IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02297-NYW

IRA S. JAFFREY, M.D.,

Plaintiff,

v.

PORTERCARE ADVENTIST HEALTH SYSTEM,

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendant PorterCare Adventist Health System's ("PorterCare" or "Defendant") Motion for Summary Judgment (the "Motion"). [#31, filed Sept. 9, 2016].[1] The undersigned considers the Motion pursuant to 28 U.S.C. § 636(c) and the Order Referring Case dated December 9, 2015 [#11]. Upon careful review of the Parties' briefing, the entire case file, applicable law, and the arguments offered during the November 30, 2016 motion hearing, the Motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiff Ira S. Jaffrey ("Plaintiff" or "Dr. Jaffrey") initiated this action on October 16, 2015, at the age of seventy-six (76). [#1]. Plaintiff, a Colorado licensed physician and board

[1] Where the court refers to the filings made in Electronic Court Filing ("ECF") system in this action, it uses the convention [#___] and uses the page number as assigned by the ECF system, except when citing from the transcript of a deposition. When citing the transcript of deposition, the court uses the ECF docket number, but cites to the page and line numbers as assigned in the original transcript.

certified oncologist, began working as a part-time ("*locum tenens*") oncologist at Defendant's facility, Mile High Oncology ("MHO"), in April 2014. [*Id.* at ¶¶ 4, 9]. However, around July 2014, the employment relationship soured and Defendant terminated Plaintiff on or about July 24, 2014. [*Id.* at ¶¶ 5–11]. Plaintiff alleges that Defendant discriminated against him because of his age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA" or "Act"), 29 U.S.C. § 621 *et seq.* (Claim I). [*Id.* at ¶ 1, 20]. Plaintiff also brings common-law claims for breach of contract (Claim II) and promissory estoppel (Claim III) against Defendant. [*Id.* at ¶¶ 21–24].

On January 4, 2016, Defendant filed its answer. *See* [#12]. Then, on January 19, 2016, the undersigned held a Scheduling Conference, setting the following deadlines: (1) March 4, 2016, for joinder of parties and amendment of pleadings; (2) July 22, 2016, for discovery cut-off; and (3) August 19, 2016, for filing dispositive motions. [#18; #19]. On August 22, 2016, the court extended the deadline for filing dispositive motions to September 9, 2016. [#30].

On September 9, 2016, Defendant filed the instant Motion, to which Plaintiff responded, and Defendant replied. [#31, #32; #38]. On November 30, 2016, the court held a motion hearing and took the Motion under advisement. [#41]. With leave of court, both parties filed supplements to their briefing on December 9, 2016. *See* [#44; #45]. The Motion is ripe for resolution, and the court considers the Parties' arguments below.

MATERIAL FACTS[2]

As mentioned, Plaintiff is a Colorado physician, board certified in oncology. [#32 at 3]. At the time of filing this suit, Plaintiff was seventy-six years of age. [*Id.*]. Defendant is a

[2] The following facts are undisputed unless otherwise noted.

Colorado nonprofit corporation and, starting in April 2014, employed Plaintiff to provide *locum tenens* oncology services at MHO. *See* [*id.*; #31 at 2]. In doing so, Plaintiff entered into an Independent Healthcare Provider Services Agreement with All-Star Recruiting Locums, LLC ("ASR")—a company that refers *locum tenens* physicians as well as permanent physicians for placement at hospitals. *See* [#31 at 2; #31-2 at 22:14–23:6]. Accordingly, Plaintiff's agreement with ASR governed his *locum tenens* services while working for Defendant. *See* [#1 at ¶ 11; #31 at 2; #31-2 at 51–58].

Not soon after his April 2014 start date, Plaintiff began negotiating a two-year position at MHO with Defendant's agents Larry Novissimo and Ken LeBlanc, both of whom recruited physicians for Mile High Oncology. [#31 at 2; #31-2 at 15:25–16:4; #31-4 at 36:3–17; #31-6 at 1–2; #32-5; #32-6 at 67:7–68:3]. Though not entirely clear, it appears that these discussions occurred largely in May, June, and July 2014, and focused on a variety of employment terms. *See generally* [#31 at 3–4]. These terms included, *inter alia*, Plaintiff's yearly compensation, a signing bonus, how many days a week he would work (*i.e.*, full-time equivalent ("FTE")), his "on-call" responsibilities, his membership and licensing fees, his dental, health, and retirement benefits, as well as additional compensation for attending meetings, conferences, and seminars. *See generally* [#31-2 at 12:14–13:19, 14:15–18, 15:4–7, 32:23–33:3, 38:18–24; #31-5 at 113:19–115:4].

On or about May 16, 2014, Dr. Jaffrey and Mr. Novissimo had a phone conversation regarding a potential two-year employment contract with a yearly salary between $240,000 and $250,000 for .75 FTE (*i.e.*, working three and one-half days out of the week). *See* [#31-3 at 53:13–17; #31-5 at 49:16–50:1, 51:12–14; #31-6 at 1]. However, it appears that Dr. Jaffrey was

unwilling (and even a bit insulted) to accept a salary in that range given his forty-five years of experience and reputation in the oncology community. *See, e.g.*, [#31-2 at 13:10–11, 14:4–18, 52:21–53:5; #31-4 at 49]. Rather, Plaintiff counter-offered with a guaranteed salary of approximately $400,000 to $450,000 in addition to a $40,000 signing bonus split over the two-year term. *See* [#31-2 at 13:10–11, 14:4–18, 31:3–14; #31-3 at 37; #31-4 at 49]. According to a May 29, 2014 email, Mr. Novissimo informed Plaintiff that Defendant could not agree to his counter-offer, but that he would work on an offer in the $300,000 range. [#31-4 at 49; #31-6 at 4–5]. That same day, Mr. LeBlanc indicated that, pursuant to Defendant's compensation model, Defendant would be willing to offer Plaintiff a yearly salary of $287,723, and that he would seek approval for a one-time singing bonus of $20,000. *See* [*id.* at 48]. Ultimately, Cheryl Curry (Defendant's Chief Financial Officer for Littleton Adventist Hospital) approved a $15,000 one-time signing bonus. *See* [*id.* at 47].

Then, on June 6, 2014, Mr. LeBlanc emailed Plaintiff a "draft employment contract" so he could review the legal language, as well as the approved compensation model of $287,723 yearly with a one-time $15,000 signing bonus. *See* [#31-2 at 30:14–18; #31-4 at 91:7–23; *id.* at 50; #31-7 at 13]. On June 19, 2014, Plaintiff and Mr. Novissimo had a follow-up call regarding the potential employment agreement. [#31-6 at 2]. During this call, the two discussed Plaintiff's 401(k) benefits, Plaintiff's request to have the signing bonus increased to $20,000 and potentially split the signing bonus over two years, and his request to have the 90-day termination provision increased to 180 days. *See* [#31-5 at 54:12–62:18; #31-6 at 2]. On June 24, 2014, Mr. Novissimo emailed Mr. LeBlanc about his June 19 phone conversation with Dr. Jaffrey. *See* [#31-6 at 8]. In this email, Mr. Novissimo informed Mr. LeBlanc that Plaintiff, in response to

the approved compensation model, again requested that the signing bonus be increased to $40,000 split between the two-year term, and that Plaintiff requested approval of a 180-day termination provision, despite Mr. Novissimo's explanation that 90 days was nonnegotiable. *See* [*id.*]. Later that day, Mr. Novissimo emailed Geoff Lawton (Defendant's Vice President of Operations) that both he and Mr. LeBlanc agreed that Defendant's best offer to Dr. Jaffrey was $287,723 yearly with a one-time signing bonus of $15,000, and that it would be Plaintiff's decision whether to accept or deny it. *See* [#31-4 at 52].

According to Plaintiff, Mr. Novissimo offered him the job on July 8, 2014, despite ongoing negotiations. *See* [#1 at ¶ 5; #31-3 at 71:3–5; *id.* at 47]. Plaintiff maintains that the Parties had negotiated all essential terms of the agreement, *e.g.*, compensation and signing bonus, work schedule, retirement, medical and dental benefits, length of employment, coverage at other clinics and other miscellaneous benefits, and that, upon his return from his July 11, 2014 vacation, a completed contract would be ready for his signature. *See generally* [#32-1 at 18:11–20, 20:15–18, 29:15–22, 30:14–31:6, 32:23–33:10; #31-3 at 71:5–23]. Conversely, Defendant contends that the Parties had yet to reach an agreement as to Plaintiff's compensation and signing bonus, his on-call responsibilities, his work schedule, or the 90-day termination provision. *See generally* [#31 at 4–6; #31-4 at 34:22–23, 40:1–7; 50:2–4]. According to Defendant, it is only after the parties reach an agreement on all terms that it offers a contract to the potential employee. *See, e.g.*, [#31-5 at 93:7–24, 110:24–111:5].

Nevertheless, on July 21, 2014, Mr. Novissimo and Mr. LeBlanc called Dr. Jaffrey and informed him that Defendant was terminating the employment negotiations. *See* [#1 at ¶ 6; 31-4 at 35:16–19; #31-5 at 68:24–69:7; #32-1 at 20:19–22]. Plaintiff testified that Defendant

withdrew the employment contract because it "wished to offer it to a younger physician." [#32-1 at 20:21–22, 21:18–21]. Defendant did in fact hire two younger oncologists for positions at MHO in the fall of 2014—Drs. Link (66 at .6 FTE) and Log (35 at 1.0 FTE). *See generally* [#31-4 at 67:21–68:3]. However, according to Plaintiff, he and Mr. Novissimo entered into an oral contract to extend his *locum tenens* services to December 31, 2014, despite the revocation of the two-year employment contract. *See* [*id.* at 20:4–13].

About July 25, 2014, ASR informed Plaintiff that Defendant had terminated Plaintiff's *locum tenens* contract at MHO. *See* [#1 at ¶ 11; #31-3 at 47]. Subsequently, Plaintiff contacted his attorney to memorialize his recent turmoil with Defendant. *See* [#31-3 at 72:6–16; *id.* at 47]. Then, on or about October 27, 2014, Plaintiff filed an age discrimination charge against Defendant with the Equal Employment Opportunity Commission ("EEOC"). *See* [#32-3; #32-7]. Finally, Plaintiff commenced the instant action on October 16, 2015. [#1].

LEGAL STANDARD

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). A fact is "material" if it pertains to an element of a claim or defense; a

factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248.

If the moving party demonstrates an absence of evidence supporting an essential element of the opposing party's claims, the burden shifts to the opposing party to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. To satisfy this burden, the nonmovant must point to specific facts in an affidavit, deposition, answers to interrogatories, admissions, or other similar admissible evidence demonstrating the need for a trial. *Id.*; *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson,* 477 U.S. at 249, 252). In reviewing a motion for summary judgment the court views all evidence in the light most favorable to the non-moving party. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

ANALYSIS

I. Claim I – Age Discrimination

A. The ADEA, 29 U.S.C. § 621 *et seq.*

The ADEA prohibits employers from discriminating against any individual over forty "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1), 631(a). "To establish a disparate-treatment claim under the plain language of the ADEA, [] a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009)

(citations omitted). In this Circuit, while Plaintiff need not allege that his age was the *sole* motivating factor for Defendant's refusal to hire him, he must allege that "age was the factor that made a difference" in causing the adverse action. *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1277-78 (10th Cir. 2010) ("an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as age was the factor that made a difference").[3] In satisfying his burden, Plaintiff may rely on either direct evidence of discrimination or indirect evidence, utilizing the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996). Here, Plaintiff relies on both approaches.

B. Direct Evidence

"Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) (internal quotations omitted) (quoting *Hall v. U.S. Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847, 854 (10th Cir. 2007)). Under the ADEA, "[d]irect evidence demonstrates on its face that the employment decision was reached for discriminatory reasons." *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002). However, comments that reflect a personal bias are not *per se* direct evidence of discrimination unless the plaintiff demonstrates that the speaker had decisionmaking authority and acted on her discriminatory animus. *See Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013). Similarly, if the evidence requires any

[3] Notwithstanding Justice Thomas's comment in *Gross* that "the Court has not definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context (*Gross*, 557 U.S. at 175 n. 2), the Tenth Circuit has reaffirmed its application of *McDonnell Douglas* to discrimination cases under the ADEA. *See Jones*, 617 F.3d at 1278.

inference to suggest discrimination, the evidence is at most circumstantial. *See Roberts v. Int'l Bus. Machines Corp.*, 733 F.3d 1306, 1308 (10th Cir. 2013) (citing *Tabor*, 703 F.3d 1216).

Here, Plaintiff argues that direct evidence of age discrimination supports his failure-to-hire claim. *See* [#32 at 5–6]. Specifically, Plaintiff testified that, during his July 21, 2014 phone call with Mr. Novissimo and Mr. LeBlanc, "[t]he gentleman on the phone said that [Defendant] had reviewed their position, was withdrawing their offer because they wished to offer it to a younger physician." [#31-2 at 20:19–22, 21:19–21 ("they were withdrawing the offer . . . because they wished to offer it to a younger physician."); #31-3 at 72:11–13].

While Plaintiff argues that a decisionmaker (*i.e.*, Mr. Novissimo or Mr. LeBlanc) made the alleged age-related comment, the court concludes that such a comment, without more, is insufficient to constitute direct evidence of discrimination to defeat summary judgment. *See Power v. Koss Const. Co., Inc.*, 499 F. Supp. 2d 1194, 1201–02 (D. Kan. 2007) (holding that the plaintiff's proffered statements wherein the defendant's representative referred to "young managers" were insufficient to defeat summary judgment, because they were the kind of "stray remarks" that are circumstantial, not direct, evidence of discrimination). Generally, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, satisfy this criteria." *Sanders v. Lincoln Cty., Tennessee*, --- F. Supp. 3d ----, 2017 WL 588138, at *4 (E.D. Tenn. Feb. 8, 2017) (internal quotations, brackets, and citation omitted).

Though not controlling, the court finds *France v. Johnson*, 795 F.3d 1170 (9th Cir. 2015) persuasive on this issue. In *France*, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that plaintiff's retirement conversations with the defendant's agent and the agent's statement that he preferred "young, dynamic agents" for higher positions were not direct

evidence of age discrimination. *Id.* at 1173. Rather, the Ninth Circuit held that this was circumstantial evidence of the agent's bias in making promotion determinations, and was more appropriately analyzed under the *McDonnell Douglas* framework. *Id.* (concluding that the agent's age-related comment "probably goes beyond a stray remark," but "standing alone this evidence would be thin support to create a genuine dispute of material fact."). *Id.*

Based on the foregoing, the court concludes that Plaintiff's testimony does not constitute direct evidence of age discrimination. Instead, it appears that the alleged age-related comment invites an inference of discrimination, which constitutes circumstantial, not direct, evidence of discrimination. *See Riggs*, 497 F.3d at 1118. Thus, the court considers this evidence below under the *McDonnell Douglas* framework.

C. *McDonnell Douglas*

Under the *McDonnell Douglas* framework, Dr. Jaffrey must initially establish a prima facie case of discrimination. *See Tabor*, 703 F.3d at 1216) (explaining that the burden at this stage is not onerous) (quoting *Orr v. City of Albuquerque*, 417 F. 3d 1144, 1149 (10th Cir. 2005)). If established, the burden then shifts to Defendant to provide a "legitimate, nondiscriminatory reason" for its conduct. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000) (quoting *McDonnell Douglas*, 411 U.S. at 802). Should the defendant provide such a reason, it is Plaintiff's burden to demonstrate that his age was the determinative factor in Defendant's employment action, or that Defendant's explanation is mere pretext. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002).

i. Prima Facie Case and Legitimate, Nondiscriminatory Reason

Neither party appears to dispute these elements of Plaintiff's ADEA claim. Nevertheless, the court independently concludes that Plaintiff satisfies his prima facie burden because he was over the age of forty at the time Defendant refused to hire him, he was qualified for the position, and Defendant hired two different oncologists. *See Alfonso v. Pueblo Sch. Dist. No. 60*, No. 15-CV-00388-RBJ, 2016 WL 2348275, at *2 (D. Colo. May 4, 2016) (noting that to establish a prima facie case for age discrimination, the plaintiff must prove that "(1) [he] belongs to a protected class; (2) [he] applied and was qualified for a job for which the employer was seeking applicants; (3) [he] was rejected for that job; and (4) following [his] rejection, the job remained open and defendant continued to seek applicants from persons with plaintiff's qualifications."); *see also Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (observing that the required showing for a prima facie case is *de minimis*). Similarly, the court concludes that Defendant proffers a legitimate, nondiscriminatory reason for not hiring Plaintiff, *i.e.*, the Parties failed to agree on the essential terms of an employment agreement. *See* [#31 at 12; #38 at 9]; *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (observing that Defendant's burden at this step is light). Accordingly, the court turns to whether Plaintiff creates a genuine issue of material fact regarding pretext.

ii. Pretext

"A plaintiff may establish pretext by showing that the employer's proffered reason for acting adversely towards [her] is unworthy of belief." *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1146 (10th Cir. 2008). Dr. Jaffrey can do so by producing evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the

employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jones*, 617 F.3d at 1280 (internal quotation and citation omitted). Plaintiff argues that Defendant's proffered nondiscriminatory reason is pretext for three reasons. However, because the first reason creates a genuine issue of material fact, the court focuses on it.

As mentioned, Defendant argues that it decided not to hire Plaintiff because the Parties failed to reach a mutual agreement, not because of Plaintiff's age. However, Plaintiff testified that on July 21, 2014, he received a phone call from Mr. Novissimo and Mr. LeBlanc, informing him that Defendant was revoking their offer because it wished to offer the position to a "younger physician." *See* [#31-2 at 20:19–22, 21:19–21; #31-3 at 72:11–13; #32-7 at ¶¶ 3 (testifying that Defendant offered the position to a younger physician who would stay with the Defendant for five years), 8 ("I believe my dismissal from staff at [Defendant] was due to my age.")]. Both Mr. Novissimo and Mr. LeBlanc denied making this statement. *See* [#31-4 at 62:11–14; #31-5 at 127:3–6].

Age-related comments referring directly to Plaintiff may support an inference of age discrimination; however, Plaintiff must demonstrate a nexus between the discriminatory statement and the decision not to hire him. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000). "A causal nexus can be shown if the allegedly discriminatory comments were directed at the plaintiff, her position, or the defendant's policy which resulted in the adverse action taken against the plaintiff." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir.1994).

Here, it is undisputed that both Mr. Novissimo and Mr. LeBlanc participated in the decision not to hire Plaintiff, *see* [#32-3 at 4], and Plaintiff testified that the reason given for the

decision was that Defendant desired to offer the position to a younger physician. *Cf. Alfonso v. SCC Pueblo Belmont Operating Co., LLC*, 912 F. Supp. 2d 1018, 1028 (D. Colo. 2012) (holding that the plaintiff established a causal nexus between the age-related comment that she was too old to perform her job and subsequent termination when the alleged remarks were made by one of the two decisionmakers in her termination). In addition, there is some uncertainty as to whether Defendant hired Dr. Link (66) or Dr. Log (35) to fill the position originally offered to Plaintiff. *Cf. Fester v. Farmer Bros. Co.*, 49 F. App'x 785, 792 (10th Cir. 2002) (concluding that the plaintiff had created a triable issue of fact by presenting evidence that the defendant hired someone under the age of forty as the plaintiff's replacement). On summary judgment, the court views the evidence in a light most favorable to Plaintiff, and should not conduct a "mini trial" to determine Defendant's true state of mind, so long as Plaintiff creates a genuine issue of material fact as to pretext. *See Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995). Because it is disputed as to whether Mr. Novissimo or Mr. LeBlanc informed Plaintiff that Defendant was revoking its offer to give it to a "younger physician," the court concludes that a genuine issue of material fact exists as to whether Defendant's legitimate, nondiscriminatory reason was pretextual. *See Plotke*, 405 F.3d at 1107 (holding that the plaintiff's supervisors' gender-biased remarks created a causal nexus to her subsequent termination); *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1479 (10th Cir. 1996) (same); *Deneffe v. Skywest, Inc.*, No. 14-CV-00348-MEH, 2016 WL 1643061, at *13 (D. Colo. Apr. 26, 2016) ("Here, the challenged comments were directed at Deneffe and were made within the context of the events that led to Deneffe's termination; it will be up to a jury to decide whether age motivated the decisions to terminate him"). It is well-settled that credibility determinations, the weighing of the evidence,

and the drawing of legitimate inferences from the facts are jury functions, not functions for this court at summary judgment. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Accordingly, the Motion is DENIED as to Claim I.

II. Claim II – Breach of Contract

Under Colorado law, the elements of a breach of contract claim are: (1) the existence of a contract; (2) the plaintiff's performance of its contractual obligations or its justification(s) for non-performance; (3) the defendant's failure to perform; and (4) the plaintiff's damages. *See Xtreme Coil Drilling Corp. v. Encana Oil & Gas (USA), Inc.*, 958 F. Supp. 2d 1238, 1243 (D. Colo. 2013) (citing *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992)). Whether a contract exists is typically a question of fact, especially when the "evidence is conflicting or admits of more than one inference." *Peace v. Parascript Mgmt., Inc.*, 59 F. Supp. 3d 1020, 1027 (D. Colo. 2014) (quoting *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 887 (Colo.1986)). However, "[t]here can be no binding contract if it appears that further negotiations are required to work out important and essential terms." *Walshe v. Zabors*, 178 F. Supp. 3d 1071, 1082 (D. Colo. 2016). For a contract to exist, the Parties must agree to all essential terms of the agreement—an agreement as to some, but not all, essential terms does not create a contract. *See Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021, 1024–25 (D. Colo. 2012) (noting that a term is essential based on the intentions of the parties and whether they had a meeting of the minds as to that term).

A. The Two-Year Employment Agreement

Defendant moves for summary judgment on Claim II because the Parties never reached an agreement as to the two-year position with MHO. [#31 at 8; #38 at 3]. Specifically, the Parties were still in negotiations concerning the essential terms of the agreement, and Plaintiff cannot maintain a breach of contract claim predicated on a blank, sample agreement that neither party signed. *See* [#31 at 9; #38 at 3–4]. In response, Plaintiff argues that he accepted all essential terms, including the offered salary of $287,723 and $15,000 signing bonus, and that the sample contract was to be completed and signed after he returned from vacation. However, Defendant subsequently rescinded the offer and offered the position to a different physician. *See* [#32 at 7–10]. For the following reasons, the court concludes that negotiations were still ongoing as to an essential term, *i.e.*, compensation; thus, no contract exists. [4]

It is undisputed that Dr. Jaffrey refused an initial salary offer between $240,000 and $250,000, testifying, "I had 45 years' experience. I had international criteria of lecturing. I had published many papers. And I felt that I was worth more than an entry level position." [#31-2 at 14:8–11; #31-3 at 53:13–17; #31-4 at 49 ("Attached is the first offer we presented to [Plaintiff] and he did not accept. He actually stated he was insulted if you recall."); #31-5 at 49:16–50:1,

[4] In addition, the court notes that negotiations as to the termination provision and on-call responsibilities were still ongoing as of July 21, 2014; however, because compensation was the most contentious term, the court focuses on it. *See, e.g.*, [#31-3 at 68:14–21 ("That's what they offered [90 days], and I wanted 180. But I figured we would negotiate it down to something."); #31-4 at 63:9–19 (Mr. LeBlanc testifying that the termination provision was still in controversy as of July 21, 2014); #31-5 at 59:10–19 (same), 113:16–115:5; #31-6 at 8 ("He asked for a 180 day out clause vs. the 90 that is in the contract. . . . [We] told him there was no movement on the 90 day language . . . He asked me to ask legal anyway.")]. *See also* [#31-2 at 15:4–7 (Plaintiff testifying that he "think[s]" the Parties agreed to four to six weekends of on-call duties per year); #31-4 at 102:15–22 (Mr. LeBlanc testifying that as of about June 30, 2014, "the call arrangement . . . had not been resolved.")].

51:12–14; #31-6 at 1]. It is also undisputed that Plaintiff counter-offered with $450,000, but indicated he would accept a salary around $300,000 for .75 FTE. *See* [#31-4 at 86:7–9; *id.* at 49]. Then, on May 30, 2014, Mr. LeBlanc was authorized to offer $287,723 as a yearly salary and a one-time signing bonus of $15,000—an offer Mr. LeBlanc sent Plaintiff on June 6 in addition to a "draft employment contract so [Plaintiff could] review the legal language." *See* [#1-1; #31-4 at 47–48, 50; #31-2 at 18:11–14 ("[t]he only document that was exchanged . . . was a blank [employment] contract . . . [to] have that reviewed by my attorney."); #31-7 at 13]. Subsequently, Plaintiff and Mr. Novissimo had a phone conversation on June 19, 2014, wherein Plaintiff requested a $40,000 signing bonus split over two-years; however, a June 24 email from Mr. Novissimo states, "at this point, [Mr. LeBlanc] and I need to present this same comp model [*i.e.*, $287,723 with a $15,000 signing bonus] back to Dr. Jaffrey as our best offer and see what he says." *See* [#31-4 at 52; #31-5 at 54:12–13, 57:1–5; #31-6 at 2, 8, 33]. On July 21, 2014, Mr. Novissimo and Mr. LeBlanc informed Plaintiff that Defendant was ceasing any further negotiations.

In his response, Plaintiff argues that he accepted Defendant's final compensation offer, including the yearly salary, signing bonus, and productivity bonuses. *See* [#32 at 7–8]. However, as Defendant argues, Dr. Jaffrey's own deposition testimony conflicts with this argument. [#38 at 4–6]. Plaintiff testified that the Parties had agreed to his salary and that it was his understanding that his salary would be $400,000, although he later testified that he though the salary was "going to be 287." *See* [#31-2 at 31:3–14; #31-3 at 69:3–5]. As to his signing bonus, Plaintiff testified, "I think we eventually agreed on a $40,000 bonus." [#31-2 at 14:17–18; #31-3 at 67:18–19 (testifying that Mr. Novissimo could make up for a lower salary by offering

"$40,000 in bonus money.")]. However, the final compensation model offered a salary of $287,723 with a $15,000 signing bonus. *See* [#31-4 at 37:14–22, 39:21–25; #31-7 at 13]. In addition, Plaintiff testified that he did not negotiate a productivity bonus with Defendant: "As far as I know, [the productivity bonus] did not become part of my contract. . . . my responsibility is to take care of patients appropriately, not to meet some bean-counter's description about how many seconds I'm allowed to talk to you or to process a physical." [#31-2 at 56:17–23; #31-3 at 43:3 ("I will not work under such a system.")].

Accordingly, the record demonstrates that compensation negotiations were ongoing as of July 21, 2014, when Defendant rescinded its offer. *See e.g.*, [#31-4 at 36:3–10 (Mr. LeBlanc testifying that during the July 21, 2014 phone conversation, Plaintiff "continued to come back wanting higher compensation, plus additional things in his contract that we were not able to provide.")]. Further, the draft agreement submitted with his Complaint contains no indication of the agreed upon compensation; rather, the agreement referred vaguely to "the Compensation Plan," *see* [#1-1 at 8], and Plaintiff's testimony is unclear as to what salary he accepted. "While the court may supply some missing essential terms . . . it may not create a contract where there is none." *Jorgensen v. Colorado Rural Properties, LLC*, 226 P.3d 1255, 1260 (Colo. App. 2010) (citations omitted). And, as discussed, the record demonstrates that the Parties had yet to reach a final agreement as to Plaintiff's compensation, despite Plaintiff's testimony that Defendant would finalize the draft employment agreement once he returned from vacation.[5] *See* [#31-2 at

[5] Although referenced in passing in Defendant's reply, the court notes that the Colorado Statute of Frauds likely bars the enforcement of the written agreement attached to Plaintiff's Complaint or any alleged oral agreement, as "[e]very agreement that by the terms is not to be performed within one year after the making thereof . . . shall be void, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party charged therewith." *Peace v.*

18:11–20]. Not only are agreements to agree in the future generally unenforceable, but as discussed, the absence of an agreement on all essential terms "prevents the formation of a binding contract." *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001). Therefore, the Motion is GRANTED as to Plaintiff's breach of contract claim regarding the two-year employment agreement.

B. The Oral Agreement to Extend *Locum Tenens* Employment

Despite discussing the end of Plaintiff's *locum tenens* employment [#31 at 9], Defendant does not move for summary judgment as to Claim I to the extent it alleges a breach of an oral contract to extend Plaintiff's *locum tenens* employment. *Compare* [#1 at ¶¶ 9, 11, 22 and #31 at 9] *with* [#31 at 9–10]. Plaintiff testified that he and Mr. Novissimo orally agreed to an extension of his *locum tenens* employment at MHO through December 31, 2014. *See* [#31-2 at 20:7–13]. "Under Colorado law, the existence of an oral contract and the contents of its terms are factual questions." *Murray v. Crawford*, 689 F. Supp. 2d 1289, 1297 (D. Colo. 2010). Thus, summary judgment is DENIED as to Claim I regarding the breach of an alleged oral contract.

III. Claim III – Promissory Estoppel

Under Colorado Law, "[t]he elements of a promissory estoppel claim are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promise; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice." *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008).

Parascript Mgmt., Inc., 59 F. Supp. 3d 1020, 1027 (D. Colo. 2014) (holding that a contract guaranteeing a three-year salary falls within the requirements of Colorado's Statute of Frauds, Colo. Rev. Stat. § 38–10–112(1)(a)).

Recovery on a theory of promissory estoppel is permissible when there is no enforceable contract. *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 741 (Colo. 2007). Thus, if a plaintiff fails to prove a breach of contract claim, he or she may nevertheless be able to recover on a promissory estoppel claim. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). For the following reasons, the court finds both of Defendant's summary judgment arguments unavailing.

First, Defendant contends that Plaintiff cannot maintain a promissory estoppel claim predicated on a "sample, template agreement that has not been filled out by the party against who a claim is made." [#31 at 13; #38 at 10–11]. However, the court agrees with Plaintiff that the promise was not the blank employment agreement, but rather, the promise of a two-year position at MHO. *See* [#32 at 10]. Plaintiff continues that he relied on this promise by foregoing other employment opportunities, including in Hawaii. *See* [*id.*; #31-2 at 27:11–15; #31-3 at 35:11–17]. And, because the court already concluded that no two-year employment contract existed, nothing precludes Plaintiff from alleging a promissory estoppel claim in the alternative. *See SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1092 (D. Colo. 2013) ("it is also true that a party is permitted to pursue a claim for breach of contract and promissory estoppel in the alternative").

Second, Defendant moves for summary judgment under Claim III as it relates to the extension of his *locum tenens* employment because enforceable contracts governed this employment. [#31 at 13–14; #38 at 11]. While true, courts recognize an exception to this principle "where the implied agreement is based upon the conduct of the parties subsequent to, and not covered by, the terms of the express contract." *Schuck Corp. v. Sorkowitz*, 686 P.2d

1366, 1368 (Colo. App. 1984). Here, the contention is that Plaintiff and Mr. Novissimo extended Plaintiff's *locum tenens* contract via an oral agreement—an agreement subsequent to and not covered by the terms of the express contract. Further, because Defendant did not move for summary judgment on Plaintiff's breach of an oral contract claim under Claim II, the court is declined to grant summary judgment in favor of Defendant as this claim pled in the alternative. *See Clyne v. Walters*, No. 08-cv-01646-MSK-CBS, 2009 WL 2982842, at *3 (D. Colo. Sept. 16, 2009). It is true that Plaintiff cannot simultaneously prevail on both claims, *see SolidFX, LLC*, 935 F. Supp. 2d at 1092, and to the extent that an oral contract for the *locum tenens* employment is found to exist (but not breached), Plaintiff's claim for promissory estoppel claim would also be precluded. *Corum Real Estate Grp., Inc. v. Blackrock Realty Advisors, Inc.*, Nos. 09–cv–01680–DME–MEH, 09–cv–02804–DME–BNB, 2010 WL 1957226, at *8 (D. Colo. May 14, 2010) (omission marks and emphasis omitted) (*citing Scott Co. of Cal. v. MK–Ferguson Co.*, 832 P.2d 1000, 1003 (Colo. App. 1992); *see also Wheat Ridge Urban Renewal Auth.*, 176 P.3d at 741 ("Recovery on a theory of promissory estoppel is incompatible with the existence of an enforceable contract."). But neither determination has been made here. Consequently, the Motion is DENIED as to Claim III.

CONCLUSION

For the reasons stated herein, **IT IS ORDERED** that:

(1) Defendant's Motion for Summary Judgment [#31] is **GRANTED IN PART** and **DENIED IN PART**;

(2) Plaintiff's Claim I **REMAINS**;

(3) Plaintiff's Claim II is **DISMISSED in part** and that judgment be entered in favor of Defendant as to Plaintiff's breach of the employment agreement claim; however, Claim II **REMAINS** as to Plaintiff's breach of the oral *locum tenens* contract extension;

(4) Plaintiff's Claim III **REMAINS**; and

(5) A Final Pretrial Conference is **SET** for **May 5, 2017**, at **9:30 a.m.**

DATED: April 4, 2017

BY THE COURT:

s/Nina Y. Wang
Nina Y. Wang
United States Magistrate Judge