

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRTEENTH DIVISION

FILED

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THE CLERK OF THE
CIRCUIT-COUNTY CLERK
PLAINTIFFS

**DONNA HARTZELL, and
LARRY WAYLAND**

VS.

NO. IJ-2001-3700

**STATE OF ARKANSAS, and
MIKE HUCKABEE, Governor, in his official capacity, and
RICHARD WEISS, in his official capacity as
Director of the Department of
Finance and Administration, and
KURT KNICKREHM, in his official capacity as
Director of the Department of Human Services**

DEFENDANTS

AND

**STATE OF ARKANSAS, and
MIKE HUCKABEE, Governor, in his official capacity, and
RICHARD WEISS, in his official capacity as
Director of the Department of
Finance and Administration**

THIRD-PARTY PLAINTIFFS

VS.

SAP PUBLIC SERVICES, INC.

THIRD-PARTY DEFENDANT

AMENDED THIRD-PARTY COMPLAINT

Third-party Plaintiffs, State of Arkansas, Governor Mike Huckabee, and Richard Weiss, Director of the Department of Finance and Administration (hereinafter referred to collectively as the "State"), by and through their attorneys, Attorney General Mike Beebe, and Assistant Attorneys General Anthony W. Black and Renae Ford Malone, for their Amended Third-party Complaint pursuant to Ark. R. Civ. P. 15, state:

I. INTRODUCTION

1. The State herein asserts against SAP Public Services, Inc.¹ (hereinafter referred to as “SAP”) a claim for specific performance and indemnification for SAP’s failure to provide to the State an integrated software system accessible to the visually impaired as required by law and as also required by the contract between the State and SAP.

2. The State herein asserts against SAP additional claims for breach of contract, promissory estoppel, breach of the implied duty of good faith and fair dealing, fraud, and for violation of the Arkansas Deceptive Trade Practices Act with regard to the purchase of an integrated software system known as the Arkansas Administrative Statewide Information System (hereinafter referred to as “AASIS”).

3. The State herein asserts against SAP further claims pursuant to the Arkansas Uniform Commercial Code for breach of express and implied warranties including the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

4. The State herein requests actual, compensatory, incidental, and punitive damages as well as civil penalties for SAP’s breach of contract, promissory estoppel, fraud, breach of warranties, breach of duties pursuant to common law, violation of the Arkansas Deceptive Trade Practices, and violation of the Arkansas Uniform Commercial Code.

II. PARTIES

5. The Third-party Plaintiffs include the State of Arkansas, a sovereign entity; Mike Huckabee in his official capacity as Governor of the State of Arkansas; and Richard

¹ SAP Public Services, Inc. was formerly SAP Public Sector and Education, Inc.

Weiss in his official capacity as Director of the Arkansas Department of Finance and Administration.

6. The Third-party Defendant SAP is a Delaware corporation with its principal place of business at 3999 W. Chester Pike, Newton Square, Pennsylvania, 19073, that sells information technology goods, products and services internationally. At all relevant times, SAP transacted business in the State of Arkansas by marketing, distributing, and selling information technology products directly to the State of Arkansas.

III. JURISDICTION AND VENUE

7. This Court has jurisdiction over the third-party claims as they arise under Arkansas statutes and Arkansas common law.

8. Venue is proper in Pulaski County, Arkansas pursuant to Ark. Code Ann. §§ 16-60-103, 4-88-104, and 4-88-112 (Supp. 2003).

9. Jurisdiction of the Circuit Court and venue in Pulaski County are not only established by law but were agreed to by the parties as a term of the contract between SAP and the State.

IV. FACTS

10. Deloitte & Touche, LLP was hired by the State of Arkansas to prepare Comprehensive Annual Financial Reports for the Department of Finance and Administration and the Arkansas General Assembly. The reports prepared by Deloitte & Touche, LLP recommended replacement of the State's then existing financial computing system with a new integrated financial management system.

11. Deloitte & Touche, LLP prepared a Financial Management System Needs Assessment (Assessment), which concluded that the State needed a fully integrated

administrative financial management computing system (also known as an enterprise resource planning system) that would include the following functions or components: accounts payable, accounts receivable, general ledger, budget preparation, budget control, human resources, payroll, purchasing, and performance based budgeting.

12. The State engaged a consulting firm, Spectrum Maximus, to assist in developing a Request for Proposals (hereinafter referred to as "RFP") to be issued to vendors for such a financial management computing system.

13. On October 12, 1999, the State issued its RFP seeking vendors with the necessary experience and financial capability to provide software and associated services for the State's specified computing needs.

14. The RFP specified that the new software system and associated services must, among other things: (a) meet the routine needs of state agencies including budget development functionality, human resource and payroll functionality, and provide for performance based budgeting, and (b) vendors were required to provide specific services to facilitate implementation of the software.

15. The RFP expressly notified all prospective vendors that, in addition to the accessibility requirements of federal law, including the Americans with Disabilities Act (hereinafter referred to as "ADA"), the Arkansas General Assembly had further specified in Act 1227 of 1999 specific criteria for accessibility to the visually impaired for technology systems and software purchased by the State. The RFP specifically asked whether each vendor could meet such requirements of State and federal law.

16. SAP responded to the RFP and presented a demonstration of the company's capabilities to a panel of State AASIS project managers. In SAP's written

response to the RFP, SAP stated that its technology system would fully meet the requirements of the ADA and Arkansas Act 1227 of 1999.

17. On February 18, 2000, the State and SAP executed a contract in which SAP expressly agreed to provide the State with a suite of integrated software providing a full range of administrative functions that would meet the State's technological requirements,² and SAP agreed to have AASIS functioning and operational no later than July 1, 2001.

18. The State relied upon SAP's promises and discontinued maintenance and support for the State's then existing financial computing system after July 1, 2001.

19. On July 1, 2001, SAP failed to deliver functionality for budgeting, performance based budgeting, accessibility for visually impaired system users, accounts payable for travel, and promised material functionality in employee self-service component.

20. In addition, on July 1, 2001, SAP failed to deliver complete and compliant functionality for some key areas that included treasury reconciliation, fund reporting, and accounts receivable.

21. The State identified material delivery and implementation deficiencies both before and after AASIS went live on July 1, 2001, including notice to SAP that AASIS did not provide accessibility for the visually impaired.

²The contract includes the following components: RFP, SAP Proposal, Professional Services Contract, Addendums to Professional Services Contract, Amendments to Professional Services Contract, Demonstration Videotapes, and Statement of Work.

22. In October 2001, SAP acknowledged eight material respects in which AASIS³ failed to meet SAP's contractual obligations to the State. The eight material failures admitted by SAP were: 1) failure to deliver access for the visually impaired, 2) failure to deliver complete budget preparation functionality, 3) failure to deliver performance based budgeting component, 4) failure to deliver a system that could process overtime hours in cost allocation, 5) failure to deliver and implement a travel module, 6) failure to deliver a system that could attach documents to e-mails and faxes, 7) failure to deliver a system capable of processing cost of living increases for more than 500 employees at a time, and 8) failure to deliver a system capable of settling multi-funded assets under construction.

23. Despite the State's reliance upon SAP's representations that these identified eight material functional gaps would be promptly addressed and corrected, these gaps have never been corrected by SAP.

24. The State has provided resources, tendered payments, and fulfilled its obligations to SAP as required by the contract. The State has retained a small portion of the final payment under the contract because of SAP's breach of material terms of the contract.

25. SAP's first attempt to deliver a budgeting system "within" AASIS as required by the contract was not yet complete when SAP unilaterally changed course. SAP's second attempt to provide a budget system "outside" the integrated system on a business warehouse platform also failed. Due to SAP's failure to deliver this component

³Although SAP acknowledged the eight identified functional gaps, there is voluminous correspondence among DFA, AASIS Support Center, and SAP officials regarding additional problems with the functionality of the system ranging from complete failure of the software to software programs that worked at such a slow pace that they were rendered useless. Other components of AASIS limited by partial functionality required users to create ways to "work around" the functional gaps in the system.

of the contract, the State has contracted with another vendor to provide a budgeting system, thereby incurring additional expenses.

26. The State has issued an RFP for vendors to submit proposals for the performance based budgeting capability that SAP promised to deliver but never even attempted to deliver.

27. SAP's failure to remedy the identified material functional gaps has resulted in an enterprise resource planning system that not only fails to provide certain material functions at all, but also fails to perform other functions at the level required pursuant to the contract.

28. For the foregoing reasons, the State hereby amends its Third-party Complaint to include the following claims against SAP:

V. CLAIMS

A. Breach of Contract

29. The State incorporates by reference paragraphs 1-28 of this Amended Third-party Complaint.

30. On July 18, 2001, Plaintiffs Hartzell and Wayland filed a Complaint⁴ against the State Defendants alleging that the State had purchased a multi-million dollar computer system that is inaccessible to visually impaired state employees in violation of Ark. Code Ann. §§ 25-26-201, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.*

31. SAP expressly represented and promised in its written contract with the State that the technology and software being provided by SAP fully met the requirements

⁴*Hartzell, et al. v. State, et al.*, Pulaski County Circuit Court Case No. IJ-2001-3700.

of Act 1227 of 1999, Ark. Code Ann. §§ 25-26-201, *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.*

32. The terms of the contract between the State and SAP were unique because only a company with certain capabilities could provide the services and products sought by the State. SAP represented that it had the capabilities to provide a system accessible to the visually impaired, to provide a system capable of performing state budgeting requirements, to provide a system for performance based budgeting, and to provide a system that integrated the various components of human resources, budgeting, etc.

33. SAP's failure to deliver functionality in all components, failure to deliver a performance based budgeting component, and failure to deliver a system accessible to the visually impaired constituted material breaches of the contract.

34. SAP is further liable to the State for damages caused by SAP's breach of contract and for any relief that may be granted to Plaintiffs Hartzell and Wayland for SAP's failure to deliver a system that is accessible to the visually impaired.

B. Promissory Estoppel

35. The State incorporates by reference paragraphs 1-34.

36. As set forth above, during the discussions and negotiations leading to the contract between the parties, SAP made numerous promises regarding, among other things, the qualities, characteristics, performance, cost and timing of the services it had agreed to perform and provide on the State's behalf, and its qualifications, abilities, credentials and intention to perform and provide such services.

37. Such promises by SAP were material and were made in order to induce the State to enter into the contract, and the State reasonably and in good faith relied upon such promises to its detriment.

38. Also as set forth above, during the course of its work on the AASIS project, SAP made numerous promises regarding the delivery of the system and the date by which its components would be fully implemented and operational.

39. Such promises by SAP were material and were made in order to induce the State to continue to devote resources to the project to its detriment.

40. The State relied in good faith on SAP's promises to the State's detriment.

41. To avoid the injustice that would otherwise result from SAP's misconduct, the State is entitled to recover the damages it sustained in reliance on SAP's promises.

C. Implied Duty of Good Faith and Fair Dealing

42. The State incorporates by reference paragraphs 1-41.

43. Every contract, whether for goods or services, imposes upon each party an implied duty of good faith and fair dealing in the performance of the contract.

44. SAP breached its implied duty of good faith and fair dealing with the State when SAP failed to provide certain material components, failed to provide components that met the functionality specified in the contract, and failed to deliver a system accessible to the visually impaired.

45. Despite SAP's admission that it has breached its contractual requirements to the State in eight material respects, and despite SAP's repeated assurances to the State that these and other material defects in the AASIS system would be remedied by SAP, in fact the defects in the AASIS system remain unresolved.

46. SAP's continued failure to perform its admitted material contractual obligations plainly demonstrate not only SAP's breach of contract but its breach of the implied covenant of good faith and fair dealing.

47. SAP's actions have resulted in substantial damages to the State. The State has incurred significant expenses in an attempt to work around the non-operational functions in the system provided by SAP; the State has further expended resources to develop Request for Proposals and contracts with other vendors to address gaps and components not provided by SAP as required by the contract between the State and SAP.

D. Fraud

48. The State incorporates by reference paragraphs 1-47.

49. The State specified in its RFP that it was seeking a vendor to provide an integrated software system that met numerous technical requirements, including accessibility to the visually impaired, a system that would support the State's use of performance based budgeting methodology to develop and report on program outcomes in State agencies, and an integrated database that processed applications in a general accounting system including payroll transactions from human resources, purchase order/requisition transactions with budget control from purchasing, inventory transactions, budget expenditure/revenue activity with budget transactions for budget preparation, and asset management transactions with acquisition information.

50. SAP, in its proposal to the State, represented that its software system would meet the State's current, as well as future, needs and would comply with all state and federal laws, including specifically the ADA and Arkansas Act 1227 of 1999.

51. However, SAP's software system did not then, and does not now, comply with the State's accessibility requirements for the visually impaired, nor did SAP ever provide software that met the State's budgeting needs or software that allowed for performance based budgeting.

52. SAP intended that the State rely upon those false representations for the purpose of inducing the State to enter into the contract with SAP.

53. SAP's representations were either intentionally false, or alternatively, were made without SAP having sufficient basis for such statements, and such representations were material representations upon which the State relied and that entitle the State to punitive damages.

54. SAP intended that the State rely upon those false representations for the purpose of inducing the State to enter into the contract with SAP.

55. Given SAP's reputation as an internationally successful information technology vendor, the State justifiably relied on SAP's assertion that it would provide a system that met the State's technical requirements.

E. Arkansas Deceptive Trade Practices Act

56. The State incorporates by reference paragraphs 1-55.

57. The Arkansas Deceptive Trade Practices Act prohibits knowingly making false representations as to the characteristics, uses, and benefits of goods or services, and engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade. Ark. Code Ann. § 4-88-107 (Supp. 2003)

58. SAP violated the Arkansas Deceptive Trade Practices Act by selling its software system to the State under the express representation that the software fully met

federal and state law concerning accessibility to the visually impaired while knowing that its software system did not possess such capability at the time SAP submitted its proposal to the State in November 1999.

59. SAP knew that its software system was not accessible to the visually impaired when it executed the contract with the State on February 18, 2000.

60. In fact, SAP only established an Accessibility Competence Center in Palo Alto, California in April 2001 in order to address visual accessibility issues within SAP's products.

61. SAP's establishment of an Accessibility Competence Center coincides with the State's notice to SAP that preliminary testing showed that AASIS was not accessible to the visually impaired as required by state law.

62. SAP also violated the Arkansas Deceptive Trade Practices Act by selling its software system to the State under the express representation that the software fully met the State's requirements pertaining to budget preparation and performance based budgeting.

63. SAP knew the State's technical requirements for AASIS when it submitted its proposal to the State in November 1999, and when SAP presented a week-long demonstration of the software's capabilities to a panel of State AASIS project managers.

64. Although SAP represented its expertise and technical capabilities in the public sector market to be sufficient to deliver the State's required contractual components, SAP failed to deliver the requisite budget preparation functionality or performance based budgeting component.

65. SAP's false representations have resulted in damages to the State.

F. Claims Pursuant to the Arkansas Uniform Commercial Code

66. In addition to the claims previously asserted in this Amended Third-party Complaint, the State seeks relief pursuant to the Arkansas Uniform Commercial Code.

(1) Breach of Express Warranties

67. The State incorporates by reference paragraphs 1-66.

68. The Arkansas Uniform Commercial Code (UCC) governs the contract executed by the State and SAP for software and implementation services because it is a contract for the sale of goods, namely software. Ark. Code Ann. §§ 4-2-102 and 4-2-105(1) (Repl. 2001).

69. Express warranties are created by either the seller's affirmation of fact or promise to the buyer relating to the goods purchased and those warranties become a part of the bargain. Ark. Code Ann. § 4-2-313(1)(a) (Repl. 2001).

70. In its response to the RFP and otherwise, SAP made various affirmations and representations to the State, including, for example, the following:

TeamSAP is exceptionally well qualified to assist the State of Arkansas with the implementation of a modern, *functional*, and *integrated* SAP R/3 systems solution. Our proven SAP implementation experience, coupled with our deep experience in organizational transformation in the public sector, *will deliver* significant value to the State and mitigate project risks. We understand the magnitude and complexity of this initiative, as well as the need to provide the diverse array of skills required to truly make this initiative a success.

71. The State relied upon SAP's statements in its response to the RFP and otherwise that its team was well qualified, its software system would be functional and integrated, and that it was experienced in public sector, i.e., governmental processes.

72. SAP breached its express warranty that the system purchased by the State would “fully meet” the requirements of the ADA and Arkansas law pertaining to visual accessibility.

73. SAP breached its express warranty to provide a budgeting system that complied with the State’s technical requirements and with federal and state laws when it failed to create a compliant budgeting system for the State.

74. SAP breached its express warranty to provide a performance based budgeting system by failing to deliver any portion of this component to the State.

(2) Breach of Implied Warranty of Merchantability

75. The State incorporates by reference paragraphs 1-74.

76. Every sale by a seller who is a merchant with respect to goods of that kind includes an implied warranty that the goods shall be merchantable and at least fit for the ordinary purposes for which they are used. Ark. Code Ann. § 4-2-314 (Repl. 2001).

77. The State contracted to purchase an enterprise resource planning software system with stated technical requirements and components from SAP, an internationally recognized vendor of precisely that type of software.

78. SAP failed to provide the State with an enterprise resource planning system fit for the ordinary purposes for which it was purchased because it fails to provide: 1) accessibility to the visually impaired, 2) budget preparation functionality, 3) performance based budgeting, 4) ability to process overtime hours in cost allocation, 5) integrate travel expenses into the remaining components, 6) allow multiple documents to be attached to e-mails and faxes, 7) process COLA (cost of living allocations) for more

than 500 employees at a time, and 8) the ability to settle multi-funded assets under construction.

79. As a result, SAP, a company in the business of marketing software programs and solutions, breached the implied warranty of merchantability by failing to provide a software system that complies with the ordinary purposes for which it was purchased by the State resulting in the State incurring additional expense to address the system's deficiencies.

(3) Breach of Implied Warranty of Fitness for a Particular Purpose

80. The State incorporates by reference paragraphs 1-79.

81. An implied warranty of fitness for a particular purpose exists where the seller at the time of contracting has reason to know any particular purpose for which the goods are acquired and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Ark. Code Ann. § 4-2-315 (Repl. 2001).

82. SAP knew at the time of executing its contract with the State that the system being sold to the State was to be an enterprise resource planning software system that would be fully integrated, flexible, and that would be accessible to the visually impaired.

83. The State relied on SAP's representations that SAP had the skill, judgment and knowledge pertaining to the delivery and implementation of a fully integrated enterprise resource planning system designed to meet not only the State's current needs, but that would meet the State's future needs as well.

84. The State relied upon SAP's express representations that SAP's technical proposal met the State's requirements for the delivery and implementation of an enterprise resource planning system.

85. By providing software that failed and continues to fail to provide material functions, including budgeting, performance based budgeting, and accessibility to the visually impaired, SAP breached its implied warranty that AASIS was fit for the State's particular purposes. As a result of such breach by SAP, the State has incurred monetary damages.

VI. DAMAGES

86. The State has suffered injury and incurred damages and additional expense as a direct result of SAP's actions in failing to deliver and implement the integrated enterprise resource planning system as required by the contract between the State and SAP.

WHEREFORE, the State respectfully prays for the following relief:

- a. Judgment that SAP is in material breach of contract for its failure to provide an integrated enterprise resource planning system that meets the specifications required in the contract.
- b. Judgment that SAP indemnify the State for any award made to the Plaintiffs pursuant to their Complaint.
- c. Judgment that SAP has breached its implied duty of good faith and fair dealing due to its failure to perform essential provisions of the AASIS contract.

- d. Judgment that SAP fraudulently induced the State to award the AASIS contract to SAP based upon SAP's false statements concerning its ability to provide an integrated software system with specified technical requirements, SAP's false statements that its software system fully met the State's visual accessibility requirements, and SAP's false statements that it would comply with all federal and state laws.
- e. Judgment that SAP violated the Arkansas Deceptive Trade Practices Act by (i) selling its software system to the State under the express representation that the software fully met the federal and state law requirements concerning accessibility to the visually impaired when it knew that its software system did not possess that capability, and (ii) selling its software system to the State under the express representation that the software fully met the State's requirements pertaining to budget preparation and performance based budgeting and then failing to deliver these material components of AASIS pursuant to the parties' agreement.
- f. Judgment that SAP breached an express warranty due to its failure to deliver an enterprise resource planning system that complied with AASIS system functionality and technical requirements and with federal and state requirements pertaining to accessibility for the visually impaired.

- g. Judgment that SAP breached an implied warranty of merchantability on the basis that the enterprise resource planning system provided by SAP is not fit for the ordinary purposes for which it was purchased in that it is missing budget preparation functionality, it is not equipped with performance based budgeting, it is unable to process overtime hours in cost allocation, it is not equipped with a travel module, it is unable to attach documents to e-mails and faxes, it has an unacceptable system performance in COLA processing – cannot process more than 500 employees at a time, it is unable to settle multi-funded assets under construction, and it does not comply with state and federal visual accessibility requirements.
- h. Judgment that SAP breached an implied warranty of fitness for a particular purpose in that SAP failed to deliver an enterprise resource planning system that it knew at the time of executing the contract was being purchased for a particular purpose. Specifically, AASIS is deficient in that it: 1) fails to provide accessibility for the visually impaired pursuant to state and federal laws, 2) omits budget preparation functionality, 3) fails to deliver performance based budgeting, 4) is unable to process overtime hours in cost allocation, 5) fails to implement the travel module, 6) is unable to attach document to e-mails and faxes, 7) provides unacceptable system performance in COLA processing – it cannot

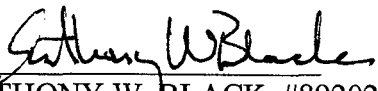
process more than 500 employees at a time, and 8) is unable to settle multi-funded assets under construction.

- i. Award the State specific performance of the contract terms that relate to accessibility for the visually impaired due to the highly specialized nature of the provision of this service. In the alternative, the State seeks a judgment against SAP for monetary damages in an amount sufficient to engage an information technology vendor to make AASIS compliant with federal and state provisions pertaining to accessibility for the visually impaired.
- j. Judgment for a sum of restitution and incidental damages to the State of all monies expended by the State in attempting to address SAP's failure to perform as required by the contract.
- k. Judgment against SAP for the actual damages incurred as a result of SAP's breach of contract in an amount sufficient to hire an information technology vendor that can address and remedy the identified issues with AASIS.
- l. Judgment against SAP for punitive damages.
- m. Judgment against SAP for civil penalties under the Arkansas Deceptive Trade Practices Act.
- n. Judgment against SAP for the State's costs and attorneys' fees.
- o. Any and all other just and proper relief to which the State may otherwise be entitled.

WHEREFORE, the State respectfully prays for relief as set forth above and requests a trial by jury in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anthony W. Black, Assistant Attorney General, do hereby certify that I have served the foregoing by depositing a copy in the United States Mail, postage prepaid, this 11th day of February 2004 addressed to:

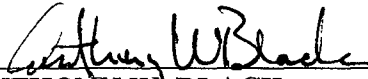
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