiff,

- v -

The University of Queensland, Ochsner Clinic Foundation d/b/a Ochsner Health System, Ochsner Baptist Medical Center, LLC., Ochsner Medical Center - Kenner, LLC., Ochsner Bayou, LLC, and East Baton Rouge Medical Center, LLC,

Defendants.

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| **INDEX NO.** | 657010/2019 |
| **MOTION DATE** | |
| **MOTION SEQ. NO.** | 001 |

**DECISION + ORDER ON MOTION**

HON. BARRY R. OSTRAGER

This dispute arises out of an agreement to operate a medical education program among two non-profit medical institutions and a for-profit corporation that introduced them. Defendant the University of Queensland ("UQ") is an Australian research and teaching university that operates a medical school. Defendants Ochsner Clinic Foundation d/b/a Ochsner Health System, Ochsner Baptist Medical Center, L.L.C., Ochsner Medical Center - Kenner, L.L.C., Ochsner Bayou, LLC, and East Baton Rouge Medical Center, LLC (collectively, "Ochsner") is Louisiana's leading healthcare system, which provides clinical training to students from medical programs. Plaintiff International Pathways, Inc. ("IPI") is a New York for-profit corporation which facilitates arrangements between non-U.S. medical schools and U.S. clinical facilities and assists in the administration of such arrangements.

The parties to this action entered into an Affiliation Agreement dated as of October 7, 2008, an Amended and Restated Affiliation Agreement dated as of August 3, 2009, and finally a Second Amended and Restated Affiliation Agreement (the "Agreement") dated as of July 1, 2011 (NYSCEF Doc. No. 8). The Agreement states that its purpose is for IPI, UQ, and Ochsner

to operate a medical education program—defined in the Agreement as the "Program"—to provide U.S. students a "medical education competitive with many U.S. medical schools and superior to other foreign medical education alternatives." Agmt. at 1; Compl. ¶47. The U.S. students who successfully complete the Program receive their medical degrees from UQ, a foreign medical school, which qualifies them for residency placements at U.S. hospitals and for U.S. medical licenses. Compl. ¶48. Each party has specific obligations in connection with the operation of the Program.

Section 9.1 of the Agreement establishes the Agreement's term and expiration date. It states, in relevant part: "This Agreement shall commence on the date first above written and shall remain in effect through December 31, 2019 (the "Initial Term"). This Agreement shall then terminate unless the Parties agree in writing to renew for additional five-year terms (each a "Renewal Term") at least 180 days before expiration of the Initial Term or Renewal Term, as the case may be." Agmt. §9.1.

In November 2017, UQ advised IPI that UQ and Ochsner intended to allow the Agreement expire at the end of its term on December 31, 2019, and that following the expiration of the Agreement, they intended to operate a new medical education and training program *without IPI* pursuant to a new agreement. Compl. ¶¶83-94. In March 2019, IPI initiated a dispute resolution proceeding pursuant to the provisions of the Agreement, claiming that (i) IPI must be included in any new program between UQ and Ochsner, (ii) to the extent the new program between UQ and Ochsner was materially different than the Agreement's Program, a transition plan must be developed to end the Agreement's Program, and (iii) that UQ and Ochsner have not been proceeding in good faith. *Id.* ¶95. The dispute was not resolved through the Agreement's dispute resolution process. *Id.* ¶99. On November 25, 2019, IPI filed its Complaint in this action.

The Complaint attempts to asset five causes of action: (1) "for breach by UQ and Ochsner of their obligation to engage in fair dealing and to act reasonably and in good faith with respect to the renewal of the Agreement" ¶101 – 105; (2) for breach of Section 9.3 of the Agreement for failure to "end" the Program. ¶106 – 111; (3) "for breach of the agreement by commencing the 'new' program in a manner that put the existing Program at risk" ¶112 -118; (4) "defendants' new program cannot start for years to come; continuing the existing Program during that time without IPI is a breach of the Agreement, undertaken in bad faith" ¶119 – 123; and (5) for breach by UQ and Ochsner for "failing to conduct themselves in good faith and fair dealing and undermining the Program's success through mismanagement of admission standards, the interview process, and the reliance on waitlists." ¶124-128. Only the Second cause of action alleges a violation of a specific provision of the Agreement, although it appears that the allusions to an obligation of good faith and fair dealing refer to Section 9.6, which provides:

> Each Party acknowledges its duty to conduct itself in good faith and fair dealing. Any Party exercising its rights under Section 9 of this Agreement must do so reasonably and in good faith.[1]

Before the Court is defendants' motion to dismiss the Complaint pursuant to CPLR 3211 (a)(1) based on documentary evidence, here, the Agreement itself, and (a)(7) for failure to state a claim. Under CPLR 3211(a)(7), this Court must determine whether, after affording the pleadings a liberal construction and accepting the allegations in the Complaint as true, "the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law …." *Leon v. Martinez,* 84 NY2d 83, 87-88 (1994) (citations omitted).

[1] The Court notes that of course the implied covenant of good faith and fair dealing applies to all contracts. Thus, to the extent plaintiff has a claim for breach of contract, plaintiff may raise breaches of the implied covenant.

**Discussion**

Plaintiff's claims fall into two factual categories. Plaintiff's first, second and fourth claims relate to the termination of the Program, and plaintiff's third and fifth claims relate to alleged mismanagement of the Program while it was operational. The parties agree that this dispute is governed by the four corners of the Agreement, and in particular Section 9 which deals with termination of the Agreement. However, the parties disagree about defendants' obligations upon termination.

Defendants argue that plaintiff fails to state a claim arising out of the non-renewal of the Agreement, and that defendants' non-renewal of the Program and creation of a new program are permissible under the terms of the Agreement. In opposition, plaintiff argues that (1) defendants have breached the requirement in the Agreement to act in good faith by failing to offer a "good faith basis" for not renewing the Agreement and (2) defendants have breached the portion of the Agreement that requires the parties to "end" the Program in the event that it is not renewed, because defendants' "new" program is essentially the Program, just without plaintiff's participation.

As quoted above, Section 9.1 provides that the Agreement "shall remain in effect through December 31, 2019" and "*shall then terminate unless the Parties agree in writing to renew* for additional five-year terms" (emphasis added). As defendants argue, the default term reflected in the contract is that the Agreement will automatically expire on December 31, 2019 by operation of the Agreement—not as a result of some event giving rise to a basis for nonrenewal. Indeed, nothing in Section 9.1 says that defendants must have a "good faith basis" or any basis for not renewing the Agreement. Moreover, nothing in the Agreement requires the parties to renew the

Agreement and there is no renewal absent the written consent of all parties – which it is undisputed did not exist here.

However, plaintiff argues that even in the event of nonrenewal, defendants are still subject to Section 9.6 which states that "[a]ny Party exercising its rights under Section 9 of this Agreement must do so reasonably and in good faith." Defendants argue that allowing the Agreement to expire is not an "exercise" of rights under Section 9, because there is no affirmative action, and compares Section 9.1 with Section 9.2 which lays out several affirmative ways the parties could terminate the Agreement (e.g. by mutual written agreement). In opposition, plaintiff reiterates defendants' purported lack of a "good faith basis" for nonrenewal.

The Court agrees that Section 9.1 and Section 9.6 both apply here. However, the Court does not read Section 9.6 to require defendants (or any party) to articulate a "good faith basis" for allowing the Agreement to expire. First, Section 9.6 says the parties should conduct themselves in good faith; it does not, by its terms, require the parties to state why they are not renewing the contract or impose any obligation to renew the contract. Second, as defendants argue, since the termination of the Agreement is the default term, it is not an "exercise" of their rights under the Agreement; it occurred on a date certain by operation of the Agreement. And third, plaintiff has failed to allege how allowing the Agreement to expire is in itself a breach of the duty of good faith. Therefore, plaintiff's first cause of action "for breach by UQ and Ochsner of their obligation to engage in fair dealing and to act reasonably and in good faith with respect to the renewal of the Agreement" is dismissed based on the express terms of the Agreement.

Plaintiff's second claim is that defendants have breached Section 9.3 of the Agreement for failure to "end" the Program. Section 9.3 provides:

> In the event that this Agreement is not renewed after the Initial Term or any Renewal Term or any Party terminates this Agreement pursuant to Section 9.2

> hereof; all Parties shall cooperate in developing and implementing a transition plan that (a) ends the Program in a responsible manner consistent with AMC, LCME, and ACGME requirements, (b) enables Program participants as of the date of expiration or termination of this Agreement to complete the Program with pre-clinical education at Queensland and clinical instruction at Ochsner, or if Queensland does not obtain AMC approval for the Program, through Queensland in Australia and (c) resolves any outstanding financial and other issues among the parties.

As described above, in November 2017, UQ advised IPI that defendants intended to allow the Agreement to expire at the end of its term, and that following the expiration of the Agreement, they intended to operate a new medical education and training program without IPI pursuant to a new agreement. Plaintiff argues that even without plaintiff's participation, defendants' "new" program would be an impermissible continuation of the Program, and a violation of Section 9.3 (a) which requires the parties to cooperate to develop a plan to "end" the Program.

Plaintiff's argument is based on two premises. First, plaintiff alleges that sometime in June 2019, UQ had updated its website to announce that the Program was ending with the entering class of 2020, and a new program would be starting "from January 1, 2020." It indicated that students would be taught through to completion (as required by the Agreement), but then explained that current students "will be able to complete their education under the new program" and will "not be impacted by the changes" which, plaintiff alleges is a "sure sign" that the new program is essentially the same as the existing Program. Second, plaintiff looks to the definition of "Program" contained in the Agreement. The Agreement describes the "Program" on page 1 as follows:

> Queensland operates a highly regarded medical school and desires to offer a medical education program (**the "Program**") leading to the M.D. and/or M.B.B.S. degrees that would consist of two years of preclinical education at [UQ] in Australia and two years of clinical instruction at [OHS] clinical facilities in the U.S. and in which qualified U.S. citizens and permanent residents could seek to enroll through admittance to [UQ], subject to the admissions regulations of the Australian Medical Council ("AMC').

Plaintiff argues that because plaintiff is not explicitly referenced in the definition of "the Program" in the Agreement, defendants working together – even without plaintiff – is an impermissible continuation of the Program under Section 9.3.

The Court finds that this narrow reading of the "Program" definition is illogical in the context of the entire Agreement. The Agreement is between all three parties, to work together to facilitate the Program. The two paragraphs that follow the one quoted above specify the roles of Ochsner and IPI. Thus, the Court rejects plaintiff's premise that any program run by defendants together – even without plaintiff – is necessarily a continuation of the Program in which IPI participated, and a failure to "end" the existing Program pursuant to Section 9.3. Likewise, the Court rejects as wholly conclusory plaintiff's allegation that because defendants promised students they would not be impacted by a change over to the "new" program, that promise means that the "new" program is essentially the same as the existing Program.

Moreover, nothing in the Agreement bars defendants from initiating a new program (regardless of similarities or differences with the Program) upon the December 31, 2019 termination of the Agreement. In contrast, if the Agreement were affirmatively terminated pursuant to any of the subsections of Section 9.2 (e.g. by mutual agreement or lack of regulatory approval), defendants would have been subject to a 24-month prohibition on creating a similar program. Relevant to this point are Sections 9.1 and 9.4, which provides:

> In the event that Queensland and Ochsner terminate this Agreement pursuant to Section 9.2(b), Queensland terminates this Agreement to pursuant to Section 9.2.(c)(i), Section 9.2.(c)(iii) or Section 9.2(c)(iv) hereof, or another Party terminates this Agreement pursuant to Section 9.2(c)(ii) due to Queensland's breach of this Agreement for twenty-four (24) months after termination, Queensland shall not directly or indirectly pursue discussions or negotiations or enter into any memorandum of understanding or other documents or arrangements with any person or entity to advance a program of medical education, leading to the M.B.B.S. degree, the M.D. degree, or their equivalents that

involves instruction at one or more clinical facilities in the U.S.[2]

Thus, had the parties intended to prohibit a new program following the termination of the Program on December 31, 2019 in the event of non-renewal, they would have said so as they did in Section 9.4. The clear purpose of Section 9.3 (a) is to protect the students enrolled in the Program, not to restrict any parties from creating similar programs. Accordingly, the Court finds that plaintiff's second cause of action for breach of the Agreement for failure to "end" the Program is dismissed for failure to state a claim.

Plaintiff's fourth claim that defendants' "new program cannot start for years to come and continuing the existing Program during that time without IPI is a breach of the Agreement, undertaken in bad faith" is dismissed for the same reasons. Plaintiff alleges that on July 30, 2019, UQ produced a draft of a proposed letter to the appropriate regulatory agencies describing UQ's plan for a new program and acknowledging the curriculum for the "new" program will not be developed and ready to begin for years to come. Plaintiff then concludes that because the new program would not be ready for some time, defendants must be impermissibly continuing (or, specifically, failing to "end") the existing Program. The Court rejects this conclusory allegation, and plaintiff's fourth cause of action is dismissed for failure to state a claim.

Plaintiff's third and fifth causes of actions relate defendant's alleged mismanagement of the existing Program. Plaintiff's third claim is that defendants breached the Agreement "by commencing the 'new' program in a manner that put the existing Program at risk." Plaintiffs alleges that defendants prematurely and improperly began promoting the new program. Plaintiff alleges defendants should have consistently assured all stakeholders, most particularly all students interested in enrolling or already enrolled, that although the Program will be ending,

[2] The same requirement is imposed on Ochsner in the subsequent sentence omitted for brevity.

they will continue in the Program until they are taught through at UQ and OHS until graduation, which is defendants' obligation under the Agreement. Plaintiff alleges that instead, defendants have indicated on their website that all students entering or already enrolled in the existing Program "will be able to complete their education under the new program" -- which has not yet been formed, will not be formed for an unspecified number of years, for which no substantive description has been offered, and for which an AMC accreditation process will not begin for just as long or longer.

While the Complaint does not state which section, if any, of the Agreement this conduct purportedly breached, it appears plaintiff is once again relying on defendants' obligation to act in good faith with respect to the termination of the Agreement under Section 9.6 and to develop a plan to "end the Program in a responsible manner" as required by Section 9.3. However barely, the Court finds that plaintiff has stated a claim that defendants allegedly breached their obligation to "cooperate in developing and implementing a transition plan that [] ends the Program in a responsible manner." Accepting plaintiff's allegations as true, promoting a program which is not yet approved by the appropriate accreditation agency or which does not yet exist may run afoul of the obligations set forth in Section 9.6 (a).

Plaintiff's fifth cause of action does not relate at all to the defendants' "new" program, but rather alleges that defendants mismanaged the existing Program while it was operational, presumably prior to December 31, 2019. Specifically, plaintiff's fifth claim is that defendants breached the Agreement by "failing to conduct themselves in good faith and fair dealing and undermining the Program's success through mismanagement of admission standards, the interview process, and the reliance on waitlists." Plaintiff alleges defendants have engaged in conduct that has undermined the Program's success, diminished enrollment and reduced the

Program's revenue, including untimely changes in entrance criteria in the middle of recruitment cycles, engaging in an arbitrary "selection process" in lieu of the AMT and UQ Senate-approved interview process, recklessly misinforming students they were ineligible to advance to the third year because they had not yet taken an exam, and mismanaging the admission standards, the interview process and the reliance on waitlists.

In their motion to dismiss, defendants focus on the allegation that they failed to enroll 120 students and point out that the Agreement only requires them to enroll "*between* 102 and 120" applicants from 2013 onward (which they did). However, plaintiff cites several other practices quoted above that allegedly undermined the Program's success such as failures in the admissions process. The ways in which defendants allegedly mismanaged the Program may be breaches of their implicit obligation to conduct themselves in good faith with respect to the administration of the Program. As such, plaintiff has stated a claim for breach of the Agreement.

Accordingly, it is hereby,

ORDERED that defendants' motion to dismiss is granted in part and denied in part. Defendants' motion to dismiss the first, second, and fourth causes of action in the Complaint is granted, and the Clerk is directed to sever and dismiss those claims; and it is further

ORDERED that defendant's motion to dismiss the third and fifth causes of action in the Complaint is denied; and it is further

ORDERED that defendants answer the Complaint by June 15, 2020; and it is further

ORDERED that the parties confer and agree upon reasonable discovery deadlines, complete and efile the Preliminary Conference Order form available on the Part 61 website, with a Note of Issue due 22 months after the date of this Order and a compliance conference set for

September 22, 2020 at 9:30 a.m.

(http://ww2.nycourts.gov/courts/comdiv/ny/newyork_judges_links.shtml#ostrager).

The parties are also urged to pursue mediation of this dispute and to contact the Court via email pursuant to the Temporary Part 61 Rules for a remote settlement conference.

Dated: May 22, 2020


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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | | REFERENCE |