**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **AMERICA'S CHOICE, INC.,** | ) | |
| | ) | **Case No. 07-CV-00428** |
| | ) | **Judge Emmet Sullivan** |
| **Plaintiff/Counter-Defendant,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **SANDRA BUSH BIENVENU,** | ) | |
| | ) | |
| **Defendant/Counter-Plaintiff.** | ) | |
| | ) | |

**PLAINTIFF/COUNTER-DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

**NOW INTO COURT**, through undersigned counsel, comes Plaintiff/Counter-Defendant, America's Choice, Inc. ("ACI"), and submits the following reply memorandum in further support of its Cross-Motion for Summary Judgment (Doc. No. 44).

## I. INTRODUCTION

In connection with their summary judgment motions, the parties have submitted an abundance of background and context evidence regarding both the negotiation and execution of a contract entered into between ACI and the Arkansas Department of Education ("ADE"), as well as the development of ACI's compensation policies. Ultimately, however, the two potentially dispositive issues before the Court are straightforward.

The first issue is whether ACI had a binding and enforceable contract with ADE in ACI's fiscal year 2006 – *i.e.*, no later than June 30, 2006. Whereas Ms. Bienvenu must rely on creative wordplay, allusions to contract "non-deliverables," and a scattershot approach to the interpretation of the relevant documents to try to persuade the Court that ACI had an enforceable agreement in its fiscal year 2006, ACI need not resort to all of that. Why? Because the

unambiguous terms of the relevant documents tell the entire story: ADE issued a Request for Proposal ("RFP"); ACI responded to that RFP with a menu of the services it could offer, including the standard pricing of those services; ACI executed an incomplete document, unilaterally revised by ADE thereafter, so that ADE could procure funding for its proposed project; funding was approved; ACI and ADE negotiated the material terms of their contract, including price and deliverables, and executed a contract in fiscal year 2007, which included an integration clause (the "Final Contract"). It is indisputable that, without the Final Contract, ADE would have no obligation to pay ACI a single penny, let alone the full *projected* value of the $6,095,000 contemplated for the project. Until that obligation was memorialized in the Final Contract, Ms. Bienvenu was not entitled to quota credit.

The second issue is what terms and conditions governed receipt of "quota credit" by Ms. Bienvenu. Here, even if Ms. Bienvenu's skewed perspective and novel approach to contract interpretation were correct, she must clear a second, distinct, hurdle to avoid summary judgment: she must demonstrate by plausible evidence that the terms of her employment, including ACI's governing compensation policy, would entitle her to quota credit in fiscal year 2006. On this point, Ms. Bienvenu appears confused. On the one hand, she concedes that ACI had not fully developed its compensation policies at the time she entered into her employment agreement with ACI. Bienvenu Opp. (Doc. No. 45), at 11. Yet, her claim rests *entirely* upon purported statements made at the time she entered into her employment agreement with ACI by her former supervisor, Mr. Solinger. And if this self-contradiction were not sufficient to render her "evidence" implausible, the very person upon whom she relies – Mr. Solinger – fails to support her proposition that ACI needs only a signature on a "contract" for its sales personnel to earn quota credit. To the contrary, Mr. Solinger's testimony wholly contradicts this proposition, as

does the very compensation policy that he wrote, memorialized, presented to ACI's board of directors, and shared with his sales staff. Ms. Bienvenu cannot avoid summary judgment by misstating the record and rewriting history. *See Durrani v. U.S. Citizenship & Immigration Serv.*, No. 08-0607, 2009 WL 161369, at *1 (D.D.C. Jan. 26, 2009) ("Summary judgment is appropriate when the tendered evidence is in its nature too incredible to be accepted by reasonable minds") (internal punctuation and citation omitted).

## II. ARGUMENT

### A. ACI Did Not Have A Binding And Enforceable Contract With ADE On June 2, 2006.

The undisputed material facts are these:[1] ACI and ADE performed under the Final Contract (SOF, ¶¶ 40-43);[2] ACI invoiced ADE under the Final Contract (SOF, ¶ 41); ADE paid ACI under those invoices (SOF, ¶¶ 42-43); and the Final Contract contained an integration clause that states as follows:

> *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.

[1] Ms. Bienvenu did not file with her Opposition a "separate concise statement . . . setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement," as required by LCvR 56.1. Therefore, ACI's previously-filed Statement of Undisputed Material Facts is deemed to be admitted. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 616 (D.C. Cir. 2000) (where a party filed a statement in support of his own motion for summary judgment but did not follow the local rule in opposing SEC's cross-motion for summary judgment, the "district court was therefore fully justified in treating as admitted the SEC's statement of material facts.") To the extent Ms. Bienvenu is permitted to incorporate and rely upon the "salient facts" enumerated in her previously-filed Memorandum in Support of Motion for Partial Summary Judgment and her Statement of Uncontested Material Facts, ACI notes that the facts detailed above were not disputed by Ms. Bienvenu in any of her papers.

[2] References to ACI's previously-filed Statement of Undisputed Material Facts (Doc. No. 44-3) are in the form "SOF, ¶ __."

(SOF, ¶ 39.)

Ms. Bienvenu relies on legal fictions (in the literal, pejorative sense), semantics, and outright misstatements of the record in her attempts to render the preliminary document executed by ACI and ADE a binding and enforceable contract as of June 2, 2006. To Ms. Bienvenu, the procurement of over six million dollars from the Arkansas legislature was a mere "formality." *See*, *e.g.*, Bienvenu Opp. (Doc. No. 45), at 3. And while the parties spent many weeks negotiating the terms of the Final Contract, the agreement that was ultimately performed, Ms. Bienvenu claims they merely "refined the details of the Arkansas Contract after June 2nd." *Id.*, at 6. Unfortunately for Ms. Bienvenu, the devil is in those details.

Ms. Bienvenu's Legal Fiction #1: The Final Contract Did Not Comport With Arkansas Procurement Law

Ms. Bienvenu, despite viewing the Arkansas procurement process as a mere "formality," argues that the failure of the Final Contract to go through that very same process dooms its status as a contract. This cannot be the case. As an initial matter, it is *ADE*, not ACI, who has the duty to know and follow the Arkansas Procurement Statute. *See* Ark. Code. Ann. § 19-11-801(a) ("It is the policy of the State of Arkansas that state agencies shall follow the procedures stated in this section. . . .") ACI's duty to Ms. Bienvenu does not arise out of the Arkansas Procurement Statute. Instead, ACI had a duty to give Ms. Bienvenu quota credit pursuant to the terms of her employment. Even under Ms. Bienvenu's theory (which ACI demonstrates as wrong in Section B, *infra*), ACI needed a binding agreement that it could enforce against ADE before it would recognize quota credit for her. *See* Bienvenu Mem. (Doc. No 40-3), at 2; Bienvenu Opp. (Doc. No. 45), at 2.

More fundamentally, and as Ms. Bienvenu recognizes, *see* Bienvenu Opp. (Doc. No. 45), at 6, "It is the duty of the courts to enforce contracts as written and in accordance with the

ordinary meaning of the language used and the overall intent and purpose of the parties." *Magic Touch Corp. v. Hicks*, 260 S.W.3d 322, 326 (Ark. Ct. App. 2007). If asked to specifically enforce the June 2, 2006 document that Ms. Bienvenu contends is the "Arkansas Contract," a court would be unable to do so.

Ms. Bienvenu concedes that, under the terms in the "Professional/Consultant Services Contract" form, ACI would not know to which Arkansas schools it would be providing materials and services. (SOF, ¶ 35.) She does not dispute that ADE's witnesses recognized that ADE was "probably having to guess" regarding the number of participating schools that were included in the "Professional/Consultant Services Contract" form and 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*.) Simply stated, if the Final Contract is a nullity for its failure to independently go through the Arkansas procurement process, then there was no enforceable contract *at all*, because ACI would not have been able to perform under the *unambiguous but incomplete terms* of the June 2nd document.[3]

Similarly, and more pertinent to the determination of Ms. Bienvenu's quota credit inquiry, a court could not specifically enforce the June 2 document against ADE. Under the express terms of that document, ADE incurs no obligation whatsoever unless and until the

[3] Ms. Bienvenu invokes the concept of contract "ambiguity" in opposing ACI's Cross-Motion for Summary Judgment. *See* Bienvenu Opp. (Doc No. 45), at 6. To be clear, ACI argued no such thing with respect to the "Professional/Consultant Services Contract" form. It is ACI's position that under the very clear terms of the "Professional/Consultant Services Contract" form, there were none of the following essential elements of a contract: (i) mutual agreement (ADE unilaterally added terms and attachments to the form after ACI had executed the document); (ii) mutual obligation (ADE was not obligated to pay one cent, even after funding for the proposed project had been encumbered); and (iii) mutual consideration (ACI had nothing to deliver, and ADE nothing to pay under the terms of that document). *See* ACI's Mem. (Doc. No. 44-2), at 18-20. Nowhere does ACI contend that the document's terms are subject to multiple interpretations; rather, material terms are missing. Ms. Bienvenu cannot fabricate a genuine issue of material fact by invoking the concept of ambiguity where none otherwise exists.

procured funds "become due." *See* ACI. Mem. (Doc. No. 44-2), at 11, 19. Consistent with the plain language of the document, and undisputed by Ms. Bienvenu, Dr. Bobbie Davis of ADE recognized that ADE's obligation to pay under the ACI-ADE contract arises only "when these services are rendered and someone has indicated those services have been rendered." (SOF, ¶ 33.) Thus, until ACI and ADE negotiated the actual services to be rendered by ACI, and until ACI actually rendered those services, there was no binding obligation on ADE to perform and nothing for ACI to enforce.

As previously noted by ACI, again without dispute or counterargument from Ms. Bienvenu, if the Arkansas Procurement Statute provides the determinative standard as to what is or is not the binding and enforceable contract between ACI and ADE, then Ms. Bienvenu still loses because 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 and not the date upon which the agreement was made." Ark. Code. Ann. § 19-11-1011(a)(2). Again, this standard is consistent with the document terms and the parties' actions and interpretations discussed above. Rather than attempt to select an execution date from a myriad of dates – various signatories, the date of legislative approval, or the date of the DFA stamp – the execution date, just like the agency's performance obligations, is dictated by the contractor's performance obligation, which performance did not occur here until July 17, 2006, at the earliest. *See*, *infra*, n.5.

Ms. Bienvenu's Legal Fiction #2: Introduction of Parol Evidence

Ms. Bienvenu curiously accuses ACI of "muddy[ing] the waters by tossing around the dates which appear on the ['Professional/Consultant Services Contract' form]," Bienvenu Opp. (Doc. No. 45), at 7, but Ms. Bienvenu brazenly tosses around dates *outside* the documents at

issue in an attempt to infuse the "Professional/Consultant Services Contract" form with terms and meaning that simply are not there.

For example, despite acknowledging that there was no binding contract as of May 30, 2006, *see* Bienvenu Opp. (Doc. No. 45), at 5, she continues to urge that an "informational session with Arkansas State personnel" that occurred on May 23, 2006, indicates that the parties had concluded a binding contract at that earlier date. *See id.* Of course, under *no document* purported by either party to be the governing contract was this "informational session" a contract deliverable. And, contrary to Ms. Bienvenu's submission, this meeting was not arranged to inform state personnel of "the services ACI *would* be providing in accordance with the Arkansas Contract." *Id*. (emphasis added). To the contrary, ACI described the services it *could* provide to Arkansas schools in an effort to recruit school principals to enlist their schools in the proposed project – the session was an occasion to "market" to the principals. Ms. Bienvenu points to no evidence to suggest that this meeting was a contract deliverable, nor can she explain how ACI could have informed school personnel about the actual services to be delivered under the contract when both the services and the identity of participating schools was not known until many weeks later. (SOF, ¶¶ 34-35.) Call it informational, call it marketing, call it preparation – Ms. Bienvenu cannot call it evidence of an enforceable and binding contract.

In the same vein, Ms. Bienvenu offers no factual basis or argument to support her suggestion that ACI's preparation for a "possible training event"[4] for Arkansas personnel in July[5] (by beginning to schedule trainers) was a tender of performance or otherwise a contract

[4] *See* ACI Statement of Disputed Facts ("SDF"; Doc. No. 43-3), ¶ 16.

[5] Ms. Bienvenu continues to make blanket assertions unsupported by anything in the record, such as her continued claim that ACI began its "intensive" two-week training seminar "beginning the first week of July 2006." *See* Bienvenu Mem., (Doc. No. 40-3), at 9; Bienvenu Opp. (Doc. No. 45), at 7. As ACI noted, the first week of training commenced on or about July 17, 2006, *see* SDF, ¶ 16, which was after the relevant portions of the Final Contract had been negotiated.

deliverable. ACI's business decision to *prepare* for a potentially lucrative contract is *not* the same as "actively proceeding with steps required under the Arkansas Contract." *See* Bienvenu Opp. (Doc. No. 45), at 7. As ACI already noted, its preparation for performance secured ACI nothing from ADE and is not enough to establish a binding and enforceable contract, *see* ACI Mem. (Doc. No. 44-2), at 29-30, the terms of which, including the integration clause, are clear.[6]

Likewise, Ms. Bienvenu seeks traction in the references to attachments in the "Professional/Consultant Services Contract" form executed by ACI's Jason Dougal, s*ee* Bienvenu Opp. (Doc. No. 45), at 7-8, even though she cannot dispute that those attachments, missing at the time ACI executed the document, were mere sample documents that ADE lifted from ACI's response to the RFP. *See* ACI Mem. (Doc. No. 44-2), at 8, 23. Ms. Bienvenu claims these attachments provided "the same items ACI now claims were lacking – a budget, scope of work, materials list . . . ." Bienvenu Opp. (Doc. No. 45), at 8. But Ms. Bienvenu does not and cannot claim that these items were *the* budget, *the* scope of work, and *the* materials list that the parties spent weeks negotiating and thereafter actually delivered in performance of their contract.[7]

In short, Ms. Bienvenu has provided no justification for the introduction of parol evidence to contradict the terms of the integrated Final Contract, a contract which the parties ultimately performed; the extrinsic "evidence" that Ms. Bienvenu proffers does not change the simple fact that ADE had no enforceable payment obligation, and thus no enforceable contract with ACI, until fiscal year 2007.

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[6] *See* ACI Mem., (Doc. No. 44-2), at 24 (discussing how a completely integrated contract precludes the introduction of extrinsic proof to add to or vary its terms).

[7] *See* SOF, Ex. O (Doc. No. 43-18) (chart comparing the deliverables contemplated in the Professional/Consultant Services Contract form to the deliverables actually agreed upon in the Final Contract).

Ms. Bienvenu's Misrepresentation of Her Role After June 2, 2006

As ACI noted in its opening memorandum, Ms. Bienvenu's prior contention that a salesperson like herself was "out of the picture once a contract was signed" was correct. *See* ACI Mem. (Doc. No. 44-2), at 27-28. ACI also noted that Ms. Bienvenu, in fact, was far from "out of the picture" as of June 2, 2006, and that she actively negotiated material contract terms, such as deliverables and proposed budgets, into July. *See id*., at 9, 27-28. Ms. Bienvenu counters this fact with a blatant misstatement of the record, representing to the Court that her "communications with respect to refining deliverables were with other ACI personnel, not ADE personnel." Bienvenu Opp. (Doc. No. 45), at 3-4 (citing ACI Exhibits 113-115, 126).

False. Three of the four exhibits cited by Ms. Bienvenu (Exhibits 113, 114, and 126) were e-mails where Dr. Rebecca "Becky" Dalton of ADE appeared as a recipient in the "To:" address field, either by herself or with ACI's Jason Dougal.[8] Within the body of one of those e-mails, dated June 14, 2006, Ms. Bienvenu addresses "Becky and Jason" regarding a change to an "Arkansas Schools and Pricing" spreadsheet. *See* ACI Ex. 114. In the body of a later e-mail, dated June 20, 2006, regarding an "Arkansas Revised Spreadsheet," Ms. Bienvenu inquired of "Becky" alone, "Check this spreadsheet and let me know if there [sic] issues with it." *See* ACI Ex. 126. The Court should reject Ms. Bienvenu's mischaracterization of her role in the contract negotiations that occurred after June 2, 2006; the evidence demonstrates the nature and extent of that role. Simply put, her work in procuring a binding and enforceable contract with ADE was not completed until ACI's fiscal year 2007. ACI Mem. (Doc. No. 44-2), at 9, 27-28.

[8] "Becky," of course, is the same Becky Dalton about whom Ms. Bienvenu testified with respect to the April 2006 "Professional/Consultant Services Contract" form. In Ms. Bienvenu's words, "Becky needed this [form] signed and she wasn't sure why." (SOF, ¶ 26.) Ms. Bienvenu has not and cannot dispute that fact – though she now runs from her prior, stated understanding of that document for purposes of this litigation.

**B. Regardless Of Contract Date, Ms. Bienvenu Is Not Entitled To Commissions For The ACI-ADE Contract Under ACI's Fiscal Year 2006 Compensation Plan.**

If the Court determines that ACI did not have a binding and enforceable contract with ADE until fiscal year 2007, then the inquiry ends, and ACI is entitled to summary judgment as a matter of law. Assuming, *arguendo*, that the Court accepts Ms. Bienvenu's contention that the parties had a binding contract as of June 2, 2006, then the Court must address a second question: whether Ms. Bienvenu was entitled to quota credit under the terms of her employment.

As a preliminary matter, Ms. Bienvenu skips the first step in a proper choice of law analysis, requiring that "the Court determine whether there is any conflict among the potentially applicable legal standards." ACI Mem. (Doc. No. 44-2), at 15 (citing *Flemming, Zulack, and Williamson, LLP v. Dunbar*, 549 F. Supp. 2d 98, 105 (D.D.C. 2008)). Ms. Bienvenu suggests that there are significant differences between the applicable substantive laws of the District of Columbia and Florida, *see* Bienvenu Opp. (Doc. No. 45), at 8, but she does not explain where that true conflict lies. Assuming, *arguendo*, that the Court should apply the substantive contract laws of Florida, as Ms. Bienvenu asserts, the outcome is the same: Ms. Bienvenu is not entitled to commissions under the 2006 fiscal year compensation plan.

ACI has no need "to avoid the clear language of the *Comford* [sic] case" and Florida law, as Ms. Bienvenu posits. *See* Bienvenu Opp. (Doc. No. 45), at 10. As ACI noted in its opening memorandum, a company is permitted to have "an established policy communicated to its employees" regarding payment of commissions, and such an established policy "effectively becomes an implied term of the employment relationship." ACI Mem. (Doc. No. 44-2), n.8 (citing *Comerford v. Sunshine Network*, 710 So.2d 197, 199 (Fla. Dist. Ct. App. 1998)). As noted in *Comerford*, "*if a contract is silent* . . . on the right of accrual, then commissions are generally deemed 'earned' when a sale is made." 710 So.2d at 198 (emphasis added). Ms.

Bienvenu therefore must practically beg the Court to find no established policy regarding quota credit accrual. In this regard, she fails miserably.

Ms. Bienvenu admits that ACI had not yet developed a comprehensive commission policy at the time she was hired. *See* Bienvenu Opp. (Doc. No. 45), at 11. Still, she clings to the notion that her then-supervisor, Nick Solinger, told her only one thing on the subject: that quota credit was earned when a customer simply signed a contract. *See id.*, at 9. Aside from her own self-serving testimony, Ms. Bienvenu cites nothing else to support this assertion. *See id.*

Ms. Bienvenu falsely states that "ACI is unable to cite any policy statement to Ms. Bienvenu prior to June 2nd, contradicting" Mr. Solinger's purported representation to her that the signing of a contract alone entitled her to quota credit. *See* Bienvenu Opp. (Doc. No. 45), at 9. To the contrary, ACI cited, *without dispute by Ms. Bienvenu*, a September 19, 2005, sales training attended by all sales personnel, wherein 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 and booking model. *See* ACI Mem. (Doc. No. 44-2), at 5 (citing SOF, ¶ 14). ACI also cited Mr. Solinger's testimony, wherein he affirmed that he discussed the "contractual certainty" concept of his fiscal year 2006 compensation plan with his sales development directors. *See id.*, at 5 (citing SOF, ¶ 15).

To be sure, Ms. Bienvenu would have this Court believe that the "undisputed testimony of Mr. Solinger" confirms her contention. *See* Bienvenu Opp. (Doc. No. 45), at 9. It does not. Mr. Solinger testified at length about the compensation policy that he developed *and documented* for fiscal year 2006, which states, "Quota credit [would] be granted for business booked in fiscal year '06 for services or products invoiced in fiscal year '06." (SOF, ¶ 10.) This policy is memorialized in Exhibit 7, which Mr. Solinger discussed at length during his deposition. Ms.

Bienvenu herself cherry-picks testimony from Mr. Solinger on this subject. *See* Bienvenu Opp. (Doc. No. 45), at 10. But Mr. Solinger's documented plan and his explanation of "business booked" does not lead to Ms. Bienvenu's desired result. Mr. Solinger's plan required more than a signature on a contract. It required "business booked":

> Q. The – what do you mean by business booked?
>
> A. A booking in my mind is a contractual commitment between a customer and America's Choice, Incorporated where America's Choice, Incorporated is committed to providing services and products and the customer's contractually obligated to receive those services and products without an ability to cancel or get out of the contract, except for failure to perform by the company, and without any dependencies or contingencies or anything other than the routine delivery of products and services by America's Choice.
>
> . . . .
>
> . . . . I worked hard to find a way to represent this notion of the school district being at risk financially to America's Choice and America's Choice having certainty that a contract would produce the revenues described. [¶] And so I looked at, you know, if there's a contractual commitment, an invoice, a commitment to a payment schedule, payments received, things like that to try to address this notion of school districts being able to wantonly cancel contracts and not pay under them. But at the same point, a desire to compensate sales people at the time based on the contract date and trying to find something which captured the notion.

ACI SOF, Ex. B (Doc. No. 43-5; Solinger 4/18/08 Dep.) at 72:6-18, 73:6-19.

Mr. Solinger's undisputed testimony is *not* that "business booked" is a signed contract alone. Even if the June 2nd document is a "contract," it did not bring with it a commitment by ADE to receive any products or services, nor did it provide any assurances that ADE would not cancel it. As already discussed, it contemplated multiple "dependencies or contingencies" – chiefly, the negotiation of the scopes of work, development of a payment schedule, and delivery by ACI. Without those developments and commitments, ADE bore no risk and was not

obligated to payment terms, as expressly stated in the June 2nd document and as confirmed by the ADE's employees. *See, supra,* p. 5.

There simply is no doubt that Mr. Solinger discussed with Ms. Bienvenu the substance of the booking model and other compensation policies contained in Exhibit 7, his September 19, 2005 presentation of the fiscal year 2006 compensation plan to ACI's board. *See* ACI Mem. (Doc. No. 44-2), at 12-13. He did so before September 19, 2005, and after.[9] Ms. Bienvenu's reliance on Mr. Solinger for a policy *that he never articulated* does not carry the day. Ms. Bienvenu's claimed ignorance of anything but a purely fictional policy between the date of her hire and June 2, 2006, does not carry the day. Self-serving testimony in litigation cannot rewrite history and permit a party to avoid summary judgment. *See Durrani*, 2009 WL 161369, at *1 ("the removal of a factual question from the jury is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence, and undermined . . . by other credible evidence").

## III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in its opening memorandum, Plaintiff/Counter-Defendant ACI respectfully requests that this Court enter judgment in its favor on its claim for declaratory judgment and that it dismiss Defendant/Counter-Plaintiff's counterclaims with prejudice.

Dated: April 6, 2009

[9] *See also* Ex. 1 (Solinger 4/18/08 Dep.) at 128:3-9:

> Q. Did you ever discuss the substance of those slides [in Exhibit 7] with your business development directors?
>
> A. Yes, I think it was both before and after [September 19, 2006] – we had discussions around the examples that I've had at length and the earlier conversations that I had.

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

By: /s/ John Rosans

Ugo Colella (D.C. Bar No. 473348)
2900 K Street, N.W.
Suite 200
Washington, D.C. 20007
Phone: (202) 625-3755
Fax: (202) 295-1174

John Rosans (D.C. Bar No. 474180)
2900 K Street, N.W.
Suite 200
Washington, D.C. 20007
Phone: (202) 625-3639
Fax: (202) 339-8267

Of Counsel:

Martin E. Karlinsky, Esq.
(D.C. Bar No. 447859)
BUTZEL LONG
380 Madison Avenue, 22nd Floor
New York, New York 10017
Phone: (212) 818-1110

*Counsel for Plaintiff/Counter-Defendant America's Choice, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2009, a copy of the foregoing PLAINTIFF/COUNTER-DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT and supporting documentation were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system (ECF). Parties may access this filing through the Court's system.

/s/ John Rosans
John Rosans