IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

MICHAEL A. KAUFMAN, M.D., an individual,

Plaintiff

v.

CAMBIA HEALTH SOLUTIONS, INC., et al.,

Defendants.

Case No. 14-cv-06430

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

August 21, 2015

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I. INTRODUCTION

This is a case about defendants' broken promises.

Regence/Cambia made specific promises to plaintiff, Dr. Kaufman, that should a performance problem arise, it would give him adequate notice to improve his performance and that he would not be terminated in the absence of up to a year of performance improvement efforts. In disregard of its promises, Cambia terminated Dr. Kaufman a matter of weeks after defendant Dr. Csaba Mera assumed the position as Interim Chief Medical Director and just eight months after Dr. Kaufman began his employment, with no effective notice, absolutely no opportunity to correct performance deficiencies, and on the basis of a biased and result-oriented papering of the file. At Dr. Mera's direction, Regence did so despite the fact that Dr. Kaufman has received positive feedback about his work throughout his first six months of employment.

Dr. Kaufman brought claims against Cambia for breach of implied contract, breach of implied duty of good faith and fair dealing, and promissory estoppel, as well as a claim against Dr. Csaba Mera, Interim Chief Medical Officer for Cambia at the time, for intentionally interfering with Dr. Kaufman's economic relationship with Cambia.

Significant material issues of fact abound, and the law does not dictate a result for defendants under the facts of this case. Defendants' arguments are insufficient to deprive the parties of a jury determination of the facts and issues. Defendants' motion should be denied and the matter resolved by a jury.

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II. Factual Argument[1]

A. Cambia Recruits Dr. Kaufman and Promises a Process before Termination

Dr. Kaufman is a well educated and experienced health care management executive. As most executives at his level have experienced, job security is seldom guaranteed. Dr. Kaufman's employment history demonstrates the point.[2] He took on several positions over his career that ended abruptly, usually when the individual directly responsible for hiring him and to whom Dr. Kaufman reported either left the company or changed roles, leading to the loss of Dr. Kaufman's employment position. In another position, Dr. Kaufman was affected by a major reduction in force (and was brought back as a consultant effectively working full time on health care projects). Kaufman Decl. ¶ 1.

When Dr. Kaufman entertained the prospect of employment with Regence, he well understood – having not received specific assurances with his previous employers – that employers generally had the right to end the employment relationship with him whenever it

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[1] Under Rule 47, the moving party has the burden to demonstrate an absence of material fact issues. As the nonmoving party, plaintiff here has the burden only of showing that material fact issues exist. When competing inferences are possible from a given fact or circumstance, the question of which inference to accept is left to the jury.

Defendant has presented its section entitled "Material Facts" in part as description of evidence and in part as the urging of favorable inferences a jury is not required to adopt. Plaintiff here will not pretend to set out undisputed facts, but rather focuses on what facts are in fact disputed, and more importantly, what inferences defendants try to advance are subject to competing interpretations. For that reason, plaintiff has entitled this section "Facts & Argument" so as to be transparent in his argument.

[2] Defendants offer evidence of Dr. Kaufman's previous employments as an attempt to urge the inference that his performance was poor. As an evidentiary matter, the asserted facts have no foundation and should be disregarded for the purpose for which defendants offer them. How Dr. Kaufman performed in other employments has no relevance to how he performed in his position with Cambia. Absent a showing of habit under ORE 406, the evidence is inadmissible; it is prejudicial beyond any probative value, ORE 403, and improper. It should be disregarded.

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suited them.[3] That understanding is precisely why he sought – and received – explicit assurance that he would be protected from an abrupt termination at Cambia but instead would be given process and an opportunity to change his performance to meet expectations. Kaufman decl. ¶ 3.

In about June 2011, Dr. Kaufman initiated contact with Dr. Ralph Prows, Cambia's Chief Medical Officer ("CMO"), to inquire about and ultimately apply for the Executive Medical Director position with Regence BlueCross BlueShield of Utah, a subsidiary of The Regence Group, later changed in name only to Cambia Health Solutions, Inc. At the time, Dr. Kaufman had just recently moved into his Manhattan Beach, California residence, which he had purchased in November 2009 and spent 13 months remodeling. Kaufman Tr. at 38:19-25; 39:1-25; 40:1-8. The residence value was significantly underwater due to the housing market collapse of 2008 and the concomitant severe recession. Kaufman Decl. ¶ 2.

During the course of negotiating for the position with Regence, Dr. Kaufman conducted several communications with Dr. Prows over the terms of the proposed employment, the compensation, and other matters related to the question whether to accept the employment. Dr. Kaufman was self employed while considering the position, and the salary and bonus package being offered was only borderline competitive. Dr. Kaufman was not desperate for employment and had been self employed for only two months at the time that he received the initial employment offer from Regence. He sought a variety of ways to increase the value of the position, including an enhanced sign-on bonus. Exh. 32.

Because of Dr. Kaufman's concern over being subjected to an abrupt no-cause

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[3] Defendants offer inadmissible evidence. They refer to and offer documents relating to a prior lawsuit by Dr. Kaufman. As with previous employment, the claims, evidence, and outcome of prior legal actions are not relevant to the instant case, nor is the reason his complaint against a different employer, under a different state's laws, and on different facts was dismissed of any relevance. Defendants' effort to introduce evidence clearly relevant for nothing more than smear purposes should be rejected.

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termination (especially in light of the prospect of relocating his personal residence to Utah in a year or two), Dr. Kaufman inquired about Regence's severance plan. He learned that the plan provided benefits only attendant to a position elimination. With knowledge of the lack of severance, Dr. Kaufman's concerns over a process grew. He expressed those concerns to Dr. Prows. In response, Dr. Prows wrote as follows:

> I talked with the HR folks yesterday re: Severance and Relo. You will hear from Alison Durkee today, I think. I don't sense much flexibility - all pretty standardized corporate policy.
>
> But on the severance issue, HR told me, and I think this is true, that not for cause terminations don't really happen unless positions are eliminated (an event that would actually trigger severance). I've actually never seen a case where anyone here was just fired without cause. What I have seen commonly is performance-related corrective actions, and if expectations are not met, then the persons are "managed out". This usually takes more than a year, and it is rarely if ever a surprise.
>
> Example: I have an employee now who is always screwing up ..... he does not get work done on time, he does not anticipate and take any initiative to get things done on schedule, etc. He received this feedback informally at first, but when he didn't improve, he received it in a formal annual performance review. He is on a plan and is being coached. He's doing a lot better now, but it could have gone the other way. If it had, he would probably have been fired in the next year. So this isn't really a "not-for-cause" termination, but it isn't for some gross and flagrant misconduct either. You get my point. This does give me some reassurance, but obviously it isn't tenure either.

Exh. 30, Prows Tr. 47:5-50:20. Moreover, Dr. Prows also spoke to Dr. Kaufman about how Regence's corrective action plan or process improvement plan works. Prows Tr. 39:15-23

Based on Dr. Prows' explicit description of the process attendant to the at-will nature of employment at Regence, Dr. Kaufman reasonably understood that, while the company referred to an "at will" relationship, the ability to terminate at any time was subject to the process described by Dr. Prows in advance of any such termination. Kaufman Decl. ¶ 6.

This understanding was enforced by his receipt of an email , also on September 13, 2012,

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from Alison Durkee, the Regence HR recruiter working with Dr. Prows, in which she described the nature of employment within Regence as at will, but with quotation marks setting off the "at will" reference: "Regence is an 'At Will' employer." Kaufman Tr. at 164:20-23; Exh. 29. Durkee's email to Kaufman was consistent with Dr. Prows' promises that termination would not occur without advance process – her placement of the words "at will" in quotation marks meant the employment was *at will* in name only, not in practice: "Even though Regence is an "At Will" employer, we invest heavily into our employee's (sic) and hope they will stay with us for the duration of their careers." *Id.*

Contrary to defendants' contention, Dr. Prows' testimony does not establish that "Prows also told Kaufman that he would be employed at-will." Instead, he testified:

> A What I would -- what I recall is that, in the context of Dr. Kaufman's concerns about, you know, persistence of employment, I would likely have said, although I don't specifically remember doing that, but I would likely have said that, yes, we are an at-will employer, but our practice is to, and then I would have gone on to describe what I did earlier about performance improvement.
>
> So I think I also alluded to this when I was answering one of Mr. Druckman's questions, that I may have implied something in that regard; that we typically would -- and this is true. We typically would have deployed some sort of a process, as I described in the September 13th email, to address any deficiencies in work and to try to work through them. That was what we had been asked to do by the president of the company, and it's what we did in truth and practice.
>
> Q All right. And that's what you described to Dr. Kaufman?
>
> A Yes. "

Prows Tr. 196:15 - 197:8.

B. Dr. Kaufman Accepts Cambia's Offer

On September 22, 2011, Kaufman accepted Cambia's offer of employment. Kaufman Tr. at 178:24-25; 179:1; Exh. 37. The offer letter contains no reference whatsoever to *at will* employment. Exh. 37. Dr. Kaufman accepted the offer in reliance on the promise that he would receive advance process – notice of any performance problems and an opportunity to improve or cure – before Cambia could terminate his employment. He would not have accepted employment

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with Cambia in the absence of such a promise.

C. Other and Later Expressions of At-Will Status are Insufficient to Change the Terms Dr. Kaufman Accepted

Defendants point to references to *at will* employment in documents presented to or made available to Dr. Kaufman only after he accepted the terms of the offer letter and began employment. They refer to a September 26, 2011, Sign-On Bonus Agreement that contains the statement that the Bonus Agreement does not "modify my at-will employment relationship with Regence." Def. Memo at 8, Exh. 39. Nothing in the Bonus Agreement negates the promise of a *process* Regence had promised would be provided before its exercise of an *at will* termination.[4] The bonus agreement does not purport to be given in consideration for a change in terms of the accepted employment relationship.

After Dr. Kaufman accepted the terms of his employment by signing the offer letter, Durkee gave Dr. Kaufman information about forms that Cambia required him to complete and provided a link to the company's internal website. Durkee advised Dr. Kaufman that he *could* access the documents and would be required to sign an acknowledgment. She did not advise him that the policies would change his right to the pre-termination *process* that had been promised to him.

Defendants also attempt to rely on general statements of at-will status in other documents, all provided to Dr. Kaufman (or to which Dr. Kaufman merely *had access to*) after he accepted the terms of employment. To the extent defendants rely on these after-provided statements, they are insufficient to change the terms of Dr. Kaufman's bargained for employment

[4] Defendants assert the legal conclusion that "Cambia is an at-will employer," relying on the simple say-so of Mark Simpson. It is insufficient to establish a question of law by just saying it is so.

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relationship, including the promise of a pre-termination *process.*[5]

D. Cambia Owed Dr. Kaufman a Pre-Termination Process, not Employment for Term

Defendants mischaracterize Dr. Kaufman's claim throughout their motion. He does not contend that he had a contract for a term of years. He does not contend his contract was for a definite duration. Defendants' arguments to the contrary miss the point. (For example, defendants argue that, "In his deposition, Kaufman admitted that he understood that he was not entering into a contract of employment with Cambia for a particular length of time and that no one told him he would be employed for a defined duration. Kaufman Tr. at 159:11-21." They tilt at windmills; plaintiff makes no such argument.)

E. Dr. Kaufman Performed Within Expectations

Dr. Kaufman was hired for the position as Executive Medical Director. His primary office was located in Salt Lake City. He shared an administrative assistant, but otherwise was without staff. His job responsibilities were:

> primarily to act as an externally-facing medical officer of the company to be overseeing and providing input on the creation of medical management reporting and presentations across the four states, not just Utah. He was responsible for that function along with others who were not clinical. And he was to go out on calls, external calls, with [Byron Clawson] or others from the sales division and meet with large clients and to provide those clients with insight into the cost drivers from a medical and a clinical standpoint, the cost drivers for their employee health costs. And he would present the reports to them, would interpret the reports, and would describe the activities within Regence that were designed to specifically help manage those employees, to reduce costs, and improve their health.
>
> He had minor responsibilities like everybody did for other things; participation and other strategic functions, or doing some appeals and grievance meetings, and doing some prior authorization and coverage determinations, those sorts of things.

Prows Tr. 65:10-66:8 & Exh. 250. The job description was generic. No one physician at Regence

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[5] As described in more detail *infra* in connection with the choice of law issue, defendants' reliance on the Utah *Trembly* case is misplaced.

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was responsible for all its elements. Kaufman Decl. ¶ 11. See also Prows Tr. 68:15-69:2. For example, Dr. Mera had different primary responsibilities than those held by Dr. Kaufman. Prows Tr. 72:15-73:10 (referring to Mera's responsibility for "clinical aspects of utilization management, disease management, case management, operations" and "for accreditation process for those programs to an organization called URAC.")

It is important to note that a newly hired executive medical director like Dr. Kaufman was not expected to be immediately up to speed and but was expected to have a long learning curve. In fact, according to Dr. Prows, it takes years. Prows Tr. 94:10 - 95:20.

> Well, you have to learn how things work at Regence. It's not simple. It's a large integrated highly matrixes complex organization, and the functions that we were all engaged with every day were examples of where you didn't always know, particularly if you're new, who another person was, what their role might be, what their deliverables might be to a particular project or thing that you were working on. * * * * You don't the politics, you don't know the people, you don't know their jobs. So when it comes to getting something completed, you have to figure out how to navigate those things, and it's a challenge to any newcomer, and it takes years really to learn that stuff.
>
> * * * *
>
> And that's -- you know, you can argue about whether someone's getting up to speed as fast as you like or not as fast as you would like. That's subjective since everybody's different, and the cases are different, and who knows what other activities are occupying that person's brain at that moment. But nonetheless, there was no indication that he was off the rails or in any way outside of bounds.

Prows Tr. 94:10 - 95:20.

Dr. Prows was in the best position to observe and evaluate Dr. Kaufman's performance. Prows Tr. 66:21 - 68:4 ("Dr. Kaufman needed very little tutoring. Dr. Kaufman had done this stuff for years in many other venues. * * * he did an exceptional job. I'm not saying that simply as my judgment. This was the judgment that the sales reps for those accounts would give to me.")

F. Defendants Set Up Dr. Kaufman for Termination without Process

Defendants load all their eggs in a single basket, *i.e.*, the argument that Dr. Kaufman

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failed to complete a corporate assignment and that he was fired. Defendants do not argue that he was given the notice and an opportunity to improve his performance he was promised.[6] Moreover, they ignore the fact that he completed the assignment despite very significant obstacles – established by Dr. Mera and Byrd to get him fired.

The first announcement that a project would be forthcoming came on March 22, 2012, and the project was divided into teams on April 18, 2012. They attempt to dismiss Dr. Kaufman's efforts with a footnote: "In his deposition, Kaufman blamed the lack of progress on the unavailability of other members of his sub-group. Kaufman Tr. at 308:15-24. However, there is no evidence that he made much, if any, attempt to engage his team members." Def. Memo at 14, n.9. Dr. Kaufman's efforts are not so easily dismissed as undisputed.

Defendants claim Dr. Kaufman had medical management experience and medical management was part of his job. When Dr Mera assumed the position vacated by Dr. Prows on an interim basis, he made no specific changes in the responsibilities held by Dr. Kaufman. Dr. Mera continued to hold primary responsibility for all medical management functions from a medical director perspective. Prows Tr. 72:15-73:13; Kaufman Tr. 265:21-23. Despite Dr. Mera's in-depth knowledge of medical management, he gave Dr. Kaufman no insights about inpatient medical management operations, operational issues, or potential improvements nor any recommendations about people Dr. Kaufman could consult. Kaufman Decl. ¶ 13.

Dr. Kaufman was asked to lead the inpatient medical management subgroup/focus group with the clear understanding that he was not familiar at all with the operational aspects of Regence inpatient medical management, that Joan Byrd would educate him about it, and that she

[6] In addition, in doing so, they also ignore the fact that Dr. Kaufman received a very positive employee evaluation in January 2012 and positive reviews from Regence executives through March 30, 2012, the end of Prows' employment with Regence. Prows Tr. 80:8-11; 91:11-16.

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would be the key contributor in defining current processes and issues.[7] Byrd not only was a part of the focus group itself, but her full-time role was leading medical management operations. Dr. Kaufman did not know the members of Byrd's leadership team and none was in Utah. Kaufman Decl. ¶ 14. Dr. Kaufman had no direct reports and was supported in Utah only by a partial FTE administrative assistant. Kaufman Decl. ¶ 11.

Because of Byrd's direct responsibility for inpatient medical management operations, Byrd was the key person whose active involvement was critical for the focus group to accomplish its assigned responsibilities. Kaufman Tr. 279:8-280:20; Kaufman Decl. ¶ 15. That involvement never came. Dr. Kaufman could not develop a plan without Byrd's assistance because he had not been an active participant in medical management and therefore did not know the current process or the people on Byrd's staff that might provide foundation knowledge about the current state of Regence medical management. Kaufman Tr. 316:24-317:4; 321:4-10.[8] Despite multiple efforts by Dr. Kaufman to discuss the focus group's work, she refused to meet or talk with him. Kaufman Tr. 279:8-19. Tupper Decl. ¶¶ 4-10.

Byrd met with Dr. Kaufman only for a brief introductory meeting at Salt Lake City airport on April 16, 2012, two days before the inpatient management focus group was established. Byrd and Dr. Kaufman talked about their common background of being involved in

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[7] Dr. Kaufman testified: "I was, on paper, leading the team. Unfortunately, care management, from the operational perspective, reported to Joan, and medical management reported to Csaba. I -- I really had no exposure to any of the inpatient medical management really for any depth previously. And I tried very hard to engage Joan in creating a team to -- to work on this issue. But she was, I guess, overwhelmed by her work when arriving at Regence, and she was really never available to work as a team member " Kaufman Tr. 279:8-19.

[8] The two other members of the focus group were Alison Goldwater, the network development lead in Oregon; and Bob Her, a medical director located in Washington who reported to Dr. Mera provided clinical support to day to day medical management. When Dr. Kaufman reached out to Ms. Goldwater, she made it clear that she was overextended with Oregon re-contracting and other initiatives and did have the time available to participate actively with the focus group.

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medical management in California. She discussed work at Health Net in California with Dr. Kaufman, and Dr. Kaufman told Byrd that he was renting a house in Park City, Utah and still owned a home in Manhattan Beach, California. He made no statement to the effect that he would not relocate to Utah; he was already living in Utah.[9] Kaufman Decl. ¶ 16. Compare Bryd Tr. 17:17-18:3.

Dr. Kaufman had lunch with Byrd in Chicago on April 26, 2012, while both attended a Blue Cross/Blue Shield Association three-day orientation program. At the conclusion of the program, they sat down for a quick lunch before Byrd left to visit family in the area. The restaurant was very crowded and noisy. The two spent time getting to know each other better as well as talking about the recently completed orientation session. No discussion took place over "the inpatient work," as defendants claim.[10]

On May 8, 2012, Byrd emailed Dr. Kaufman with information striking Dr. Kaufman as wholly inconsistent with her previous position on the focus group. Kaufman Tr. 305:23, Exh. 71. First, it was apparent from the email that Byrd had been communicating with a Michael *Dekker*, not Dr. Michael Kaufman about the subject. Second, her comments were surprising in that she wrote Dr. Kaufman as if she had not made herself unavailable to Dr. Kaufman for a meeting or

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[9] Compare Byrd's testimony claiming that she met with Dr. Kaufman on April 16, 2012 and that he told her that he did not intend to relocate to Utah. Byrd Tr. 17:20-24.

[10] Dr. Kaufman Decl. ¶ 17. Defendants claim "Byrd met individually with Kaufman over lunch on April 26, 2012 * * * to discuss the impatient work." Def. Memo at 14. Byrd's testimony is as follows:

> Q How much of that meeting in Chicago -- or how long did that meeting last?
> A It was over lunch in a noisy place rushed on the way to the airport. I don't think it was very long, but I don't know for sure.
> Q And did you discuss or advise Dr. Kaufman of individuals who would be resource information on that subgroup?
> A I don't recall.

Byrd Tr. 65:25-66:8.

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telephone conversation to discuss the project despite Dr. Kaufman's efforts to set up a phone call.

Nonetheless, he proceeded to conduct a telephone meeting with Byrd regarding the focus group on May 11, 2012. The call included Nicole Bell, a Regence executive, who was in Byrd's office. Bell was leading a project focused on improving Regence hospital contracts. During the meeting, Byrd informed Dr. Kaufman that she had retained Milliman, an outside consulting firm, to evaluate and make recommendations about inpatient medical management and other medical management activities. She further stated that she would not be available to participate with the focus group or discuss inpatient medical management with Dr. Kaufman because she would be tied up with the Milliman project and her other responsibilities. Kaufman Decl. ¶ 19.

Despite the extreme difficulties Dr. Kaufman was having setting up a dialogue with Byrd, he did not contact Dr. Mera before May 15, 2012 about those difficulties. He did not want to complain about her. Kaufman Tr. 284:7-21. Dr. Kaufman chose not to make Dr. Mera aware of Byrd's failure of availability until: (1) she wrote suggesting she was not a member of his focus group; (2) Byrd ignored her announcement to him that the Milliman initiative had superseded the project; (3) she implicitly asserted that Dr. Kaufman was responsible for the focus group's failing to develop recommendations; and (3) Dr. Mera by email suggested Dr. Kaufman was solely accountable for the focus group failing to develop recommendations. Dr. Kaufman had no idea that Byrd and Mera were in regular contact about Dr. Kaufman and that Byrd was forwarding email correspondence to Dr. Mera. Kaufman Decl. ¶ 20.

On May 16, 2012, when Dr. Kaufman understood that Byrd was providing false information about her undertakings for the focus group, Dr. Kaufman emailed to Dr. Mera, describing his inability to engage Byrd and her lack of availability to work on the focus group, and asking for guidance on who to talk with to learn about current inpatient medical management

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operations. Dr. Mera failed to provide the requested guidance and did not even respond to the email. Based on Dr. Kaufman's conversation with Byrd on May 11 and the email announcement about the Milliman project originating from her office on May 14, 2012, Byrd Tr. 93:20, Exh. 227, Dr. Kaufman was convinced that the focus group work had been superseded by the Milliman consulting project and, if anything, he would hear from someone from Milliman about their inpatient medical management review.

Despite the clear indications that the focus group's proposed work had been taken over by Milliman, Dr. Kaufman continued to attempt to convene a meeting of the focus group members. On May 15 or 16, 2012, he directed his administrative assistant, Melissa Sandoval, to work with the administrative assistants of the focus group members to come up with dates and times for a telephone meeting. Kaufman Tr. 321:15-25, Exh. 80. Dr. Kaufman asked her to provide them with a list of potential dates and times, but the request met with no responses from Byrd, Goldwater, or Herr. Nor did anyone respond with alternative dates. Kaufman Decl. ¶ 22. See Tupper Decl. ¶ 6.

Throughout April and May 2012, Dr. Kaufman was actively involved in developing a new accountable health solutions model and the materials describing it as well as presenting and discussing this new model with potential delivery systems in Utah. In fact, on the day Dr. Mera called Dr. Kaufman to dress him down on May 30, 2012, Dr. Kaufman had earlier presented the accountable health model to the leadership of the University of Utah Medical Center and was commended for the quality of the presentation by its CFO as well as by Byron Clawson.

The May 30, 2012, phone call from Mera was the first time since his assumption of the interim CMO position that he contacted Dr. Kaufman to talk about the focus group project. He never scheduled regular meetings with Dr. Kaufman as Dr. Prows had done. In fact, he never called Dr. Kaufman to provide feedback on *any* issues. Nonetheless, in the course of the phone

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call, Dr. Mera subjected Dr. Kaufman to offensive and denigrating, very negative and belittling comments about Dr. Kaufman, many of which refered to the time Dr. Prows was CMO and none of which he had shared with Dr. Prows. Kaufman Decl. ¶ 24.

G. Dr. Kaufman Completes the Assigned Project

Nonetheless, after Dr. Mera's phone call on May 30, 2012, although very upset by their interaction Dr. Kaufman committed to providing the report on inpatient medical management by June 6, 2012. He met with Byron Clawson, the vice president of network contracting and provider relations in Utah. Mr. Clawson brought into his office Todd Sprouse , the manager in charge of hospital contracting, and Jared Collings, a data analyst that supported provider contracting. Dr. Kaufman then followed up with both of them in regard to current contracts and contract issues as well as reporting capabilities that supported provider contracting. Collings provided the names of other individuals that Dr. Kaufman might contact who were involved in corporate health care data analytics and report development. Sprouse provided the names of individuals in other Regence states that could provide input on contracting issues. Kaufman Decl. ¶ 26.

Dr. Kaufman also left a phone message for Byrd asking for the names of her leadership staff who could brief him on current processes and asking for her to advise them he would be calling. In response, for the first time, Byrd emailed on May 31, 2012 approving Dr. Kaufman's contact with her staff directly. Kaufman Tr. 328:1, Exh. 84. On the same day, Byrd scheduled receipt of the focus group recommendations for June 15, 2012.[11] Kaufman Tr. 327, Exh. 83.

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[11] Byrd's rescheduling the due date for the focus group recommendations into the middle of June 2012 indicates that the previous "due dates" were either contrived or merely target dates. Had the recommendations been truly necessary for some board presentation in April, as alleged, then the entire project would have been dismissed as unnecessary. That did not happen; instead, Byrd's reference to a mid-June 2012 target date – met in advance by Dr. Kaufman – means he met and exceeded the extended due date for the project.

Dr. Kaufman assured her she would have the recommendations by the end of the following week, June 8,

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Defendants try to suggest that Dr. Kaufman made little, if any, attempt to engage his team members. Def. Memo at 14, n.9. This contention is untrue and disputed. Following Dr. Mera's attacking phone call on May 30, Dr. Kaufman contacted all the individuals whose names Byrd had provided, either on direct referral from Byrd or based on recommendations of the people he spoke to (effectively acting as surrogates for Byrd). Dr. Kaufman gathered information and ideas from Sharon Arneson, Assistant Director of Integrated Care Management, and Judy Campbell, Kathy Schwab, and Sheree Comer from utilization management. From these calls, he acquired an overview of the recent history of inpatient medical management operations, the current state of these operations, issues thought to inhibit the effectiveness of those operations, and ideas for improving the inpatient program. He also spoke with Bob Herr, a member of the focus group and a medical director, to get his observations on the UM process and learn more about inpatient medical management from the perspective of a physician who was actively involved in day to day inpatient medical management. Kaufman Decl. ¶ 28.

For an expanded contracting perspective, Dr. Kaufman contacted Alison Goldwater from his focus group; Beth Johnson, the network contracting Vice President for Washington; Seyra Lawrence, an associate provider network executive in Idaho; and Erin Hughes and Nicole Eldredge in provider contracting to gather information and to schedule time to discuss in detail the current state of Regence contracts as well as re-contracting initiatives. Dr. Kaufman emailed Johnson, Clawson, and Goldwater on May 31. Johnson and Lawrence provided context and insight on the prior authorization issue and potential changes to hospital contracts that would facilitate inpatient medical management. They identified Regence employees who did data analytics and report development who could provide current reports, discuss the strengths and

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2012. Dr. Kaufman provided the recommendations "white paper" on June 5, 2012, 10 days ahead of schedule. Kaufman Tr. 333:11, Exh. 87.

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weaknesses in the reports, and update reports in development. Dr. Kaufman discussed the issue of linking medical department decisions such as denial of admission and length of stay with claims payment with Carol Culver, a supervisor of integrated support services, as well as other individuals who provided input to the white paper. Kaufman Decl. ¶ 29.

Concomitantly, Dr. Kaufman followed up on recommendations from Collings, Johnson, as well as Byrd's staff, and reached out to a large number of data people, over the days between June 1 and June 4, including Alex Robinson, Erik Segren (actuarial analyst), Jenni Trentman, Shelley Webb (assistant director, actuarial), Sheree Comer, Sarah Couey (Director HCS Planning and Analytics), and Zhenya Abbruzzese (manager of health care analytics, discussing the inpatient related reports and a DRG-diagnosis focused analytic tool that was not being utilized but appeared to have significant potential to refine diagnosis and hospital focus).[12] Kaufman Decl. ¶ 30.

Dr. Kaufman engaged in an active dialogue with Alison Goldwater between June 1 and June 4 during which they exchanged at least 13 emails, Regence 03016 - 022, and solicited her input on outstanding contract related issues. Goldwater provided very specific detailed answers to the questions raised by Dr. Kaufman. Dr. Kaufman's work with her was very collaborative even though it does not appear that he received some of the specific information she committed to sending before he completed the report. Kaufman Decl. ¶ 31, Exh. 251. Throughout the four day period, he sent her questions and she responded with specific and relevant details, contrary and in stark contrast to the contention in the Goldwater Declaration.

Dr. Kaufman focused his attention on relevant operational recommendations and solicited input from several executives not affiliated with Regence, including Dr. Jeff Kamil, the Vice

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[12] It appears Byrd had little or no familiarity with the reports on which Abbruzzese was working and contacted Shelley Webb on about June 8 to learn about them.

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President and Senior Medical Director at WellPoint; Sunil Joshi from government business contracting at Wellpoint; Cindi Scollins, RN, former VP of Health Care Operations at WellPoint; and Dr. Glenn Pomerantz, CMO of Horizon Blue Cross. Kaufman Decl. ¶¶ 31-32, Exh. 251. Dr. Kaufman drew upon his managed care experience and more specifically his relevant experience while employed with United, WellPoint, and Harvard Pilgrim Health Care to make actionable admission oversight and readmission prevention recommendations. In addition, he identified outstanding issues and opportunities and provided very specific recommendations about how to address them. For example, in support of the recommendation on the use of IVR to reach Regence members, he identified the need to capture complete and accurate hospitalized member phone numbers when conducting UM. Although it is not discussed in the paper, phone numbers from member enrollment are often inaccurate because people move, change their cell number, or the entries are keyed in wrong. Kaufman Decl. ¶ 32-33.

Dr. Kaufman prepared several drafts of the report on June 4 and June 5, and the evening of June 5 sent the proposed white paper to the focus group members: Joan Byrd, Alison Goldwater, and Bob Herr. Kaufman Tr. 333:11, Exh. 87. The comments in response were positive although Byrd raised one question about staffing ratios even though the white paper included the recommendation to solicit what a best-in-class ratio should be and discussed the ratio of one nurse to 38-40,000 members and noted that the key to staffing was making sure the company had the right case load to maximize return on investment. Dr Herr wrote him that the paper "Looks truly great." Kaufman Decl. ¶ 35, Exh. 252. Dr. Kaufman sent the final version of the white paper to Dr. Mera and several other executives on the morning of June 6 with a cover note acknowledging that the document was not meant to be definitive but a foundation for discussion and the outstanding input and support he had received from over 20 Regence executives and employees. Kaufman Decl. ¶ 35, Ex. 87.

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The white paper was an effort to bring together information and ideas that had been compartmentalized at Regence, expand awareness of the current state of Regence initiatives relevant to inpatient medical management, and make practical suggestions about how to improve inpatient medical management that did not appear to be currently being implemented or even under consideration. Given that Milliman had been charged with doing a thorough review of Regence inpatient medical management, including comparing Regence operational functions to industry competitors and best in class companies, Dr. Kaufman viewed the paper as a useful document for discussion with Milliman and potential source of ideas for them to address as well as a means of identifying existing relevant reports that they needed to review and potential reporting deficiencies that they needed to assess. Kaufman Decl. ¶ 37.

H. The Report – White Paper – Was Specific and Contained Specific Recommendations

Defendants claim the white paper submitted by Dr. Kaufman "was substandard and did not meet Mera's expectations: it consisted of known concepts that anyone could have copied and pasted out of a medical management book and failed to include specific recommendations on the approach and collaboration necessary amongst departments to implement the concepts, which had been the assigned task." This after-the-fact rationalization is insufficient to establish the absence of a material issue of fact. It is a fact question whether the white paper had substance, was specific, or included sufficient recommendations.

In fact, the contention that the paper was substandard, lacked specifics, or failed to include recommendations, is false. The document about Regence inpatient medical management was not a "cut and paste." Dr. Kaufman made it clear in his cover note that it was not intended to be a definitive inpatient medical management assessment but rather a foundation for further discussion The white paper was not a theoretical document; it had very specific

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recommendations,[13] detailed in Dr. Kaufman's Declaration. Kaufman Decl. ¶ 39.

The specific recommendations appearing in the White Paper show that defendant's offhanded dismissal of the content of the white paper is groundless.

I. Defendants' Evidence Regarding the Decision to Terminate is Contradictory and Inconsistent

Defendants offer inconsistent and contradictory testimony in many respects. Concerning when the decision to terminate was made and who made it, Dr. Mera testified that the decision was initially made in a meeting attended by himself, Gaspar, and Byrd in late April or early May. Mera Tr. 74:25-75:19, 98:24-99:16. Byrd denies any such meeting occurred. Byrd Tr. 42:21-22.[14] Stimpson testified that Dr. Mera was the decision maker, Stimpson Tr. 41:4-10, and makes no reference to Gaspar as involved in the decision, but only contacted him after the decision was made. Stimpson Tr. 72:19-21. Jennifer Brion, the other HR activist, contends she had no communications with Gaspar about the termination. Brion Tr. 75:3-6.

Brion testified that the Regence corrective action process does not apply to high level employees such as Dr. Kaufman. Brion Tr. 57:1-7. Nothing in the corrective action section of the handbook even hints at such an exclusion. Furthermore, their assertion is inconsistent with Dr. Prows' experience with other high level executives, including Dr. Kulpa, Dr. Gifford, and Dr. Mera. Prows Tr. 36:4-39:23, 51:7-54:8. In the case of Dr. Kulpa, for example, Dr. Prows

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[13] The specifics of the white paper must be judged by the fact that Dr. Mera failed to provide Dr. Kaufman with any standards to meet or model and never discussed the recommendations with Dr. Kaufman. Dr. Kaufman had never seen a written analysis of any subject at Regence (other than PowerPoint presentations) or any documents that describe some "standard" for Regence's reports.

[14] Defendants contend that Gaspar "expressed frustration that Kaufman had fallen asleep in strategic imperative meetings." The contention that Dr. Kaufman fell asleep is disputed. Dr. Kaufman never attended a meeting in person with Steve Gasper and Jared Short at which the subject was the review of strategic plan assignments and cost savings work. As such, he could never have fallen asleep at such a meeting and did not fall asleep at any meeting with Short or Gasper. He did attend an executive medical director meeting Portland shortly after Dr Prows was terminated at which Steve Gasper and Jared Short may have made separate and brief introducing themselves appearances. He did not fall asleep in that meeting. Kaufman Decl. ¶ 40.

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was instructed by HR to develop a very elaborate corrective action plan that included changing her responsibilities and providing both training and mentoring. Prows Tr. 53:12-54:8; Gifford Decl. ¶¶ 3-4.

Dr. Prows testified that he subjected Dr. Mera himself to a corrective action plan, Prows Tr. 51:7-53:11, yet Dr. Mera denies that it occurred. Mera Tr. 33:2-25. Dr. Prows testified he left files relating to Dr. Mera's performance coaching, Prows Tr. 55:10-14, 56:1-12, 56:25-57:2; Dr. Mera, who took over Dr. Prows' office, claims no such documents existed, that his file contained only his performance evaluation. Mera Tr. 177:19-178:7.

Despite the inconsistencies on who made the decision and when the decision was first visited, on May 22, 2012, Dr. Mera met with HR representatives and advised them that he wanted Dr. Kaufman terminated. See Mera Tr. 98:24-99:16. Thereafter, defendants' HR engaged in a process predetermined to justify the termination decision already made.

Although defendants paint an orderly "investigation," the process played out as simply a means to justify an already-made decision by Dr. Mera to terminate. First, Dr. Mera prepared a paper explaining how to justify terminating Dr. Kaufman even before meeting with HR. Mera Tr. 87:5-11, Exh. 88. Second, HR employee Jennifer Brion set about getting other employees to make negative statements about Dr. Kaufman.[15]

Defendants offer second hand comments by a number of people criticizing Dr. Kaufman

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[15] Brion and Stimpson contradict each other with regard to the so-called investigation. Both point to the other as having acquired information from key individuals in Utah. Neither admits to talking with Bob Hatch or Jennifer Danielson, yet the "documentation" provides information attributed to both. Exh. 204. Note the artful description by defendants of the contact with the Utah individuals: "Brion then ***spoke with and/or received information from*** Rich Rainey, M.D., Executive Medical Director for Idaho; Stimpson; Byron Clawson, Vice President of Provider Services – Utah; and Jennifer Danielson." Def. Memo at 17 (emphasis supplied).

A reasonable jury could conclude that the "documentation" was contrived and therefore false and that, as a result, defendants as a whole should not be believed. Summary judgment in the face of such possible juror reaction is not appropriate.

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– all solicited after the decision to terminate had already been made. Those include:

1. General comments by Dr. Rainey referring to some unidentified project, a missed phone call, and attendance at panel meetings, and complaints about corporate matters.

Although it is totally unclear what Rainey is referring to in his conversation with Brion, Dr. Kaufman never missed a scheduled telephone call with Rainey about anything absent prior information by Dr. Kaufman to Dr. Rainey or his administrative assistant of a schedule conflict and either the rescheduling of the call or follow-up with Dr. Rainey to address what occurred during the call. Dr. Kaufman never missed an appeal panel meeting in which he was scheduled to participate absent notice in advance of a scheduling conflict. Dr. Rainey and Dr. Kaufman regularly covered for each other at the appeals panel meetings in scheduling conflict instances. Kaufman Decl. ¶ 41.

2. Comments by Stimpson, "who has an office in Utah near Kaufman's, told Brion that Kaufman was often not around and that they did not interact much."

Stimpson's office was half a building away from Dr. Kaufman's office next to a completely different administrative support pod. Stimpson was frequently away from his Utah office because of his Portland based corporate executive human resources role and rarely encountered Dr. Kaufman or had a basis to know when Dr. Kaufman was present or not. Kaufman Decl. ¶ 42.

Dr. Kaufman also was often out of the office for informal meetings with network development and SIU staff as well as meetings outside of the office with providers and potential and existing sales clients. He would regularly fly to Portland for accountable health solutions and other meetings. Kaufman Decl. ¶ 43.

3. Comments by Danielson to the effect that "she had concerns about Kaufman's work ethic and level of engagement."

Dr. Kaufman never had any one on one meetings with Danielson. Her office was half a

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building away from Dr. Kaufman's, and she was supported by a different administrative assistant pod next to her office. Dr. Kaufman attended few meetings with her because their functional responsibilities were distinct. During the first several months of Dr. Kaufman's employment with Regence, he understood that she was preparing for her wedding and taking care of family responsibilities in the evening, and then later adjusting to her new marriage. She had so little contact with Dr. Kaufman during his time at Regence that she has no basis for commenting on his work ethic or level of engagement. Kaufman Decl. ¶¶ 44-45.

4. References to missed meeting by Clawson.[16]

Dr. Kaufman did not miss meetings he was scheduled to attend with Clawson, except for one occasion in October or early November 2011 where he was unable to attend person but participated by phone. On that occasion, Dr. Kaufman was up most of the night before the meeting with severe GI symptoms and fever and was unable to drive into to Salt Lake City to participate in person at a meeting at the University of Utah Medical Center. He apologized to the participants and participated in the meeting by telephone. Over the next several months, Dr. Kaufman attended several meetings at the University of Utah Medical Center, in person at each of them. Kaufman Decl. ¶ 46.

5. The Decision to Terminate Came Long Before any Warning

It was only after Dr. Mera had HR solicit and collect unfavorable contentions against Dr. Kaufman and after he created a memo purporting to justify termination, that Dr. Mera finally decided to advise Dr. Kaufman of his alleged concerns. He waited until May 30, 2012 to talk with Dr. Kaufman, well after the solicited negative comments were already compiled. Although

[16] It is notable that Clawson provided favorable comments about Dr. Kaufman ***until*** Brion told him he should be critical of Dr. Kaufman: "Byron raved about Dr. Kaufman's contributions until I asked if it would surprise him he is the only one who has this perspective." Exh. 236. It was only after that less than subtle clue by Brion that Clawson got the message and started identifying negatives to provide about Dr. Kaufman.

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Dr. Mera claims he sought to discern if Dr. Kaufman's "employment was potentially salvageable" Mera Tr. at 88:19-24; 90:1-14, it is clear the decision had already been made.[17]

III. Legal Argument

A. Choice of Law

Defendants give short shrift to the application of Utah law. Because the case is brought in Oregon, Oregon law presumptively applies:

> It is the burden of the party advocating the application of a different jurisdiction's law to identify material differences between that jurisdiction's law and Oregon's, and the Oregon courts will apply Oregon law if no party identifies any material distinctions, without regard to whether such distinctions in fact exist. *Angelini [v. Delaney],* 156 Or. App. [293,] at 300, 966 P.2d 223 [(1998)] (where the parties have not identified material distinctions, "it is not [the] obligation [of the courts] to cast around the law of [a proposed alternate forum] in quest of possible material differences"); *Spirit Partners, LP v. Stoel Rives LLP,* 212 Or. App. 295, 303–304, 157 P.3d 1194 (2007) (court is not obligated to conduct a conflict-of-law analysis in the absence of express identification of material differences between Oregon law and the law of the proposed alternative forum).

Powell v. Sys. Transp., Inc., 2015 WL 364338, at *5 (D. Or. Jan. 26, 2015).

Defendants claim, without analysis, that the law of Utah and Oregon does not differ. To the contrary, the law applicable to plaintiff's claims differs significantly as between Oregon and Utah. Because material conflicts of law exist[18], the court must conduct a choice of law analysis.

Because the law differs, it is necessary to apply a choice of law analysis. Under Oregon law, the most significant relationship approach applies and requires the court to consider which state has the most significant relationship to the parties and the transaction, and [to determine]

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[17] The contention that, "Had Kaufman's work product met Mera's expectations, Mera would have revisited the termination decision with Gaspar and may have reconsidered," urged by defendants, is not an inference a jury is required to accept. Based on the circumstantial evidence of Mera's targeting of Dr. Kaufman, the jury is entitled to conclude that the decision to terminate was previously made, was made for improper reasons, and would not have been influenced by the content of the white paper.

[18] These differences are discussed in connection with the substantive claims in Sections B though E below.

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whether the interests of Oregon are so important that we should not apply [another state's] law, despite its significant connection with the transaction *Id.* at 304, citing *Stricklin v. Soued*, 147 Or.App. 399, 404, 936 P.2d 398, *rev. den.*, 326 Or. 58, 944 P.2d 948 (1997) (citing *Lilienthal;* further citation omitted); *see also Frost v. Lotspeich*, 175 Or.App. 163, 188–90, 30 P.3d 1185 (2001) (applying that test).

In *Spirit Partners*, the court found guidance in the *Restatement (Second) of Conflict of Laws* section 148(2), which states that when the "plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made," the court will consider which state has the most significant relationship to the occurrence and the parties. *Spirit Partners* at 305. Factors considered by the court under the most significant relationship approach, based on the *Restatement*, include:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
>
> (b) the place where the plaintiff received the representations,
>
> (c) the place where the defendant made the representations,
>
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
>
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement, *supra*, section 148(2).

Defendants contend that because plaintiff was employed by Cambia in Utah, lived in Utah rental housing during the work week, and paid Utah income taxes on his wages, Utah law applies. Their analysis is insufficient.

If all the relevant factors are assessed, it becomes apparent that Oregon law applies. The

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corporate defendant Cambia Health Solutions, Inc.,[19] the entity that made false representations to plaintiff regarding his employment, are incorporated and maintain its principal place of business in Oregon, and defendant Csaba Mera, M.D. is an Oregon resident and acted for purposes of this action primarily in the state of Oregon. Dr. Kaufman received an offer letter from Regence in Oregon; his paychecks originated from Oregon; he maintained his official residency in California with only temporary housing in Utah; he reported to the CMO at his office in Portland, Oregon; the focus group project defendants claim caused his termination was a corporate initiative originating from Oregon; his formal performance evaluation identifies Oregon as the state of employment; he had no formal reporting relationship to anyone in Utah; all significant decision makers were in Portland, Oregon; he made regular visits to Portland for accountable health solutions and other projects; and he paid state income tax in California as well as Utah.

These significant contacts require the application of Oregon law. *See Spirit Partners* at 307.[20]

B. Breach of Implied Contract

Contrary to defendants' argument, plaintiff does not dispute that he was an "at-will" employee, ***except*** to the extent that he was promised a pre-termination *process* before the at-will right could be applied. The law as between Oregon and Utah is in conflict regarding the general rule of at-will employment "that an employer may discharge an employee at any time and for any reason, absent a contractual, statutory, or constitutional requirement to the contrary."

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[19] Plaintiff refers to Regence and Cambia as Kaufman's employer. Because the entity was known as Regence during much of the operative period, Regence is often referred to herein.

[20] Even if the result of the significant relationship analysis is not clear, the relative interests of the states make clear that Oregon has the most substantial interest. *Spirit Partners* at 307. Oregon has a substantial interest in the conduct of Oregon corporations, an area in which Utah would have little material interest.

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Cocchiara v. Lithia Motors, Inc., 353 Or. 282, 290, 297 P.3d 1277 (2013), *citing Washburn v. Columbia Forest Products, Inc.*, 340 Or. 469, 475, 134 P.3d 161 (2006). Nor does plaintiff contend that an at-will employee has a "reasonable expectation of *continued* employment" *Cocchiara v. Lithia Motors, Inc.*, 353 Or. 282, 290, 297 P.3d 1277, 1282 (2013) (emphasis added).

Instead, plaintiff claims that defendants' conduct, as well as their express words, resulted in a promise that, regardless of his at will-status, he would be afforded a pre-termination process by which he would not be abruptly terminated – a process that could take approximately one year to complete. Plaintiff fully understood that this promise did not alter his at-will status *generally* and that defendants could terminate his employee with or without cause. Yet, it was this significant promise of notice and an opportunity to cure – a promise on which plaintiff reasonably relied – that induced him to accept defendants' offer of employment and bind defendants to their own promise.

The existence of a contract requires an examination of the parties' objective manifestations of intent. Such manifestations are measured by whether a reasonable person would construe a promise from the words and acts of the other. *Real Estate Loan Fund v. Hevner,* 76 Or. App. 349, 354, 709 P.2d 727 (1985) (internal citations omitted). "[A] contract includes not only what the parties said, but also what is necessarily to be implied from what they said." And, it may be said broadly that any conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as such. *Id.* at 355.

In an implied-in-fact contract,

> "the parties' agreement is inferred, in whole or in part, from their conduct." *Staley v. Taylor,* 165 Or.App. 256, 262, 994 P.2d 1220 (2000) (citing *Restatement (Second) of Contracts* § 4 comment a (1979)). "The conduct that is relevant to the inference of assent is not limited to the parties' actions at the commencement of the

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> alleged relationship." *Montez v. Roloff Farms, Inc.*, 175 Or. App. 532, 536–37, 28 P.3d 1255 (2001). An implied-in-fact agreement arises "only where the natural and just interpretation of the acts of the parties warrants such conclusion." *Owen v. Bradley*, 231 Or. 94, 103, 371 P.2d 966 (1962). "Frequently, implied-in-fact contracts arise because an accepted course of conduct would permit a reasonable juror to find that the parties understood that their acts were sufficient to manifest an agreement." *Staley*, 165 Or.App. at 262 n. 6, 994 P.2d 1220 (citations omitted).

Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP, No. 110505726, 2015 WL 4477819, at *11 (Or. Ct. App. July 22, 2015).

Defendants cite *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah App. 1994), to support their contention that plaintiff accepted their unilateral change to the offer of employment by continuing to work for the defendants after communication of the modification. Def. Memo at 22. *Trembly* conflicts with Oregon law.

Plaintiff does not claim that defendants unilaterally modified the employment contract. Rather, plaintiff claims that defendants failed to honor the promise made to him when his offer of employment was negotiated and agreed upon. The court considers the following criteria in determining whether a subsequent action renders a promise enforceable:

> (1) a promise,
>
> (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred,
>
> (3) actual reliance on the promise,
>
> (4) resulting in a substantial change in position.
>
> When those broad tests are met, "justice generally requires the enforcement of the promise through the medium of an appropriate contractual remedy."

Bixler v. First Nat. Bank of Oregon, 49 Or. App. 195, 199, 619 P.2d 895 (1980), citing *Schafer et al. v. Fraser et ux.*, 206 Or. 446, 290 P.2d 190 (1956).

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A claim for breach of contract accrues when the contract is breached. *Pritchard v. Regence Bluecross Blueshield of Oregon,* 225 Or. App. 455, 458, 201 P.3d 290, 291 (2009), citing *Alderson v. State of Oregon,* 105 Or.App. 574, 580, 806 P.2d 142 (1991); *Kantor v. Boise Cascade Corp.,* 75 Or.App. 698, 703, 708 P.2d 356 (1985), *rev. den.,* 300 Or. 506, 713 P.2d 1058 (1986). In *Kantor v. Boise Cascade Corp.,* 75 Or. App. 698, 708 P.2d 356 (1985), the court held that the plaintiff's claim for breach of an oral contract did not accrue until defendant refused to pay him benefits on the basis of the original rate after the benefits became due. *Id.* "It is questionable whether plaintiff received adequate notice that defendant would not honor the agreement." *Kantor* at 705. In other words, the fact that an employee continues employment does not waive one's rights to a claim for breach of contract under circumstances in which the employee could not possibly have known that the contract had been breached until the breach occurred. Thus, Oregon law conflicts with Trembly, and Trembly does not control.[21]

It is apparent from the record, notwithstanding plaintiff's nominal acknowledgment of the general at-will status (which he interpreted as modified by the promises of Dr. Prows), that he had no notice, and no awareness whatsoever, that defendants would breach their promise to afford him the agreed pre-termination process negotiated prior to his acceptance of defendants' offer of employment until the breach occurred and his employment was abruptly terminated.

Throughout his negotiations with Dr. Prows, acting in his position of authority for defendants, plaintiff made defendants aware of his concern regarding the pre-termination

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[21] In *Trembly* the employee handbook was modified to include an at will employment provision after Trembly had been working for the defendant. Trembly was fully aware of modifications because he used the handbook in his employee orientation and training sessions. In contrast, Dr. Kaufman does not assert that the employee handbook was modified. Dr. Kaufman interpreted the corrective action section of the handbook within the context of the representations made to him by defendants that he would receive pre-termination process. This corrective process did change Dr. Kaufman's at will status otherwise and did not in any way preclude termination after compliance with represented procedures. *Trembly* is not on point with the instance case.

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disciplinary process used by defendants to terminate an employee. Kaufman Decl. ¶¶ 3-7. Considering plaintiff's previous negative employment experiences, his concern was reasonable. Understanding that his employment was nominally at will, plaintiff's primary concern was that concerns regarding his performance arose, he would be advised of them and given the opportunity to improve his performance as opposed to being abruptly terminated. Dr. Prows, acting for defendants, provided assurance that plaintiff would not be terminated without notice and that he would be provided a pre-termination process by which he could attempt to improve his performance. Dr. Prows further advised plaintiff that this process typically took about a year. Prows Tr. 57:3-24, Exh. 30. Plaintiff had no reason not to rely Dr. Prows' assurances. In fact, plaintiff reasonably believed that Dr. Prows assurances were implicitly, if not explicitly, expressed by the e-mail he received from Alison Durkee ("Ms. Durkee"), Associate Recruiter for Regence, dated September 13, 2011, in which Ms. Durkee stated: "Even though Regence is an 'At Will' employer, we invest heavily into our employee's [sic] and hope they will stay with us for the duration of their career." Durkee Tr. 37:14-19, Exh. 29. Plaintiff reasonably understood that by placing the words "at will" in quotes, Ms. Durkee intended to convey Dr. Prows' promise regarding the process by which defendants provided high level employees notice of performance issues and the opportunity for such employees to improve their performance *and* that this same process applied to plaintiff. Kaufman Decl. ¶ 7.

Whether plaintiff's reliance on defendants' promise is reasonable is a question of fact for the jury.

C. Breach of Implied Duty of Good Faith and Fair Dealing

Defendants cite Utah law to support their assertion that a plaintiff "cannot use the covenant of good faith and fair dealing to restrict Cambia's right to terminate him for any reason (or no reason) at any time." Def. Memo at 24. As previously stated, plaintiff does not dispute

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that he was an at-will employee; rather, plaintiff's claim focuses on defendants' promise to provide a process *before* terminating his employment. Plaintiff does not claim that defendants' promise altered their right to terminate him with or without cause – which is supported by his signed acknowledgments. Instead, defendants' promise provided a process of termination that would require approximately a year. Dr. Prows assured plaintiff of this process. Plaintiff relied on defendants' assurance in accepting their offer of employment. In *Elliott v. Tektronix, Inc.*, the court stated that "the fact that defendants were offering plaintiff a position that was terminable at will does not mean that she could not reasonable rely on representations they made. *On the contrary, she had a right to rely until she knew or should have know that the terms had been modified." Elliott v. Tektronix, Inc.*, 102 Or. App. 388, 392, 796 P.2d 361, *rev. den.*, 803 P.2d 731 (1990) (*emphasis* in original).

Under Oregon law, every contract includes an implied covenant of good faith and fair dealing. *Arnett v. Bank of America, NA*, 874 F. Supp. 2d 1021, 1032 (2012), citing *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 237 Or. App. 434, 445, 240 P.3d 94 (2010). The purpose of the good faith doctrine is to "facilitate performance and enforcement of the contract when it is consistent with and in furtherance of the agreed-upon terms of the contract, or where it effectuates the parties' objectively reasonable expectations under the contract". *Morrow v. Red Shield Ins. Co.*, 212 Or. App. 653, 661-662, 159 P.3d 384 (2007), citing *Best v. U. S. National Bank*, 303 Or. 557, 563, 739 P.2d 554 (1987).

In *Best v. U.S. National Bank*, the Oregon Supreme Court stated that the covenant of good faith and fair dealing are particularly applicable under circumstances when a party to a contract is given discretion affecting the rights of another party. "The parties ordinarily contemplate that that discretion will be exercised for particular purposes. If the discretion is exercised for purposes not contemplated by the parties, the party exercising discretion has

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performed in bad faith." *Best* at 563.

The Employee Handbook provided to plaintiff includes a section titled: "Corrective Action". This section states:

> At its discretion and on a case-by-case basis, Regence believes that constructive, positive corrective action may be of assistance in helping to improve employee performance.
>
> You're expected to conduct yourself according to standards of behavior that we believe are acceptable. In some circumstances and at its discretion, Regence may issue oral or written warnings and/or impose other forms of corrective action.
>
> It's not necessary that a verbal warning or any written warning be given preceding termination.

Kaufman Tr. 189:17, Exh. 41at 6.

In *Arnett v. Bank of Am., N.A.*, the court found the application of the duty of good faith and fair dealing particularly relevant when a contract provides for discretion, but does not provide for a method of exercising that discretion. *Arnett v. Bank of Am., N.A.*, 874 F. Supp. 2d 1021, 1034 (D. Or. 2012) (internal citations omitted). In the present case, the Employee Handbook does not provide a method by which corrective action would occur. Plaintiff reasonably relied on defendants' promise that they would engage in the pre-termination process outlined by Dr. Prows prior to terminating plaintiff and that they would exercise any discretionary power in a manner consistent with this promise.

Genuine issues of material fact regarding whether defendants acted in good faith and with fair dealing preclude summary judgment on this claim.

In every contract there is an implied covenant of good faith and fair dealing. Perkins v. Standard Oil Co., 235 Or. 7, 16, 383 P.2d 107, 383 P.2d 1002 (1963). See also, Comini v. Union Oil Co. of California, 277 Or. 753, 756, 562 P.2d 175, 176 (1977). (Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.)

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Best v. U.S. National Bank, 303 Or. 557, 563, 739 P.2d 554 (1987), which was decided under Oregon law, that "[t]he covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another."

when a contract provides for discretion, but does not provide for a method of exercising that discretion, the duty of good faith and fair dealing may still apply. Arnett v. Bank of Am., N.A., 874 F. Supp. 2d 1021, 1034 (D. Or. 2012) (internal citations omitted).

The duty of good faith and fair dealing does not apply to "at will" employment contracts. Sheets, 779 P.2d at 1008. "However, if the parties agree to restrict the right to terminate at will, the duty of good faith applies to the restrictive terms, as it does to the performance and enforcement of all of the contractual terms except the right to terminate itself." Elliott v. Tektronix, Inc., 796 P.2d 361, 365 (Or. App.), review denied, 803 P.2d 731 (Or.1990).

D. Promissory estoppel

Citing Utah law, defendants assert that plaintiff's claim for promissory estoppel should be dismissed because plaintiff cannot offer evidence that he provided consideration to defendants sufficient to prevent an at-will termination. This assertion conflicts with Oregon law. In *Natkin & Co. v. H.D. Fowler Co.,* 128 Or. App. 311, 314, 876 P.2d 319 (1994), the court explained that promissory estoppel is not an independent action. "It is a substitute for consideration, and provides a basis for enforcing a promise as a contract despite a lack of consideration, when the promisor has relied on a promise to his or her detriment." *Id.*

Defendants again misinterpret the overarching premise of plaintiff's claims. Plaintiff does not dispute that his employment was at-will generally. Plaintiff instead asserts that he accepted defendants' offer of at-will employment as a result of and conditioned upon their promise that although he could be terminated with or without cause, he would be afforded a resolution process prior to his termination that would take approximately a year. This was precisely the

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assurance he sought before accepting defendants' offer.

The elements of a claim based on promissory estoppel are: "(1) a promise, (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred, (3) actual reliance on the promise, (4) resulting in a substantial change in position." *Neiss v. Ehlers*, 135 Or. App. 218, 223, 899 P.2d 700 (1995), citing *Bixler v. First National Bank*, 49 Or. App. 195, 199-200, 691 P.2d 895 (1980).

In *Cocchiara v. Lithia Motors, Inc.*, 353 Or. 282, 297 P.2d 1277 (2013), the court acknowledged its previous adoption of the doctrine of promissory estoppel as defined in the *Restatement of the Law of Contracts* § 90 (1932). *Id.* at 291-292, citing *Shaffer et al. v. Fraser et ux.*, 206 Or. 446, 468-469, 290 P.2d 190 (1955).

> A promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does not induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Cocchiara at 291, citing *Restatement (Second) of Contracts* § 90.[22] *Restatement (Second)* § 90 comment b delineates that the enforcement of a promise "may depend on the reasonableness of the promisee's reliance, [and] on its definite and substantial character in relation to the remedy sought". *Id.* at 292. It is not unreasonable for an employee to rely that the employer's right to terminate will be consistent with the entirety of the contract – which in the present case, included the defendants' promise of a pre-termination process by which any at-will termination would be accomplished.

In *Cocchiara*, the employee was promised a position that induced him to accept the position. Relying on this promise, the employee turned down a position with a different

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[22] The court noted that the elements for an action based on promissory estoppel "are similar or even identical under both Restatements." *Id.* at 292, n. 4.

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employer. Citing *Tadsen v. Praegitzer Industries, Inc.,* the court held that an employer's right to terminate an employee at any time, with or without cause, "does not carry with it a conclusive presumption that the employer will exercise that right." *Cocchiara* at 292. The court further stated that "[n]othing in our case law or the *Restatement (Second)* suggests that a promisee's reliance is *per se* unreasonable if the underlying promise is for a contract that is terminable at will." *Id.* at 292. The court, in particular, noted that in a situation in which the employer "asserts the employee's value to the company, it may be reasonable for the employee to rely on the promise. . ." *Id.* at 293. Furthermore, if, as in this case, the prospective employee reasonably relies on such a promise, "a remedy may be necessary to avoid injustice." *Id. See also Neiss, supra,* at 229 ("The evil to be rectified through promissory estoppel is not the breach of the promise, but the harm that results from the promisor's inducement and the promisee's actions in reliance.")

The unresolved questions of fact preclude summary judgment on this claim.[23]

E. Intentional Interference with Economic Relationship ("IIER")

Oregon and Utah law on IIER conflicts. Defendants rely on the Utah Supreme Court decision in *Eldridge v. Johndrow,* 345 P.3d 553 (Utah 2015). In *Eldridge,* the court held that in the absence of an improper means, an improper purpose is not grounds for IIER. Oregon law is to the contrary. Under Oregon law, a claim for IIER requires intentional interference with an economic relationship through an improper means ***or*** an improper purpose - contrary to Utah law which requires both an improper means and an improper purpose.[24]

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[23] *See Schafer et al. v. Fraser et ux.,* 206 Or. 446, 481, 290 P.2d 190 (1955) (noting that the issue of reliance in promissory estoppel claim "presented a question for the jury").

[24] The elements of the Oregon tort are: "(1) the existence of a professional or business relationship (which could include, *e.g.*, a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means ***or*** for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages." *Mannex Corporation v.*

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As shown above, under relevant choice of law analysis, and in light of the conflict in law, Oregon law applies in this case.

Defendants argue, without citation to any evidence, that Dr. "Mera acted on behalf of Cambia." Def. Memo at 28. Whether a supervisor is a third party to an employee's contract with the same employer depends on whether that employee was acting within the course and scope of his or her employment. Several Oregon cases have addressed the third party issue. Defendants are correct that an employee may be acting as the employer and not as a third party. On the other hand, when an "agent's purpose is one that is not for the benefit of the corporation, the agent is not acting within the scope of employment and may be liable." *Boers v. Payline Systems, Inc.*, 141 Or. App. 238, 242-43, 918 P.2d 432 (1996). In *Porter v. OBA, Inc.*, 180 Or.App. 207, 42 P.3d 931 (2002), the court denied summary judgment on the third party issue, finding it a question of fact whether the majority shareholder who fired the plaintiff, was a third-party to the at-will employment relationship. The court held that, even though evidence supported defendants' theory that the shareholder terminated plaintiff to benefit the company, "a trier of fact could infer from plaintiff's evidence that [the shareholder] acted solely for his own interests [i.e., to deprive plaintiff of his ownership interest in Oba]." *Id.* at 216.

It is enough that the improper purpose is to inflict injury. *Eusterman v. Northwest Permanente, P.C.*, 204 Or. App. 224, 236, 129 P.3d 213, 220 (2006), *citing Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 498, 982 P.2d 1117 (1999).

Although improper purpose and third-party status are discrete elements of the tort, evidence that proves one may be sufficient to show the other. *Kaelon v. Reddaway, Inc.*, 180 Or. App. 89, 98 n.1, 42 P.3d 344 (2002). If a jury believes that a defendant acted to injure the

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Bruns, 250 Or.App. 50, 279 P.3d 278 (2012) (internal citations omitted) (emphasis added).

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plaintiff, it can find that the defendant acted with an improper purpose. *Straube v. Larson,* 287 Or. 357, 361-62, 600 P.2d 371 (1979). Evidence that the defendant did not act to serve the principal which is sufficient to show that the defendant did not act in the scope of employment may also be sufficient to show that the defendant had an improper purpose and thus may be liable for intentional interference. *Boers, supra* at 244-45, *citing Straube v. Larson,* 287 Or. 357, 361-62, 600 P.2d 371 (1979).

The record shows a determined pattern of efforts by Dr. Mera to set up Dr. Kaufman for termination, intentionally fail to communicate with him, withhold vital information in his possession and control needed by Dr. Kaufman, set in motion a contrived "investigation," and lead the effort to terminate Dr. Kaufman after only being in the Interim CMO position for a few weeks. A reasonable jury is entitled from the record facts that Dr. Mera acted with the improper purpose of injuring Dr. Kaufman, making summary judgment on this claim inappropriate.

F. Summary Judgment on any of Plaintiff's Claims Based on this Record Disputed Fact is Inappropriate

Compelling public policy supports refusing to permit employers to lie to potential employees to induce them to accept an offer of employment. At will employment is not a license for conduct that is deceitful or dishonest. Such behavior tarnishes the public image of employers and poses significant economic risks for a state.

Each of plaintiff's claims present material, disputed issues of fact. Defendants' witnesses' contradictions, lack of consistency, and general lack of credibility makes establishing an undisputed record of material facts impossible.

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Each of defendants' motions should be denied and the matter set over for trial.

DATED: August 21, 2015.

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