UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CECIL HARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:07-cv-00195**
	)	
AMERICA'S CHOICE, INC.,	)	**Judge John V. Parker**
	)	
Defendant.	)	**Mag. Judge Stephen C. Riedlinger**
_____	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Defendant, America's Choice, Inc. ("ACI"), and submits the following memorandum in support of its Motion for Partial Summary Judgment, pursuant to Fed. R. Civ. P. 56(b). For the reasons that follow, Defendant's motion should be granted and Plaintiff's Complaint should be dismissed, at his cost.

I. STATEMENT OF THE CASE

Plaintiff Cecil Harris ("Mr. Harris") has sued ACI in this case for commissions. Mr. Harris, a former business development manager ("BDM") for ACI, and his direct supervisor, Sandra Bienvenu ("Ms. Bienvenu"), a business development director ("BDD"), joined ACI in the summer of 2005.[1] In late 2005 and early 2006, Mr. Harris participated in securing the Arkansas Department of Education ("ADE") as a client for ACI. ACI ultimately entered into an enforceable contract with ADE, but it took several months and three different and distinct documents to finalize the material terms of the ACI-ADE relationship, including the scope of work, the parties' respective performance obligations, and the manner in which and when ACI

[1] Ms. Bienvenu has also sued ACI for commissions, in a case pending in the United States District Court for the District of Columbia, *America's Choice, Inc. v. Sandra Bienvenu*, Civil Action No. 07-CV-00428 (ES).

would be paid for its work. An enforceable contract was not executed until July 2006. ACI's performance began the same month.

This case presents the Court with two questions: (1) Is Mr. Harris entitled to a commission on the ACI-ADE contract? (2) If so, how much should that commission be? The answer to the first question is easy and not disputed between the parties: yes, ACI agrees that Mr. Harris is entitled to a commission for his efforts in securing ADE as a client for ACI. ACI further agrees that the amount of the commission should be based on the terms of Mr. Harris's employment and in accordance with ACI's policies governing payment of commissions, and on the real-world, common sense notion that commissions are payable only *after* a final, binding agreement is reached and the parties begin performance of their contractual obligations. In this case, Mr. Harris earned no commission under his initial, fiscal year 2006 compensation plan, because he failed to secure an enforceable contract with ADE in that year, and because ACI neither rendered any performance under a contract with ADE in that year nor received any payment therefor. Instead, any commission earned by Mr. Harris on the ADE contract was subject to the terms of the Company's 2007 compensation plan, which would result in a substantially lower commission payment.

Unfortunately, Mr. Harris was not interested in accepting a commission payment based on the terms of his employment and the policies of his employer. Instead, through this lawsuit, Mr. Harris is attempting to rewrite his contract with ACI and to hit the proverbial jackpot with his outlandish commission claim. Mr. Harris says he is entitled to nearly *$2,000,000* in commissions and bonuses for assisting in securing a $6,095,000 contract. The absurdity of this claim goes beyond its mere magnitude. Mr. Harris claims entitlement to a commission under a commission plan that was no longer in effect and which he concedes had terminated. And he

makes the startling contention that he is entitled to commissions for two years of contract *extensions* for which he freely admits that he did no work whatsoever *and* that were signed *after he voluntarily resigned from ACI*. Mr. Harris's claims are flatly inconsistent with the terms of the contract that forms their basis and with ACI's policies governing accrual and payment of commissions.

By this Motion for Partial Summary Judgment then, ACI seeks a determination that (1) Plaintiff did not earn a commission on the ADE Contract under the Company's commission plan for fiscal year 2006, and (2) Plaintiff did not earn any commission on an amendment and extension of the ADE contract that he admits was negotiated subsequent to his voluntary resignation and which he admits he played no role in securing. As we will demonstrate below, ACI is entitled to judgment on these issues as a matter of law.[2]

II. STATEMENT OF UNCONTESTED MATERIAL FACTS

The Creation of ACI's Sales Force and Compensation Plan

ACI is engaged in the business of providing curriculum materials and professional development in connection with public school reform and improvement to struggling public schools, school districts, and states nationwide. (SOF, ¶ 1.)[3] Beginning in 1998, ACI's predecessor existed as a business division of the National Center on Education and the Economy ("NCEE"), a not-for-profit corporation. *Id.* As of November 1, 2004, after it was spun off from NCEE, ACI has existed as a for-profit corporation. *Id.*

[2] As noted, ACI does not dispute that Mr. Harris was owed a commission. Nor would it object to the entry of judgment in the amount of the commission that it offered to Mr. Harris before his resignation ($160,000). But Mr. Harris's claim here goes far beyond his entitlement and is neither legally nor factually sustainable.

[3] Pursuant to Local Rule 56.1, ACI has filed a separate Statement of Material Facts. Citations to the facts contained therein will appear here as "SOF, ¶ __."

After becoming a for-profit corporation, ACI set about creating its first commercial sales force in 2005. (SOF, ¶ 2.) This endeavor included the hiring of BDDs like Ms. Bienvenu and BDMs like Mr. Harris. (SOF, ¶¶ 4-5.) Mr. Harris commenced work with ACI on or about August 16, 2005, and was assigned Louisiana and Arkansas as his territory. (SOF, ¶ 4.) Ms. Bienvenu was Mr. Harris's direct supervisor. (SOF, ¶ 5.) Both Mr. Harris and Ms. Bienvenu worked under Nicholas Solinger ("Mr. Solinger"), the then-vice president of sales and marketing charged with creating the ACI sales force and a sales compensation model. *Id*.

The Fiscal Year 2006 Compensation Plan

Attached to Mr. Harris's August 10, 2005, letter of employment was a one-page document setting forth his fiscal year 2006 (July 1, 2005 to June 30, 2006) annualized compensation plan, outlining a base salary, his fiscal year 2006 quota, a bonus for attaining 100% of his fiscal year 2006 quota, and his commission rate for hitting various levels of his quota. (SOF, ¶¶ 6-7.) (ACI's fiscal year runs from July 1 to June 30.) (SOF, ¶ 6.) Mr. Harris concedes that neither the letter of employment nor the attachment contained any of ACI's quota recognition or commission payment policies and that he did not discuss issues pertaining to commissions, quotas, quota recognition, or payment of commissions with anyone prior to commencing work with ACI. (SOF, ¶¶ 8, 13.) It was generally understood by new hires to the sales force that the compensation plan structure for fiscal year 2006 was a work-in-progress in the summer of 2005 and not yet finalized by Mr. Solinger. (SOF, ¶ 10.) Mr. Harris concedes that, during his employment with ACI, he was subject generally to the company's rules and policies, including policies he assumed existed based on his previous employment experience in a sales position. (SOF, ¶ 13.)

By September 19, 2005, the sales compensation plan for ACI's fiscal year 2006 had been finalized and was presented to the ACI board of directors. (SOF, ¶¶ 9, 14.) Pursuant to the ACI fiscal year 2006 compensation plan, "Quota credit [would] be granted for business booked in fiscal year '06 for services or products invoiced in fiscal year '06." (SOF, ¶ 11.) In other words, ACI could not book business unless and until a customer was contractually committed, could not unilaterally cancel a project, and could be invoiced; when revenue could be recognized by ACI under generally accepted accounting principles (because work had been done or products shipped); and when the customer was committed to a payment schedule. *Id.* Under ACI's compensation policy, commissions would be paid out on a quarterly basis as various work by ACI was completed, invoiced, and paid by the customer. (SOF, ¶ 12.) In order to receive a quarterly payment, a BDM or BDD must have reached his or her minimum quota credit in a given fiscal year, ACI must have invoiced the client and received payment in full on that invoice, and the BDM or BDD must be employed by ACI. *Id*.

At a September 19, 2005, sales training attended by Mr. Harris, Judy Codding, ACI's CEO, used an abbreviated version of the presentation that Mr. Solinger had made to ACI's board of directors to explain ACI's compensation plan. (SOF, ¶ 14.) Mr. Solinger also separately discussed the fiscal year compensation plan policies with his BDDs, including Ms. Bienvenu. (SOF, ¶ 15.)

Prior to his departure from ACI in late-November of 2005, Mr. Solinger also had discussed with the ACI sales staff that, with limited exceptions for certain ACI offerings, contracts for future fiscal years would not be considered for compensation in the current fiscal year because they were not binding on ACI's customers (and because services had not been rendered). (SOF, ¶¶ 17-18.) From a sales perspective, BDMs generally would need to build

their "pipeline" of potential business and be active in the marketplace in the winter and spring at the close of one fiscal year (June 30) in order to procure ACSD contracts that would be entered into and require delivery in the next fiscal year – *i.e.*, commencing in July. (SOF, ¶ 17.) An exception to this general rule of contracting in the educational field would occur when a school system or state used dollars from one fiscal year for a product or program whose delivery occurred in both that fiscal year and the next. (SOF, ¶ 18.) In such a scenario, ACI's sales personnel would get quota credit under the first fiscal year's compensation plan. *Id.*

Contracting With ADE

The process of finalizing the material terms of the ACI-ADE contract took several months and resulted in three different executed documents, with the final, binding contract signed mid-July 2006. Without any first-hand knowledge of the negotiations or contracting process with ADE, and without any legal training, Mr. Harris speculates that the only operative ACI-ADE contract was a State of Arkansas form titled "Professional/Consultant Services Contract," which was signed by Jason Dougal ("Mr. Dougal"), ACI's Vice President of Legal and Business Affairs, on April 17, 2006. (SOF, ¶ 23.) But this document was not a binding, enforceable agreement between ACE and ADE. A blank form of this document was received by Mr. Dougal from ADE on Friday, April 14, 2006, and Ms. Bienvenu conveyed to Mr. Dougal that Dr. Becky Dalton of ADE, who had provided the form, was not sure why the form needed to be filled out. *Id.* In Ms. Bienvenu's words, "Becky [Dalton] needed this signed and she wasn't sure why." *Id.*

By the following Monday, April 17, 2006, ACI had filled out the Arkansas form as best it could and, per instruction, inserted a "Projected total cost of contract" of $6,095,000, and then returned the form to ADE, signed only by ACI. (SOF, ¶ 24.) At the time this partially executed

"Professional/Consultant Services Contract" was returned to ADE on April 17, 2006, it was the understanding of those who had discussed it, including Mr. Dougal of ACI and Dr. Dalton of ADE, that the document was not a contract, much less an agreement that imposed binding obligations on either ACI or ADE. (SOF, ¶ 25.) From ACI's perspective, the April 17, 2006, document lacked specificity from ADE regarding the scope and details of the ACSD program to be implemented and the program requirements to be imposed on ADE, payment timing terms, and essential terms pertaining to intellectual property protections. *Id.*

Under the document's scope of work provision, ACI was to deliver its "intensive" school design program to thirty-six low-performing public schools in Arkansas and its "basic" model to ten schools (for forty-six schools total), but the schools were not specified. (SOF, ¶ 27.) That number of schools ultimately changed; as did, throughout the entire contracting process, the identification of schools and the services to be included. Indeed, in the end the number of schools was materially fewer. The version of the document signed by Mr. Dougal listed various attachments in § 8, but no documents were attached. *Id.* The document signed by Mr. Dougal on April 17, 2006, also did not include a contract extension date under § 12. *Id.* Finally, Section 5 of the April 2006 document states the following regarding essential payment terms: "The method of rendering compensation will be delivered in accordance with a schedule developed by the contractor and ADE." (SOF, ¶ 27.)

It was only after Mr. Dougal signed the April 17, 2006, "Professional/Consultant Services Contract" form and returned it to ADE that ADE added attachments to the document and also added terms, such as a contract extension date under § 12. (SOF, ¶ 28.) The attachments on their face appear to be selected "sample" documents ACI had attached previously to its response to ADE's RFP, except that the documents as attached to the

"Professional/Consultant Services Contract" form no longer contained the word "sample." *Id.* ADE also both added and changed terms on the document that Mr. Dougal had signed, again unilaterally and again without informing ACI. *Id.* Neither Mr. Dougal nor anyone else at ACI saw the "complete" "Professional/Consultant Services Contract" form, with the modified "sample" attachments and modified terms, until produced by ADE during the course of this litigation pursuant to a non-party subpoena. *Id.*

But even with all the after-the-fact attachments and terms, the ACI-ADE contract still was neither final nor imposed binding obligations on either ACI or ADE. That is because the "Professional/Consultant Services Contract," as unilaterally amended and modified by ADE, had to go through a multi-step approval process so that funding could be encumbered for the requested project. (SOF, ¶ 29.) Funding approval eventually is noted by a stamp from the Arkansas Department of Finance and Administration ("DFA") which, in this case, occurred on June 2, 2006. *Id.*

Yet, just as the April 2006 version of the document was not a final, binding agreement, neither was the June 2006 stamped document a final, binding agreement between ACI and ADE. To the contrary, the several material and essential terms outlined above still had neither been addressed nor agreed to. In mid-June 2006, Pat Whiteaker, ACI's Director of Contracts, began drafting the scope of work/exhibits to "Contract No. 424." (SOF, ¶ 31.) The process took several weeks. *Id.* In drafting this contract, ACI needed to know the configuration of schools to be serviced, including size and grade level, in order to create an appropriate scope of work and determine pricing variances. *Id.* The identity and number of participating schools was important in order to get to the point of a final contract, a point that Mr. Harris concedes. (SOF, ¶ 32.) Without knowing such information, ACI would not know where products and services would be

delivered, what quantity of products would be needed, or how many development trainers it would need to employ. *Id.*

In mid-June, ACI, with the assistance of Ms. Bienvenu, was still working out a proposed budget and an appropriate scope of work, including the number and identity of Arkansas schools participating in its ACSD program. (SOF, ¶ 33.) Mr. Dougal informed Mr. Harris at this time that the contract with ADE was going to take longer than Mr. Dougal originally had told him because the scope of work was not standard. *Id.* Contrary to the position he now takes in this lawsuit, Mr. Harris made no claim that the contract had been finalized in April.

The ACI-ADE contract ultimately was finalized in July 2006. After additional changes in July affecting material terms, ACI sent the final agreement to ADE on or about July 20, 2006, and it was thereafter executed by ADE (the "Final Contract"). (SOF, ¶ 34.) There are two provisions of the Final Contract that are especially noteworthy. First, the Final Contract, *for the first time*, specified the parties' respective performance obligations, which were inextricably intertwined with the scope of work that was finalized in July 2006. Indeed, under this provision, ACI had *no* obligation to perform unless and until ADE performed its own "Scope of Work" obligations, as Section 5 of the Final Contract plainly states:

> **Section 5. Responsibilities of Client.** Client shall fulfill its commitments as described in the Scope of Work and any Additional Scope, and the performance thereof by Client shall be a condition of ACI's obligation to perform any of its obligations under this Agreement.

(SOF, ¶ 35.)

Second, the Final Contract also unambiguously made clear several critical points: (i) that the April 2006 and June 2006 written agreements were not final, binding contracts; (ii) that the Final Contract "constitute[d] the entire and sole agreement between the parties" regarding the ACI-ADE relationship; and (iii) that the Final Contract

"supersede[d] any prior written agreements" between ACI and ADE. *Id.* All of these points flow from the Final Contract's integration clause, found in Section 9, which provides:

> **Section 9. Entire Agreement.** This Agreement, along with the Scope of Work and any additional Scope, constitutes the entire and sole agreement between the parties with respect to the subject matter hereof and supersedes any prior written agreements, arrangements, communications and understandings and any prior, contemporaneous or subsequent oral agreements, arrangements, communications and understandings, with respect to the subject matter hereof.

Id.

By comparison, the April 2006 document contained no such clause, but instead made reference to the need for a future agreement ("The method of rendering compensation *will be delivered in accordance with a schedule developed* by the contractor and ADE." (Emphasis added) (SOF, ¶ 27.)). The April 2006 document also did not specify the parties' respective performance obligations. Instead, it contained a "Non-Appropriation Clause" calling for its termination "[i]n the event the State of Arkansas fails to appropriate funds or make monies available . . . for the services to be provided by the contractor. . . ." *Id.* The April 2006 document (and its stamped June counterpart) also contained the following emphasized language in Section 15:

> AGENCY SIGNATURE CERTIFIES NO OBLIGATION WILL BE INCURRED BY A STATE AGENCY UNLESS SUFFICIENT FUNDS ARE AVAILABLE TO PAY THE OBLIGATIONS WHEN THEY BECOME DUE.

Id. Whereas the Final Contract details the parties' performance obligations, this clause quite obviously emphasizes that ADE had no performance obligation whatsoever without funding *and* that it also had no obligation to perform unless and until such obligations "become due." Until ACI and ADE had the Final Contract, with its functional Scope of Work and payment schedule, ACI's performance obligation was unknown and ADE's obligation was never due.

In addition to Sections 5 and 9 of the Final Contract, the parties' conduct confirmed that only the Final Contract was the last stop in the contracting process. Services under the ACI-ADE contract were for the 2006/2007 school year, *i.e.*, fiscal year 2007, and ACI began delivery under the contract in July 2006. (SOF, ¶ 36.) On July 20, 2006, ACI invoiced ADE under the Final Contract, pursuant to the payment schedule first appearing therein, for half the value of the contract, or $3,047,500, and ADE remitted that amount to ACI on August 10, 2006. (SOF, ¶¶ 37-39.) Mr. Harris concedes that ACI received no money in ACI's fiscal year 2006 from ADE by virtue of his efforts. (SOF, ¶ 40.) Mr. Harris also concedes that, when he had unilaterally and without notice to ACI's management requested to ADE that it make a payment to ACI, on or about May 24, 2006, ACI had neither rendered services to ADE nor shipped merchandise to ADE. (SOF, ¶¶ 41-42.) At that time, ADE had no enforceable obligation to make any such payment, ACI had no right to demand such a payment, and ADE made no such payment. (SOF, ¶¶ 27, 30, 37, 39.)

The Fiscal Year 2007 Compensation Plan

Mr. Harris understood that the 2006 fiscal year compensation plan, as attached to his employment letter, would remain in effect only until June 30, 2006, and that it would be superseded and replaced with a plan for fiscal year 2007. (SOF, ¶ 43.) In developing the compensation plan for fiscal year 2007, ACI relied on a well-known outside human resources consulting firm (Mercer Consulting) and on Thomas Harris, who had replaced Mr. Solinger as vice president of sales. (SOF, ¶ 44.) Prior to Mr. Solinger's departure from ACI in November

2005, however, Mr. Solinger told Mr. Harris that his fiscal year 2007 quota would be higher than Mr. Harris's 2006 quota.[4] (SOF, ¶ 43.)

Mr. Harris received a copy of the fiscal year 2007 compensation plan on or about August 31, 2006, which included a $4 million quota that had been set in July. (SOF, ¶¶ 45-46.) By June 2006, however, Mr. Harris already was voicing his displeasure that the ADE revenue would not be recognized until ACI's 2007 fiscal year, when his commission quota would be higher and his payout lower. (SOF, ¶ 47-48.) Prior to Mr. Harris's departure from ACI, ACI nonetheless offered to lower his fiscal year 2007 quota from $4 million to $3 million and to accelerate the recognition of revenue for purposes of satisfying his quota, and thus to increase his payout. (SOF, ¶ 55.) Mr. Harris refused to accept commission payments under those terms. (SOF, ¶ 56.)

Amendment to the ADE Contract

Mr. Harris resigned from ACI effective December 31, 2006, via a December 26, 2006, e-mail and a telephone call to Ms. Bienvenu sometime in the previous week. (SOF, ¶ 57.) After Mr. Harris's departure, ACI signed a State of Arkansas amendment form on February 16, 2007, because ADE had approved an extension of its contract with ACI through July 1, 2009. (SOF, ¶ 51.) After ADE approved the extension, the proposed amendment, which included additional funding, had to follow the same procurement approval process, which included review by DFA, legislative review, and then a return to DFA, where it was stamped on April 23, 2007, nearly four months after Mr. Harris's voluntary resignation. *Id.*[5]

[4] Indeed, fiscal year 2006 quotas were significantly lower as they were prorated because sales representatives beginning their employment at the end of summer (on the eve of the commencement of the school year) missed out on what was traditionally the most fruitful selling period in the educational field.

[5] ACI and ADE followed the identical contracting process with respect to this fiscal year 2008 amended contract as they did with respect to the fiscal year 2007 contract, first executing an Arkansas form document, "Amendment to Professional/Consultant Services Contract," then obtaining Arkansas legislative approval, and finally negotiating and executing the actual, full-blown and detailed contract. The fiscal year 2008 contract was materially different

Mr. Harris does not know when the amendment to the ADE contract was effective, had no involvement in promoting, procuring or drafting the amendment, and admittedly took no steps whatsoever in connection with the amendment. (SOF, ¶ 52.) There is no evidence that former ACI employees were entitled to commissions for contract amendments or extensions that occurred after their departure from the company.

III. ARGUMENT

A. Controlling Summary Judgment Principles

A district court must grant summary judgment when the pleadings, depositions, admissions, answers to interrogatories, and documents, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). The substantive law governing the case determines which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Although the movant has the initial burden of demonstrating the absence of material-fact issues, "[t]o avoid summary judgment, the non-movant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial." *Abbott v. The Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993) (citing *Celotex Corp. v. Catrett*, cited above). "To be certain, Rule 56 '*mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case. . . .'" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Celotex Corp.*, 477

---

from the 2007 contract in that, among other things, it changed the identification of the schools to be included in the program. (SOF, ¶ 51.)

U.S. at 322). Once the moving party makes the required showing, the burden shifts to the non-moving party to show that summary judgment is inappropriate. *Celotex*, 477 U.S. at 324.

To defeat a properly supported motion for summary judgment, the non-moving party must adduce specific, affirmative evidence. *Anderson*, 477 U.S. at 250; *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In other words, it must come forward with specific and supported facts to oppose the motion. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884-85 (1990). Naked assertions of a factual dispute unsupported by admissible evidence of material facts in dispute do not suffice. *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989); *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1413-14 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). The non-movant cannot satisfy its burden putting forth "some metaphysical doubt as to the material fact" or relying upon "conclusory allegations" or "unsubstantiated assertions." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Only concrete evidence – not argument in a brief – will satisfy the non-movant's reciprocal burden of proof. *Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 166-67 (5th Cir. 1991).

Finally, not only is "summary judgment . . . appropriate in *any* case 'where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant,'" but it is looked upon with favor and should be granted unless some genuine issue of fact is presented. *Little*, 37 F.3d at 1075 (emphasis added) (quoting *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993)).

B. Plaintiff Did Not Earn a Commission on the ADE Contract Under The 2006 Fiscal Year Commission Plan

Mr. Harris's Complaint conspicuously fails to articulate any method or policy that was contained in his August 10, 2005, letter of employment or the attached one-page individualized

compensation plan, beyond pure mathematics, that describes the timing of how contracts would be booked and commissions credited and thereafter paid to him. *See* Court Docket Doc. No. 1 (Petition for Damages), ¶ 8. Mr. Harris concedes that this information was not set forth in his letter of employment or the attached compensation plan and that, at the time he accepted employment with ACI, he did not raise any questions on the subject with anyone. (SOF, ¶¶ 8, 13.) Indeed, new hires during the summer of 2005 were aware that the overall compensation plan was a work-in-progress under Mr. Solinger's purview. (SOF, ¶ 10.)

That same letter of employment stated that the attached fiscal year 2006 compensation plan was in "current form" and "subject to change by board resolution." *See* Exhibit A-3. There never was a change to the numbers applicable to Mr. Harris under the fiscal year 2006 compensation plan attached to his letter of employment. The only "change" that occurred was the continued development and finalization of the previously non-existent but necessary scheme under which sales personnel would see quotas credited and then paid out. This was accomplished, with the knowledge of the sales force, in September of 2005, when the policies to govern quota credits and payment were presented to the ACI board of directors and then to the sales force at a September 19, 2005, training session. (SOF, ¶¶ 9, 14.) At that point, the comprehensive compensation plan, finally pairing policy with numbers, became a term of Mr. Harris's employment.

The case of *Trigg v. Pennington Oil Co., Inc.*, 835 So.2d 845 (La. Ct. App. 1st Cir. 2002), is instructive in this regard.[6] In *Trigg*, a former employee filed suit against his former employer to recover retirement benefits allegedly due him under a contract of employment. The

[6] There is no dispute that the substantive law of Louisiana applies to Mr. Harris's commission claim. As Mr. Harris has previously noted, his claim implicates Louisiana's statutory wage payment statute, *see* La. R.S. 23:631, *et seq.*, and commissions are considered wages for purposes of that statute. *Lorentz v. Coblentz*, 600 So.2d 1376 (La. App. 1st Cir. 1992). Therefore, Louisiana law will govern the underlying claim. *See* Pl.'s Opp. to Motion to Dismiss, Transfer, or Stay (Court Docket Doc. No. 9), pp. 13-14.

employment offer at issue specifically outlined salary and various benefits, then promised "a retirement plan in the near future," as none was in place at the time. *Id.* at 847. Other employees testified that they too were promised retirement benefits. *Id.* The court, however, affirmed a grant of summary judgment for the employer, noting that the plaintiff was an at-will employee who "was never promised a specific type of retirement plan" and "knew there was no retirement plan in place when he started with the company or at any time during his tenure with the company." *Id.* at 848. Consequently, the employer "was free to modify the terms of his employment at any time." *Id.*

In Mr. Harris's case, ACI did not promise any particular policy regarding quota credit recognition or payment at the time of his hire as an at-will employee. It simply did not exist in final form at the time Mr. Harris was hired. Mr. Harris knew that policy was not yet in place and did not raise any questions about its impending development and finalization. Thus, when that necessary component of the overall sales compensation plan was finally resolved, and presented to ACI's board in September 2005, it could hardly be deemed a modification. But to the extent the development of something from nothing is deemed a "modification" of the terms of one's employment, the *Trigg* case instructs that an employer is free to make such a modification.[7]

Under ACI's finalized 2006 sales compensation policy, "Quota credit [would] be granted for business booked in fiscal year '06 for services or products invoiced in fiscal year '06." (SOF, ¶ 11.) In other words, when ACI had a clear contractual commitment, and had rendered services or shipped products, and thus could invoice the customer, ACI could book the revenue under generally accepted accounting principles and the employee could "book" the revenue against his or her quota. *Id.*

[7] Naturally, an employee implies his acquiescence in the new contract term by continuing to work, as Mr. Harris did. *See* La. Prac. Employment Law § 3:23.

In the case of the ADE contract, it is undisputed that ACI did not book that contract until fiscal year 2007: a payment schedule was not finalized until on or about July 20, 2006; ACI's deliverables under the contract commenced with training services in July 2006; ACI's rendering of services was a necessary predicate to any legal obligation of ADE to pay ACI under its contract; and ACI did not receive payment from ADE until such services had been rendered. (SOF, ¶¶ 27, 30, 34, 36, 39.) As Mr. Harris has acknowledged, ACI received no money in fiscal year 2006 from ADE by virtue of his efforts. (SOF, ¶ 40.) Therefore, under the terms of ACI's compensation plan applicable to Mr. Harris, he was not entitled to quota credit until fiscal year 2007.

This result makes perfect sense because, as discussed in greater detail below, ACI did not even know what it was to deliver, or to whom, until the Final Contract was completed. "When commission sales are at issue, the inquiry of whether a wage was actually earned focuses on what work associated with the sale remained at the time of resignation." *Becht v. Morgan Bldg. & Spas, Inc.*, 822 So. 2d 56, 59 (La. Ct. App. 1st Cir. 2002). Accordingly, "[w]here only collection of the fee is outstanding and collection is beyond the control of the employee, the employee has earned his commission pursuant to La. R.S. 23:634." *Patterson v. Alexander & Hamilton, Inc.*, 844 So.2d 412, 416 (La. Ct. App. 1st Cir. 2003). But "if a substantial amount of time and effort are needed to complete a sale, then the right to a commission may not have been earned." *Id.* at 416-17 (citing *Howser v. Carruth Mortgage Corp.*, 476 So.2d 830, 835 (La. Ct. App. 5th Cir. 1985)).

As of June 2, 2006, when the DFA stamp indicated funding approval for ADE's project with ACI, the performance and collection of fees were not the only outstanding tasks. To the contrary, substantial time and effort, including the efforts of the sales team, were expended in the

following weeks to develop with ADE the material terms of the contract, not the least of which was a scope of work that would eventually provide ACI the who, what, when, where, and how of its performance obligations. Without knowing the deliverables, ACI could not perform, and without performance ADE would never have an obligation to pay. Thus, ACI's compensation plan, in its totality, is consistent with Louisiana law and common sense – an employee cannot expect commission credit unless and until material terms defining performance obligations, pricing, and payment are agreed upon between the contracting parties.

C. ACI Did Not Owe Cecil Harris Commissions Under the 2006 Plan Because It Did Not Have an Enforceable Contract With ADE Until Fiscal Year 2007.

Assuming *arguendo* that Mr. Harris could properly ignore the booking requirement outlined in ACI's sales compensation plan and instead rely solely on the date of contracting, he still is not entitled to commissions under the fiscal year 2006 plan because ACI did not have a binding and enforceable contract with ADE in ACI's 2006 fiscal year.

1. The April 17, 2006 document is not an enforceable contract.

Mr. Harris testified repeatedly at his deposition that the ACI-ADE contract at issue was signed on April 17, 2006, thereby allegedly entitling him to quota credit under his fiscal year 2006 compensation plan. (SOF, ¶ 23.) Mr. Harris has misunderstood Arkansas law.[8]

The essential elements of a contract under Arkansas law are: (i) competent parties, (ii) subject matter, (iii) legal consideration, (iv) mutual agreement, and (v) mutual obligations. *Hunt v. McIlroy Bank & Trust*, 616 S.W.2d 759, 761 (Ark. Ct. App. 1981) (citations omitted); *Williamson v. Sanofi Winthrop Pharm., Inc.*, 60 S.W.3d 428, 433 (Ark. 2001) (citations omitted).

[8] Pursuant to Louisiana Civil Code Article 3537, "an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue." *See also J. Ray McDermott, Inc. v. Berry Contracting*, Nos. 03-2054 & 03-2099, 2004 WL 224583, at *4 (E.D. La. Feb. 3, 2004). Because the negotiation and performance of the subject April 17, 2006, document occurred in Arkansas, with the state as one of the parties, and because its subject matter was the Arkansas public school system, Arkansas law applies to determine its status.

In order to have a valid contract, all terms must be definitely agreed upon and must be reasonably certain. *Hanna v. Glover*, No. CA 03-939, 2004 WL 848329, at *3 (Ark. Ct. App. April 21, 2004) (citations omitted). Conversely, where all essential terms of a contract are not agreed upon, the contract is unenforceable. *Superior Fed. Bank v. Mackey*, 129 S.W.3d 324, 338 (Ark Ct. App. 2003).

In the first instance, there was no "mutual agreement," no meeting of the minds, as to this document. ACI signed a form of the document that ADE later unilaterally, and without notice to ACI, altered by attaching documents that were not attached when ACI signed the document and by changing terms. (SOF, ¶ 28.) On this score, these parties were like ships passing in the night. ACI could not have been bound to a document different than the document it executed. *See K.C. Prop. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, No. 07-471, 2008 WL 659825, *8 (Ark. March 13, 2008) ("contracts are founded upon mutual assent of the parties and require a meeting of the minds") (citing 17 C.J.S. Contracts § 3 at pp. 553-554 (1963)); *Van Camp v. Van Camp*, 333 Ark. 320, 323, 969 S.W.2d 184, 186 (Ark. 1998) (requirement of mutual agreement or assent).

Second, the April 17, 2006, "Professional/Consultant Services Contract" cannot be a binding contract because there is no mutuality of obligation. *Hunt*, 616 S.W.2d at 761 ("mutual obligations" is required contract element). Indeed, the document itself contains a "Non-Appropriation Clause" whereby the ADE is not bound to perform if the State of Arkansas fails to appropriate funds for the proposed project. (SOF, ¶ 27.) Critically, Section 15 of the April 2006 document makes clear that, as of April 2006, ADE had no payment obligations to ACI:

> AGENCY SIGNATURE CERTIFIES NO OBLIGATION WILL BE INCURRED BY A STATE AGENCY UNLESS SUFFICIENT FUNDS ARE AVAILABLE TO PAY THE OBLIGATIONS WHEN THEY BECOME DUE.

Id. As the Arkansas courts have stated, "[w]e have recognized that mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus, neither party is bound unless both are bound." *The Money Place v. Barnes*, 349 Ark. 411, 414, 78 S.W.3d 714, 716-17 (2002). *See also Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000). Notably, "[a] contract, therefore, that leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other." *Id. See also Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962). That is precisely the case before this Court.

Third, there was no legal consideration to support the April 17, 2006, document. It is axiomatic that a contractual promise, to be binding, must be supported by adequate consideration. Consideration, in this sense, means detriment or benefit to the promisor. *See Kearney v. Shelter Insurance Company*, 71 Ark.App. 302, 306, 29 S.W.3d 747, 749 ("Consideration is any benefit . . . agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice . . . agreed to be suffered by promisor, other than such as he is lawfully bound to suffer.") Here, neither ADE nor ACI in respect of their promises received a benefit or sustained a detriment, as neither side was bound by the April 17 document to deliver the promised performance. (*See, supra*.)

Finally, and as we discuss below in greater detail, the April 2006 document also states that "[t]he method of rendering compensation will be delivered in accordance with a schedule developed by [ACI] and ADE." (SOF, ¶ 27.) As a result, the April 2006 document was, as we demonstrate further below, a mere agreement to agree and thus even more clearly unenforceable.

In sum, as of April 17, 2006, ADE was not obligated to perform under this document or to pay ACI a single penny at any time, and as such the document did not constitute a binding contract.

2. Even after funding was encumbered, the "Professional/Consultant Services Contract" was not an enforceable contract.

Though Mr. Harris relies on the April 17, 2006, "Professional/Consultant Services Contract" as the basis for his claim that he should have received quota credit, he still would be in error if he hitched his wagon to the version of that document that was returned with DFA approval on June 2, 2006, signifying that funding had been encumbered for the project contemplated thereunder. In that version, just as with the April document, material terms remained open and, at best, the parties had made an agreement to agree.

Agreements to agree are not enforceable contracts. *See Harris v. Turner*, No. CA 93-601, 1994 WL 318042, at *3 (Ark. Ct. App. June 29, 1994) (holding that letter of agreement was not binding contract because material and essential terms were left open for future negotiations, and because parties' actions in entering subsequent negotiations supported notion that first document was not complete and binding).[9] The June 2, 2006, version of the "Professional/Consultant Services Contract" document lacked essential terms pertaining to scope of work, which required specificity from ADE regarding the components of the ACSD program to be implemented, as well as specific payment terms and intellectual property protections. (SOF, ¶¶ 25, 27-28, 31-32.) These are all not just the product of ACI's preferences; nor could they have been implied or otherwise added to the contract by unilateral conduct. Rather, the

[9] *See also* CORBIN ON CONTRACTS § 2.9 ("The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made") and § 4.3 ("Frequently the price is agreed upon but the terms of payment are left to be agreed upon later. Many cases have found that such an agreement is fatally defective").

scope of work and payment terms are absolutely integral to the contract. It could not be performed without these terms.[10]

With respect to the scope of work, Mr. Harris himself recognized and acknowledged that decisions would need to be made regarding the identity and number of schools participating in the school design program to get to the point of contracting. (SOF, ¶ 32.) Mr. Harris's supervisor, Ms. Bienvenu, recognized and acknowledged that ACI could not and would not know to which Arkansas schools it would be providing materials and services under the "Professional/Consultant Services Contract" form. *Id.* Dr. Julian of the ADE noted that they were "probably having to guess" regarding the number of participating schools that were included in the "Professional/Consultant Services Contract" form, and the ADE's Estelle Mathis confirmed that school profiles were "the kind of thing America's Choice needed so they would know how many people they needed to employ, where the services would be and those kind of things." *Id.*

Indeed, although the parties adjusted the contract deliverables throughout the process of negotiation and development of the Final Contract so that the projected total cost of the contract remained the same as it had initially been, the number of participating schools did not adhere to the general breakdown that was included in the "Professional/Consultant Services Contract" form, nor did that form identify participating schools at all, either by name, status, size, or grade level (all essential components of ACI's ability to deliver services). (SOF, ¶¶ 25, 27, 31.) Thus, under any version of the "Professional/Consultant Services Contract," ACI would not know what

[10] And of course, just as in *Harris v. Turner*, *supra* at 21, the parties here also entered into subsequent negotiations virtually immediately following their execution of the April 17 document, thus enforcing the notion that the April 17 document was not complete and binding, but required further contractual commitments.

products and services would need to be delivered to whom.[11] And, at any point prior to reaching agreement on these terms, ADE and ACI had the right to walk away from the deal altogether.

The "Professional/Consultant Services Contract" form, in Section 5, also states as follows: "The method of rendering compensation will be delivered in accordance with a schedule developed by the contractor and ADE." (SOF, ¶ 27.) Thus, the parties explicitly contemplated preparation of a future agreement. Pursuant to that understanding, the parties did in fact have additional discussions, after June 2, 2006, ultimately agreeing upon a payment schedule as well as developing comprehensive scopes of work. (SOF, ¶¶ 31, 33-34.)

Moreover, the form of "Professional/Consultant Services Contract" that ADE submitted to the Arkansas Legislative Council for approval and that came back with such approval on June 2, 2006 (Ex. A-73), was *not* the document that ACI had signed. ACI's officer signed a form of this document that contained no attachments. (SOF, ¶ 28.) Apparently, in an effort to portray this document as a complete contract, contracting officials at ADE attached to the form revised portions of the ACI proposal responding to ADE's RFP, purportedly representing a budget and scopes of work. But these were mere proposals and sample documents, neither final nor agreed to in any way. (Indeed, someone at ADE apparently revised the scope of work document to omit the designation "sample" at the top of the document. *Compare* Bates numbers ADE 0371 in Ex. 73 *with* ACI 0452 in Ex. 15.) As ACI's witness testified, the first occasion that ACI even saw this "complete" document was when ADE produced it in discovery pursuant to a non-party subpoena. Thus, since the document that Mr. Harris contends is a binding and enforceable contract is a different document than that signed by ACI, there could not have been a meeting of

[11] "Communications that include mutual expressions of agreement may fail to consummate a contract for the reason that they are not complete, some essential term not having been included." 1 Perillo, CORBIN ON CONTRACTS § 2.8 (Revised Ed. 1993).

the minds over its terms. *See K.C. Prop. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, No. 07-471, 2008 WL 659825, *8 (Ark. March 13, 2008) ("contracts are founded upon mutual assent of the parties and require a meeting of the minds") (citing 17 C.J.S. *Contracts* § 3 at pp. 553-554 (1963)).

On the other hand, the July 20, 2006, contract executed by the parties governed their respective performance obligations to one another – providing ACI its scope of work and ADE its payment obligations. The parties would have perpetually remained in neutral without the material terms contained in the July contract. In addition, the July 20, 2006, contract contains an explicit and comprehensive integration clause. Therefore, even if the earlier "contracts" could have governed the extent of the parties' relationship – which they did not – they were superseded by the final contract. *See Primex Int'l Corp. v. Wal-Mart Stores, Inc*., 679 N.E.2d 624, 627 (N.Y. 1997) (holding that the purpose of a general merger provision is to "bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" and that a "completely integrated contract precludes extrinsic proof to add to or vary its terms").[12]

Finally, that the Final Contract contained an effective date of May 30, 2006, does not lead to the conclusion that the ACI-ADE contract became final and binding on that date. Arkansas procurement law confirms precisely to the contrary. *See* Ark. Code. Ann. § 19-11-1011(a)(2) ("The *execution date* of all [professional and consultant services] contracts *shall be defined as the date upon which performance of the services to be rendered under the contract is to begin*

[12] The July 20, 2006, contract included a New York choice of law provision. *See* Exhibit 89, § 15. Even if Arkansas law were to apply to this contract, however, the outcome remains the same; the integration clause must be respected, and the earlier "contracts" were superseded. *See McNamara v. Bohn*, 13 S.W.3d 185, 188 (Ark. Ct. App. 2000) (citing *Farmers Coop. Ass'n v. Garrison*, 454 S.W.2d 644 (1970)) (noting that a merger clause extinguishes all prior and contemporaneous negotiations, understandings, and agreements). Louisiana law shows similar deference to integration clauses. *See Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 564 (5th Cir. 2005) ("Louisiana law is consistent in its interpretation of contracts vis a vis an integration or merger clause. . . . By its very definition, an integration or merger clause . . . is a provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document") (internal citation and punctuation omitted).

and not the date upon which the agreement was made." (Emphasis added)). As discussed above, ACI provided ADE a school design program for the 2006/2007 school year, and services commenced with the training of teachers, principals, and administrators in July 2006 – *i.e.*, ACI's fiscal year 2007. Thus, under these facts – where the parties, with the aid of ACI's sales personnel, were clearly developing appropriate scopes of work into July – and under the law, there was no contract in ACI's fiscal year 2006 entitling Mr. Harris to commissions under his fiscal year 2006 compensation plan. (Ark. Code. Ann. § 19-11-1011(a)(2) also demolishes any contention that the April 2006 document was executed in ACI's fiscal year 2006, as it explicitly provides that the "execution date" of that document, even assuming that it was or later became an enforceable contract, was in fact the date of first rendering of services to ADE, *i.e.*, in July 2006.)

D. Cecil Harris Has No Basis In Fact or Law to Request Commissions For Contract Amendments and Extensions That Occurred After His Resignation.

ADE approved an extension of its contract with ACI through July 1, 2009, but it did so without *any* involvement from Mr. Harris. (SOF, ¶ 51.) The amendment form, like the original "Professional/Consultant Services Contract" form, had to go through the procurement approval process to secure additional funding. *Id.* As noted above, ACI and ADE followed the identical contracting process as they had earlier with respect to this amendment, eventually negotiating and executing a detailed contract on ACI's form. *Id.* Even if Mr. Harris had not resigned his post with ACI prior to execution of this amendment, he would not be entitled to commissions on this amendment because, according to Mr. Solinger, "renewals were driven by the delivery performance of the company by field services," not the sales force. (SOF, ¶ 53.) A similar principle is also explicitly captured in ACI's compensation plan. *See id.*, citing Ex. H, p. 11 and

Ex. GG, p. 13) ("Revenue in future fiscal years in multi-year contracts are excluded" from quota credit).

It is an acceptable practice for an employer's compensation plan to condition payments of commissions upon the employee being in the employer's service at the end of the commission period. *See, e.g., Becht,* 822 So. 2d 56; *Hebert v. Ins. Ctr. Inc.,* 706 So.2d 1007 (La. Ct. App. 3d Cir. 1998). ACI's plan does that. This makes Mr. Harris's position beyond preposterous – he had no role whatsoever in procuring the additional years of business from ADE, he was not employed by ACI at the time it was secured, and yet he claims that he is entitled to remuneration on that additional business using a prorated annual quota that was not even in effect at the time he left ACI's employ.

E. Cecil Harris is Not Entitled to Penalties or Attorney Fees Under the Louisiana Wage Payment Act.

Mr. Harris has made a claim for penalty wages under La. R.S. 23:632, but such penalties require him to show that: (1) wages were due and owing; (2) demand for payment was made where the employee was customarily paid; and (3) ACI did not pay upon demand. *Harrison v. CD Consulting, Inc.*, 934 So.2d 166, 171 (La. Ct. App. 1st Cir. 2006) (citations omitted). "Generally, when there is a good-faith question of whether the employer actually owes wages . . . resistance to payment will not trigger penalty wages." *Id.* at 172 (citations omitted).

ACI has acknowledged that Mr. Harris was due a commission payment after the first quarter of fiscal year 2007. (SOF, ¶ 56.) However, in an effort to placate Mr. Harris, ACI was ready and willing, prior to his resignation, to lower his fiscal year 2007 quota from $4 million to $3 million and to recognize some revenues on an accelerated basis, which would have entitled him to $160,000 in commission payments for his work on the ADE contract. Despite this good faith offer, Mr. Harris refused to accept payment and instead instituted this lawsuit, seeking a

nearly $2 million payday. ACI's resistance to paying this amount, or any other amount previously requested under the wrong compensation plan, is not enough to trigger La. R.S. 23:632.

IV. CONCLUSION

For the foregoing reasons, Defendant ACI respectfully requests that this Court enter partial judgment in its favor on Plaintiff's claims and dismiss Plaintiff's Complaint (or Petition) with prejudice to the extent that it seeks recovery of commissions (a) pursuant to ACI's fiscal year 2006 compensation plan and (b) with respect to the amendment and renewal of the ADE contract.

DATED: December 5, 2008

LEMLE & KELLEHER, L.L.P.

By: /s/ David M. Whitaker

Alan H. Goodman, Esq. (6131)
David M. Whitaker (21149)
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Fax: (504) 584-9142

Martin E. Karlinsky, Esq.(admitted *pro hac vice*)
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022-2585
Telephone: (212) 940-8800

Ugo Colella, Esq. (admitted *pro hac vice*)
John Rosans, Esq. (admitted *pro hac vice*)
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW
Suite 200
Washington, D.C. 20007
Telephone: (202) 625-3500

Attorneys for Defendant America's Choice, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, a copy of the foregoing Memorandum In Support Of Defendant's Motion For Partial Summary Judgment was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to S. Bradley Rhorer and Vera K. Crumby-Nance by operation of the court's electronic filing system.

/s/ David M. Whitaker
David M. Whitaker (21149)
Attorney for America's Choice, Inc.
Lemle & Kelleher, L.L.P.
601 Poydras Street, Suite 2100
New Orleans, LA 70130
Phone: (504) 584-9404
Fax: (504) 584-9142
E-mail: dwhitaker@lemle.com