Filing # 105381688 E-Filed 03/24/2020 06:10:12 PM

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE17001178 DIVISION 25 JUDGE Carol-lisa Phillips

Tralongo, LLC, et al
Plaintiff(s) / Petitioner(s)
v.
Yatin Patel, et al
Defendant(s) / Respondent(s)
_____/

ORDER FOLLOWING BENCH TRIAL

THIS CAUSE came before the Court for a bench trial that commenced on February 24, 2020 and ended on February 28, 2020. The Court, having heard the testimony of the witnesses and considered the evidence in the record, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Tralongo LLC ("Tralongo") is in the business of providing centralized dental and business management services to dental clinics to promote efficient operation and administration of the clinics with an emphasis on patient care. Additionally, Tralongo has developed a proprietary system for dentists to grow their respective businesses by acquiring existing dental practices in their local markets with the eventual goal of packaging multiple clinics and selling them to Tralongo or another buyer to maximize the value of the clinics for both the selling dentist and Tralongo.
2. Tralongo was founded by David Lopez and Dr. Ken Tralongo in or around November 201 Both Dr. Tralongo and Mr. Lopez testified at trial. Dr. Tralongo explained his extensive experience in acquiring and operating multiple dental practices for nearly twenty years before he co-founded Tralongo LLC with Mr. Lopez. Mr. Lopez testified about his

experience starting up and developing numerous businesses before he co-founded Tralongo LLC. Mr. Lopez had a vision of replicating and scaling Dr. Tralongo's system of acquiring and operating multiple clinics by allowing other dentists to similarly grow their dental practices. Eventually, Tralongo, LLC planned to package numerous dental practices together and complete a global sale of such practices. Through such a global sale, Tralongo, LLC expected to achieve a higher value for the network of dental practices than the participating dentists would otherwise be able to achieve if they sought to sell their respective clinics individually.

3. Dr. Tralongo and Mr. Lopez testified that they spent nearly a year and hundreds of thousands of dollars in strategizing and building the necessary infrastructure before Tralongo LLC started recruiting and signing up dentists to become Tralongo Alliance Partners. Dr. Tralongo and Mr. Lopez also recruited Dr. Steven Wingfield to become a partner in Tralongo to capitalize on his extensive clinical and operational expertise and his prior experience in completing a global sale involving multiple dental clinics. Notably, Dr. Wingfield, who also testified at trial, had previously worked as a clinical director for Nanston Dental and had helped grow that business from $25 million to $47.5 million in revenues before Nanston Dental sold its clinic businesses to Great Expression in 2013.
4. Defendant, Dr. Mamta Patel started her own dental practice in Stamford Connecticut in 2010. She testified that she had no prior experience in acquiring or operating multiple dental practices before she joined Tralongo in 201 Dr. Patel and her husband, Yatin Patel, testified that they became interested in joining Tralongo because they viewed Tralongo's business model and the opportunity to grow their business and eventually participate in a global sale as a way for her to "get out of the chair" and avoid the long hours and physical stress that she experienced in practicing dentistry. As described below, the Patels executed a Territory Agreement and three (3) Strategic Alliance Clinic

Agreements with Tralongo during the course of their approximately two and one-half (2 & 1/2) year business relationship with Tralongo.

5. Specifically, on or around April 7, 2014, Dr. Patel, through her affiliated entity CT Smiles Dentistry, P.C., entered into a Territory Agreement with Tralongo for the purpose of obtaining an exclusive territory in which Dr. Patel could open and acquire additional dental clinics that would become a part of the Tralongo Alliance Partner System.
6. Additionally, at around the same time the Territory Agreement was executed, Dr. Patel, through her affiliated company, Stamford Dental Spa, P.C., executed and delivered to Tralongo a Strategic Alliance Clinic Agreement for the purpose of merging Dr. Patel's existing dental practice located in Stamford, Connecticut into Tralongo's Strategic Alliance Partner System ("SAP").
7. As discussed more fully below, Dr. Patel entered into a second clinic agreement in October 2014 in connection with her acquisition of an existing dental practice in Manchester, Conn. operated by a dentist the name of Dr. Battaro. Dr. Patel and her husband also executed a third Clinic Agreement in July 2016 upon their acquisition of another dental practice in Connecticut called Parkway Dental.
8. Dr. Patel was represented by competent counsel in connection with her negotiations with Tralongo leading up to her decision to execute the Territory Agreement and first Clinic Agreement. Dr. Patel also retained accounting professionals who assisted her in evaluating the business opportunity with Tralongo as part of her decision to enter into her first three agreements with Tralongo. David Lopez testified that Dr. Patel's counsel seemed particularly knowledgeable about the dental industry and that he extensively negotiated the terms of the Territory Agreement and the Stamford Clinic Agreement before Dr. Patel executed and delivered those Agreements to Tralongo.
9. Dr. Patel testified that the essence of her relationship with Tralongo revolved around the

acquisition of multiple practices so that she would be able to participate and capitalize on any future global sale by Tralongo of some or all of the clinics in the SAP system.

10. To that end, the Territory and Clinic Agreements expressly state that the goal of these Agreements is to increase the value of the Patels' dental practices by possibly combining or packaging the clinics with other dental clinics for a global sale as a related group of clinics with similar operations and with Tralongo's management business to make the clinics more attractive to potential buyers. *See e.g.*, The Territory Agreement (Plaintiff Ex. 1) at p. 3, and the Stamford Clinic Agreement (Plaintiff Ex. 2 at pp. 2 – 3. The Territory and Clinic Agreements also state that in order to accomplish this goal of increasing the attractiveness of the Patels' dental practices and similarly situated clinics, Tralongo must have the ongoing right and ability to acquire the dental practices from the Patels at any time upon terms and conditions specified in the agreements. Plaintiff Ex. 1 at pp. 3 – 4 and Plaintiff Ex. 2 at pp. 2 – 3.
11. Under the Stamford Clinic Agreement and the two subsequent Clinic Agreements, Tralongo was obligated to provide initial training, consultation, assistance with general management services, accounting services, insurance verification services, payment posting services, assistance with marketing, payroll services, and HIPAA compliance. *See e.g.*, Plaintiff Ex. 2, §§ 5.1 – 5.6 at pp. 6 – 10. In exchange, the Patels agreed to pay Tralongo a monthly management fee that equals 6% of each dental practice's gross revenues for the 10-year term of the Clinic Agreement. *Id.*, §6.2.1 at p. 10.
12. The three Clinic Agreements contain a 1-year probationary period that permitted the Patels to terminate their relationship with Tralongo and relieve them from any further rights or obligations under the Clinic Agreements. *Id.*, §7.16 at pp. 17 – 18.
13. In all three Clinic Agreements, the Patels granted Tralongo a Buyout Option to purchase each of the dental practices under enumerated circumstances that were defined in the

Clinic Agreements as a "Triggering Event." The Buyout Options included specific formulas that established the purchase price that Tralongo would be required to pay to purchase each of the dental practices. *Id.*, §§ 9.1 – 9.11 at pp. 20 – 28.

14. Dr. Tralongo testified that after Dr. Patel executed the Stamford Clinic Agreement, Tralongo provided her with extensive training on its 12-step merger and acquisition program. Additionally, Dr. Wingfield, Dr. Tralongo, and David Lopez testified that Dr. Patel received extensive and personalized training, assistance, and support from Tralongo because of the fact that she was one of the earlier SAPs to join Tralongo. For example, after Tralongo on-boarded Dr. Patel's Stamford practice into the Tralongo SAP system, Drs. Wingfield and Tralongo made several trips to Stamford, Connecticut to support and coach Dr. Patel on Tralongo's processes and systems.
15. Under the guidance and tutelage of Tralongo, Dr. Patel was able to increase her Stamford Clinic's monthly production from $60,000 before she joined Tralongo to $105,000 within a few months of joining Tralongo.
16. On or around October 29, 2014, Dr. Patel, through her affiliated entity, Manchester Smile Family and Implants Dentistry, LLC, executed and delivered to Tralongo the Second Strategic Alliance Clinic Agreement for the purpose of acquiring and merging her second dental practice in Manchester, Connecticut into Tralongo's SAP system.
17. Dr. Tralongo testified that Tralongo had sourced the Manchester practice, assisted Dr. Patel in acquiring that practice from Dr. Battaro, and provided extensive training and guidance to Dr. Patel relating to the operation of the dental practice and her dealings with Dr. Battaro. Indeed, Dr. Tralongo and David Lopez testified that Tralongo lent Dr. Patel $105,000 to assist Dr. Patel in closing the transaction. By identifying the Manchester practice and assisting Dr. Patel to complete the acquisition of that practice, Tralongo enabled Dr. Patel to grow the revenues of her dental business from $700,000 to $1,800,000 by the end of 2014.

18. Dr. Tralongo testified that he repeatedly advised Dr. Patel to build a rapport with Dr. Battaro and to keep him happy to maintain his revenue production in the Manchester Practice. Notwithstanding, Dr. Patel disregarded Dr. Tralongo's advice which ultimately led to Dr. Patel having a contentious relationship with Dr. Battaro. Indeed, Dr. Patel wrote to Tralongo complaining that Dr. Battaro was having a cancerous effect on her office and the staff. Dr. Tralongo testified that he received a telephone call from Dr. Patel and her husband, Yatin Patel who were seeking to sell the Manchester practice at that time. Dr. Tralongo advised them against selling the practice because it was producing the highest EBITDA in Tralongo's SAP system. Notably during that call, Dr. Patel and Mr. Patel informed Dr. Tralongo that they had taken down several pictures that Dr. Battaro had hung in the office knowing that the removal of those pictures would upset Dr. Battaro.
19. Although Dr. Patel attempted to shift the blame for her contentious relationship with Dr. Battaro onto Tralongo, Dr. Patel conceded on cross examination that Tralongo had experienced substantial resistance from Dr. Battaro's staff during the on-boarding of the practice into the Tralongo SAP system. The resistance that Tralongo and its representatives experienced in onboarding the practice made it challenging for Tralongo to provide services to the Manchester office. Dr. Patel also conceded that the tension between her and Dr. Battaro was due in part to Dr. Battaro seeking to renegotiate the terms of the sale of the practice and demanding to receive a higher percentage of the practice's collections than he had initially agreed to when he sold the practice to Dr. Patel.
20. Although Dr. Patel introduced into evidence multiple examples of the issues that she and her practices were experiencing with the services that Tralongo was providing under the Clinic Agreements, Both Dr. Patel and Mr. Patel conceded on cross

examination that they never notified Tralongo that they believed Tralongo to be in default on its obligations under the Clinic Agreements. Nor did the Patels attempt to mediate any issues relating to the services that Tralongo was providing to them as they were required to do under Sections 12.6.1 of the Stamford and Manchester Clinic Agreements.

21. Dr. Wingfield testified that Tralongo's quality control standards aim for 95% accuracy with its insurance verification, credentialing, accounting, and payment posting services and that the issues that Dr. Patel was experiencing with Tralongo's services fell well inside the 5% rate of human error that is to be expected when providing these types of services. Both Dr. Wingfield and Tralongo's director of operations, Patricia George, testified that the issues that Dr. Patel was experiencing with the services routinely occur in dental practices and would have occurred regardless of who was providing the services to Dr. Patel's practices. Indeed, Dr. Patel conceded on cross examination that it was unreasonable to expect the services to be performed accurately 100% of the time. Dr. Patel also testified that Tralongo was always responsive and sought to address any concerns or issues that Dr. Patel's practices experienced.
22. Additionally, Tralongo continually sought to improve the quality of the services that it was providing to the SAPs and to recruit highly experienced professionals to achieve a global sale of the clinics in the SAP system. To that end, Tralongo hired Brian LaBasco to serve as its Chief Financial Officer. Mr. LaBasco had significant experience working for prominent investment firms and private equity funds on global rollups and capital raising. Tralongo also hired Jim Gochis as its purchasing manager. Mr. Gochis had nearly 20 years of procurement experience in the healthcare industry and leveraged his experience to build a savings network that offered discounted pricing on quality products for the SAPs. Tralongo also hired Patricia George who has more than 30 years of clinical and operational experience in the dental space.

23. Moreover, Dr. Patel and Mr. Patel testified that notwithstanding any issues that they may have experienced with the services that Tralongo was providing to the practices, they strategically chose to enter into a third Clinic Agreement because they wanted to have more “skin in the game” (*i.e*. more practices available to participate in any future global sale of the clinics by Tralongo.)
24. In March, 2016, Dr. Patel and Mr. Patel attended the annual conference that Tralongo held for the SAPs. During that conference, Dr. Patel agreed to provide a testimonial video in which she touted the outstanding services that Tralongo was providing to her practices and the growth that her business had experienced since joining Tralongo. Dr. Patel stated on the video that her experience with Tralongo was “awesome” and that she was excited about her future with Tralongo.
25. On or around July 27, 2016, Dr. Patel and Mr. Patel, through their affiliated company, Parkway Dental Hamden, P.C., executed and delivered a Strategic Alliance Clinic Agreement for the purpose of acquiring and merging Dr. Patel’s third dental practice in Hamden, Connecticut in the Tralongo SAP system. Additionally, Dr. Patel and Mr. Patel exercised and delivered to Tralongo a Personal Guaranty Agreement whereby they personally guaranteed Parkway Dental Hamden, P.C.’s obligation under the Hamden Clinic Agreement. (see pages 63-65, Plaintiff's exhibit #5)
26. Dr. Patel and Mr. Patel testified that they entered into the Hamden Clinic Agreement and agreed to personally guarantee their affiliated companies’ obligations under all three Clinic Agreements because they wanted to maximize their upside by having more practices available to participate in any future global sale of some or all of the Clinics in the Tralongo SAP system. Notably, the Patels testified that they acquired the Hamden dental practices because they had attended a presentation by Brian LaBasco during the SAP annual conference wherein Mr. LaBasco gave a presentation on Tralongo’s efforts

to raise capital to begin the process of buying dental practices and further the goal of eventually achieving a global sale of some or all of the clinics in the SAP system.

27. Specifically, Brian LaBasco testified that in May, 2016, Tralongo had secured $55,000,000 from Freedom III Capital, LLC for the purpose of acquiring tranches of clinics from the SAPs in order for Tralongo to prove the concept of its business model and ultimately facilitate a global sale of all or some of the clinics in the SAP system.
28. In September, 2016, Mr. LaBasco and Dr. Tralongo traveled to Stamford, Connecticut to present to the Patels an offer to purchase their Stamford dental practice. David Lopez, Dr. Tralongo, and Brian LaBasco testified that Tralongo sought to purchase the Stamford Practice because the Patels had approached them desiring to sell one or two of their practices because Dr. Patel wanted to focus on starting a family. To that end, Mr. LaBasco and Dr. Tralongo presented an initial offer to the Patels to purchase the Stamford practice for approximately $1,200,000. In response, the Patels stated that there were several add-back charges that need to be included in the EBITDA calculation for the practice. Tralongo agreed to the Patels' request to add back approximately $90,000 in add-back charges to the EBITDA calculation for the practice and Mr. LaBasco emailed the Patels a revised offer to purchase the Stamford practice for approximately $1,500,000. Plaintiff's Exs. 47 and 50.
29. David Lopez and Dr. Tralongo testified that although Tralongo could have treated the financing that it received from Freedom III Capital, LLC as a "Triggering Event" under the Clinic Agreements which would have required the Patels to sell the Stamford Clinic to Tralongo, Tralongo chose not to do so because their idea was not to force the Patels to sell the Stamford practice. Rather, Tralongo wanted to oblige the Patels' wishes to purchase one of their clinics and allow Dr. Patel to reduce her responsibilities practicing dentistry. David Lopez and Brian LaBasco testified that Tralongo also wanted to provide

the Patels with a liquidity event that would allow them to pay off the debt on the practice and use the surplus cash to acquire additional practices that would increase the upside for the Patels upon a future global sale of some or all of the Clinics in the SAP system.

30. David Lopez and Brian LaBasco further testified that the offer to purchase the Stamford practice provided the Patels with 31% premium above the expectations that were set forth in the Stamford Clinic Agreement. Mr. LaBasco further testified that Tralongo made the following concessions to accommodate the Patels: (a) adding $90,000 of expenses into the EBITDA of the practice which a third-party buyer would normally refuse to do; (b) setting the fair market value of the Stamford practice at 78% of its trailing 12-month revenue when the industry standard for dental practices to sell for 60 to 70% of the practice's trailing 12-month revenues; and (c) reducing the earn-out portion of the offer from 25% to 20% of the purchase price to accommodate the Patels' desire to receive more of the purchase price at the closing of the sale. The Patels ultimately rejected Tralongo's offer but asked its representatives to keep them in mind for future purchases.
31. On or around November 30, 2016, the Patels sent Tralongo a notice of termination through an attorney from California. Plaintiff Ex. 65. In the termination letter, the Patels informed Tralongo for the first time that Tralongo had "completely failed" to provide the services that were provided for in the Clinic Agreements. On cross-examination, Dr. Patel admitted that the termination letter was inaccurate to the extent that it claimed that Tralongo had completely failed to provide the services that were provided for in the Clinic Agreements. Mr. Patel also conceded that the service issues were continually fixed and that Tralongo was responsive but the issues occurred over and over again. The Patels have continued to use some of the Tralongo vendors.
32. Dr. Patel further testified that she sought to terminate the relationship with Tralongo because she did not like the offer that Tralongo made to purchase her Stamford practice

and she felt that the offer somehow demonstrated that Tralongo had changed its business model in a way that would prevent Dr. Patel from getting "out of the chair." Both David Lopez and Dr. Tralongo testified that the Patels never shared any of their concerns regarding the perceived changes in Tralongo's business model with them. Nor did the Patels ever notify Mr. Lopez or Dr. Tralongo of any major problems with the services that Tralongo was providing to the practices prior to terminating the relationship with the Company.

33. David Lopez and Brian LaBasco testified that Tralongo's efforts to complete a global sale were significantly delayed as a result of the Patels' repudiation of the Clinic Agreements. By pulling their practices out of Tralongo's SAP system, Tralongo simply could not immediately replace the Stamford and Manchester practices that had been in Tralongo's system for two years. In addition, with the termination, the Patels stopped paying the monthly management fees that Tralongo was entitled to receive for the remainder of the 10-year term of the three Clinic Agreements.
34. Tralongo commenced this breach of contract against the Patels and their affiliated corporate entities seeking to recover damages resulting from their unlawful repudiation of the Territory and Clinic Agreements. Specifically, Tralongo seeks to recover damages from the loss of its ability to exercise its Buyout Options in the Clinic Agreements and its lost profits from the management fees which the Patels stopped paying upon their repudiation and termination of the agreements.
35. Dana Kaufman, Tralongo's damages expert, calculated Tralongo's damages to be $1,655,955, which comprise of: (a) $896,700 resulting from the loss of the Buyout Options in the Clinic Agreements, and (b) $759,255 resulting from the lost profits on the management fees that Tralongo would have otherwise received for the duration of those Agreements.

36. Dr. Stanley Stevenson, the Patels' damages expert, conceded on cross examination that: (a) Tralongo is entitled to recover some damages if the Court finds that the Patels unlawfully repudiated the Clinic Agreements; (b) he did not perform any alternative calculations to ascertain the amount of damages that should be awarded to Tralongo; (c) Tralongo's loss of the Buyout Options constitute "expectation damages" that are properly recoverable in this case; and, (d) the methodology that Tralongo's damages expert employed to calculate the lost profits on the management fees was correct although Dr. Stephenson testified it was unknown if there were avoidable variable costs.

Conclusions of Law

37. In order for Tralongo to prevail on its breach of contract claims, it must prove that: (1) it entered into valid contracts with the Defendants; (2) the Defendants materially breached those contracts; and (3) it suffered damages as a result of the Defendants' breach of the contracts. *J.J. Gumberg Co. v. Janis Servs, Inc.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003).
38. With respect to the first element (i.e., valid contracts), Tralongo introduced into evidence the Territory and Clinic Agreements and the Patels do not dispute the validity of those Agreements.
39. As to the second element (material breach by the Defendants), Tralongo introduced sufficient evidence that the Patels unlawfully repudiated the Territory and Clinic Agreements. Drs. Tralongo and Wingfield, David Lopez, Dr. Patel, and Mr. Patel testified that the reasons that the Patels cited for their termination of their relationship with Tralongo were inaccurate or at a bare minimum exaggerated. Although the Patels testified that the primary reason for the termination was Tralongo's letter of intent to purchase the Stamford Clinic which they perceived to be a derogation from the global-

sale model that made them join Tralongo, the evidence clearly showed Tralongo's offer to purchase the Stamford Practice actually far exceeded the expectations that were set forth in the Stamford Clinic Agreement and was entirely consistent with Tralongo's business model and the industry standards for similar purchase and sale transactions.

40. With regard to the third element (i.e., damages resulting from the Defendants' breach of the contracts), Tralongo offered competent evidence that it has suffered damages of $1,655,955 resulting from the Defendants' unlawful repudiation of the Territory and Clinic Agreements. The Court finds that the damages calculations and testimony of Dana Kaufman, Tralongo's damages expert, to be reasonable and reliable. This conclusion is bolstered by the testimony of the Defendants' damage expert, Dr. Stanley Stephenson that Mr. Kaufman's methodology was appropriate and that his 2% growth rate assumption with respect to the management fees and his use of 11.3 multiple with respect with the Buyout Option were conservative.
41. The Patels have asserted the following affirmative defenses to the breach of contract claims: (a) the Clinic Agreements are illusory and thus unenforceable, (b) Tralongo, as the first breaching party, is not entitled to recover damages under the Clinic Agreements, and (c) the Patels are entitled to set off the damages that purportedly resulted from Tralongo's alleged breach of the Clinic Agreements against the damages sought by Tralongo in this action.
42. With respect to the Patels' first affirmative defense (i.e., the Clinic Agreements are illusory), the Patels contends that the Clinic Agreements entitle Tralongo to terminate the Agreements but do not afford them a similar right. Although the Clinic Agreements grants Tralongo a unilateral right to terminate those Agreements, the lack of mutuality of termination does not render the Clinic Agreements illusory. This is because "[e]ven if there is no mutuality of termination, Florida courts have upheld the unilateral right of one

party to cancel a contract as long as consideration exists." *Avatar Dev. Corp. v. De Pani Const., Inc.*, 834 So.2d 873, 875 (Fla. 4th DCA 2002) (citing *Rollins Servs. v. Metro. Dade County*, 281 So.2d 520 (Fla 3d DCA 1973); *Murry v. Zynyx Mktg. Commc'ns, Inc.*, 774 So.2d 715 (Fla. 3d DCA 2000)). In *Avatar Dev. Corp.*, 834 So.2d at 874, the contract between the parties contained the following termination clause: "67.1 The Company [Avatar] may terminate this Agreement at any time for any reason by giving at least ten (10) days prior written notice." The trial court determined that "the unilateral, termination provision contained in Article 67 was illusory and unfair because it lacked in mutuality of obligation." *Id.* at 875. On appeal, the Fourth District reversed the trial court's finding concluding that: "Article 67[wa]s a valid and enforceable unilateral termination clause as it required Avatar to provide 'at least ten (10) days prior written notice,' which constituted sufficient consideration." I*d.* (citing *Sugar Cane Growers Coop. of Fla., Inc. v. Pinnock*, 735 So.2d 530 (Fla. 4th DCA 1999). Ultimately, the Fourth District concluded that even if there was no mutuality of termination, the termination clause in article 67 was valid because it had consideration. *Id.*

43. Notably, other Florida courts have found unilateral termination clauses valid where the termination clause contains a notice requirement. *See Murry*, 774 So.2d at 715 (stating that "[t]he contract require[d] [the plaintiff] to provide [the defendant] with sixty days written notice of his intent to terminate the contract. This condition was sufficient to satisfy mutuality requirement for the contract); *Sugar Cane Growers Coop. of Fla. Inc.*, 735 So.2d at 530 (ten-day notice requirement before termination of contract was sufficient to overcome claim of lack of mutuality); and *Bossert v. Palm Beach County Comprehensive Community Mental Health Ctr.*, Inc., 404 So.2d 1138 (Fla. 4th DCA 1981) (two-week notice requirement sufficient to avoid lack of mutuality claim).
44. Additionally, several federal courts have reached similar conclusions regarding unilateral

termination provisions. *Hardin v. First Cash Financial Services, Inc.*, 465 F.3d 470, 479 (10th Cir. 2006) (an arbitration agreement allowing a defendant company the unilateral right to modify or terminate the agreement is not illusory so long as reasonable restrictions are placed on this right.); *Laclede Gas Co. v. Amoco Oil Co.*, 522 F. 2d 33 (8th Cir. 1975) (Since the courts . . . do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or is based on some other objective standard") (citation omitted); *Cox v. The Travelers Companies, Inc.*, 2011 WL 128118 at *5 n.4 (N.D. W.Va. Jan. 14, 2011) ("A bilateral contract is not rendered invalid and unenforceable merely because one party has the right to cancellation while the other does not."); and *Lyon v. Reames Foods, Inc*., 1992 WL 73556 at *5 (D. Kan. Mar. 12, 1992) ("a contract is not unenforceable merely because one party has the right to cancel it when the other does not. Contrary to its assertion, defendant did not possess an unbridled right to terminate Mr. Lyon before a sale of the company in order to avoid liability to him. There were sufficient legal constraints on Reames Foods' ability to fire the plaintiff that even under defendant's postulation of the defense this alleged agreement is not illusory.").

45. Here, the Clinic Agreements obligate Tralongo to provide a notice of default and a 30-day opportunity to cure upon the occurrence of certain enumerated events of default. *See, e.g.*, Plaintiff Ex. 2, § 11.2.2 at pp. 33 – 34. The Clinic Agreements also restrict the rights of Tralongo to terminate the Agreements without an opportunity to cure to a narrow subset of circumstances where an opportunity to cure is either unavailable or impracticable. *Id.* § 11.2.1 at pp. 32 – 33. Moreover, the Clinic Agreements afford the

Defendants an opportunity to resolve any disputes through mediation and a dispute resolution process which the Patels admittedly did not employ prior to repudiating the Clinic Agreements. *Id.* §12.6.1 at p. 36. Finally, several other provisions in the Clinic Agreements clearly demonstrate that the Patels received consideration for entering into and complying with the terms of those Agreements. *Id.* § 5.1 (initial training) at p. 6, and § 7.1 (training for the clinic) at p. 13.

46. Even if the Court were to find that the unilateral termination provision to be illusory, that provision does not render the entire Clinic Agreement illusory because each of the Clinic Agreement contain a severability provision that prevents a severable provision from impairing the remaining provisions of each of the Clinic Agreements. *Id.* § 12.11 at p. 38. *See Energy Smart Indus. LLC v. Big R of Lamar, Inc.*, 2012 WL 3061600 at *11 (S.D. Fla. Jul. 26, 2012) (“Thus, assuming, arguendo, that the unilateral termination clause is unenforceable for lack of consideration, the plaintiff could still be able to enforce the remaining portions of the contract pursuant to the severability clause. Accordingly, the Court finds that the Agreement is not invalid for lack of consideration.”).
47. With respect to the Defendants’ second and third affirmatives (first breaching party and setoff), it is important to point out that those two defenses are inconsistent with each other. It is well settled that when a party does not fully complete its contract, the non-breaching party's remedies turn on whether that failure to perform constitutes a material or a minor breach. *See* generally RESTATEMENT (SECOND) OF CONTRACTS § 243 (1981). A minor breach may allow the aggrieved party to recover damages or a set-off against the breaching party, but it does not excuse that aggrieved party from performing. *Id.* §§ 241, cmt. a., and 251. A material breach, on the other hand, does entirely discharge the aggrieved party's obligation to perform. *Id.* § 241, cmt. d.
48. Simply put, the first breaching party doctrine requires a material breach by Tralongo

which the Patels viewed as a total breach that discharged their obligation to perform their obligations under the Clinic Agreements. *See Indemnity Ins. Co. of D.C. v. Cayloa*, 130 So. 3d 783, 786 (Fla. 1st DCA 2014) (As a basic matter of contract law, a breach only relieves the non-breaching party of performance if the breach was material); *see also Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) ("Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability.").

49. Conversely, the setoff defense is designed to compensate the non-breaching party for a non-material or a minor breach of the contract. *See Tubby's Customs, Inc. v. Euler*, 225 So.3d 405, 407 (Fla. 2d DCA 2017) (a party may instead affirm the contract, insist upon the benefit of his bargain, and seek the damages that would place him in the position he would have been in had the contract been completely performed) (citation omitted)).
50. Here, the Defendants have conflated the two defenses. They induced Tralongo to continue to perform their obligations under the Clinic Agreements for two years and are now seeking a setoff of their damages which implies that any breach by Tralongo was a minor breach that did not entitle them to terminate the Clinic Agreements. This is clearly inconsistent with the Defendants' position that Tralongo was the first breaching party which precludes it from recovering damages under the same Clinic Agreements. *See also City of Miami Beach v. Carner*, 579 So. 2d 248, 251 (Fla. 3d DCA 1991) ("The rule is quite clear that a contracting party, faced with a material breach by the other party, may treat the contract as totally breached and stop performance. However, if the complaining party continues to demand performance from the breaching party, damages can only be recovered for partial breach.")
51. The evidence clearly shows that the issues that Tralongo did not commit a material

breach of the Clinic Agreements. The Patels testified that they accepted Tralongo's performance for over two years and never notified Tralongo of any defaults or afforded them an opportunity to cure any such default prior to terminating the Clinic Agreements. *Lowy v. Kessler*, 522 So. 2d 917, 918 (Fla. 3d DCA 1988) ("Deeply embodied legal principles require that a person unwilling to act under the terms of a contract not induce the belief that she assents to its terms by standing by silently and performing under it.").

52. The evidence also shows that in July, 2016, merely four months before they terminated their relationship with Tralongo, the Patels voluntarily chose to enter into the Third Clinic Agreement and personally guaranteed the obligations under The Parkway Dental Hamden Agreement with Tralongo. The foregoing demonstrates that at a bare minimum, Tralongo substantially complied with its obligations under the Clinic Agreements. *Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981 Ltd.*, 642 So.2d 766, 768 (Fla. 4th DCA 1994) (Substantial compliance or performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the other party the benefit of the bargain); *see also Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 14 (Fla. 2d DCA 2015) (substantial compliance is, in essence, the opposite of a material breach of contract). The foregoing clearly demonstrates that the first breaching party doctrine does not apply because the Defendants failed to prove that Tralongo committed a prior material breach of the Clinic Agreements.

53. Nor does the setoff defense save the day for the Defendants because they clearly waived any minor breaches by Tralongo. The evidence clearly shows that although the Defendants were experiencing issues with Tralongo's services, the Defendants voluntarily chose not to terminate any of the Clinic Agreements within the one-year probationary period provided for in each of those Agreements. *Sch. Bd of Pinellas*

County v. St. Paul Fire & Marine Ins. Co., 449 So. 2d 872, 873 - 74 (Fla. 2d DCA 1984) (an owner who accepted work with knowledge that it had not been done according to the contract waived any issues relating to the contractor's defective performance); *see also* 23 Williston on Contracts § 63:9 (4th ed. 2018) ("Waiver may be found from an unexplained delay in enforcing contractual rights or accepting performance different than called for by the contract.").

54. Assuming, *arguendo*, that the Defendants did not waive any minor breach by Tralongo, their setoff defense still fails because the Defendants have failed to introduce any evidence regarding any damages that they may have suffered as a result of Tralongo's minor breach of the Clinic Agreements. Instead, the Defendants represented to this Court that they were seeking reimbursement of the $75,000 in acquisition fees that they paid to Tralongo. However, that amount cannot be set off against Tralongo's damages because the evidence clearly demonstrates that Tralongo provided acquisition and onboarding services to the Defendants in exchange for the acquisition fees.[1] The Defendants have not introduced any evidence of damages reasonably arising from the breaches as required by law. *Knowles v. C.I.T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977) ("It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of evidence the existence of a contract, a breach thereof **and damages flowing from the breach**.") (emphasis added); *Smith v. Austin Dev. Co.*, 538 So. 2d 128, 129 (Fla. 2d DCA 1989) ("Damages cannot be based upon speculation or guesswork, but must have some reasonable basis in fact."); *Jedak Corp. v. Seabreeze Office Associates, LLC*, 244 So. 3d 342 (Fla. 5th DCA 2018) (reversing and remanding entry of summary judgment against moving party where moving party filed to establish damages arising from breach of particular lease provisions.)

55. Based on the foregoing, the Court finds that the Defendants unlawfully repudiated the Territory and Clinic Agreements and as such, Tralongo is entitled to recover its damages from the Defendants in the amount of $1,655,955, excluding the Patels (see paragraph 57).
56. The Patels contend that their personal guaranty is limited to unpaid amounts that are due and owing under the Hamden Clinic Agreement. In support of this argument, the Patels point out that the personal guaranty is limited to the Hamden Clinic Agreement and any other agreements between Tralongo and Parkway Dental Hamden, P.C. *See* Plaintiff Ex. 5 at p. 63. The Court agrees, and finds the language of the Personal Guarantee clear and unambiguous and specifically binds the Patels to any obligation owed by the "clinical operator"- Parkway Dental Hamden, only.
57. Based on the foregoing, the Court finds that Dr. Mamta Patel and her husband, Yatin Patel, individually, jointly, and severally liable to Tralongo for the awarded damages of Parkway Dental Hamden, only.
58. The Court also finds that Tralongo is the prevailing party in this case and reserves ruling on the amount of prevailing party's attorney's fees and taxable costs that should be awarded to Tralongo.

---

[1] The Defendants have asserted breach of contract counterclaims against Tralongo that are predicated on the same facts as their first breaching party and setoff defenses. For the reasons set forth in paragraphs 47 through 54 above, Tralongo is the prevailing party on the Defendants' counterclaims against it.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 03-24-2020.

CACE17001178 03-24-2020 3:36 PM
Hon. Carol-lisa Phillips
CIRCUIT JUDGE
Electronically Signed by Carol-lisa Phillips

Copies Furnished To:
Beshoy Rizk , E-mail : acoro@zarcolaw.com
Beshoy Rizk , E-mail : brizk@zarcolaw.com
Beshoy Rizk , E-mail : apiriou@zarcolaw.com
Beshoy Rizk , E-mail : reception@zarcolaw.com
Bradford J Beilly , E-mail : patty@beillylaw.com
Bradford J Beilly , E-mail : brad@beillylaw.com
Bradford J Beilly , E-mail : john@beillylaw.com
John W. Salmon , E-mail : martha@sd-adr.com
Kaari Gagnon , E-mail : reception@zarcolaw.com
Kaari Gagnon , E-mail : nespinosa@zarcolaw.com
Kaari Gagnon , E-mail : kgagnon@zarcolaw.com
Robert Mitchell Einhorn , E-mail : reception@zarcolaw.com
Robert Mitchell Einhorn , E-mail : reinhorn@zarcolaw.com
Robert Mitchell Einhorn , E-mail : jmenendez@zarcolaw.com