

CAUSE NO. 2008-17510

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WASTE MANAGEMENT, INC.
AND USA WASTE-MANAGEMENT
RESOURCES, L.L.C.

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IN THE DISTRICT COURT OF

v.

HARRIS COUNTY, TEXAS

SAP AG AND
SAP AMERICA, INC.

164TH JUDICIAL DISTRICT

**DEFENDANTS SAP AMERICA, INC. AND SAP AG'S RESPONSE TO PLAINTIFFS
MOTION TO ENFORCE COURT'S ORDER AND FOR SANCTIONS**

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WM has filed a motion claiming that SAP has failed to comply with the Court's order of March 13, 2009, and that SAP has somehow failed to cooperate in the discovery process. WM is wrong on both points.

- First, the Court's order of March 13, 2009 required SAP to provide WM with dates for eight depositions within 14 days of the order. SAP timely provided those dates.
- Second, the order states that the depositions are to begin within thirty (30) days. Based on the discussion at the hearing and the Court's comments, SAP's counsel understood the Court to be providing SAP 30 days to review the millions of documents WM was going to produce before the start of the depositions. SAP had provided the date of March 19 for one of the proposed deponents, Dean Elger, but WM rejected that date. WM insisted that of the 8 witnesses, SAP produce the two witnesses who reside in Germany first. SAP accommodated WM's request, and SAP is paying to bring these witnesses to the United States rather than forcing WM to depose them at the consulate in Germany when the consulate is available. Those depositions are scheduled for April 20 and 21, with the other six scheduled thereafter.
- Third, WM's allegation that SAP is not cooperating in discovery is false. Since the inception of this case, SAP has engaged in massive and incredibly costly efforts (spending millions on an E-discovery vendor and contract attorneys to find, review and produce documents and proceed with discovery).

Regarding the deposition dates, SAP has been fully cooperative. To start, the German witnesses (Paul Jurkiewicz and Bernhard Goldstein) consented to take time from their work and families and come to the United States for deposition, instead of insisting that their depositions take place where they reside in Germany. Had SAP or the witnesses insisted on depositions in

Germany, under German law, the depositions would have had to take place at the U.S. consulate. We understand it can take months to schedule the consulate. To avoid such delay, SAP and the witnesses have agreed to come to the U.S. at SAP's expense. These witnesses could not come to the U.S. for preparation and deposition before the scheduled dates. Indeed, the earlier week is Easter week, with Good Friday and Easter Monday both German federal holidays. Additionally, as stated, SAP had previously offered one of the deponents, Dean Elger, on March 19, 2009, but Waste Management insisted that the two German witnesses be deposed first.

Regarding the dates for the other six witnesses, those dates have been provided with a third deposition occurring in April, four in May and one in June. If WM ever substantially completes its document production and provides the initial witnesses SAP has requested, the schedule going forward would be about two witnesses (one per side) each week for the foreseeable future.¹

SAP's lead counsel, Winn Carter and Kell Damsgaard, do, of course, have other active cases. Mr. Carter has a trial set for May 4 in Louisiana state court and another set for June 1 in federal court in San Antonio. Mr. Damsgaard has, among other things, a Markman hearing in a patent case in Delaware next week and significant other commitments over the next three months. They have both strived hard to make certain that their other cases do not slow discovery. Notably, as WM's counsel knows, Mr. Damsgaard has cancelled half of his long-standing vacation with family and friends to accommodate the dates Paul Jurkiewicz and Bernhard Goldstein were available for deposition.

WM's general allegation that SAP is not cooperating in discovery is patently wrong and offensive.

¹ Each witness or lawyer needs at least a 2-3 day block of time for each deposition—a travel day, a preparation day, and a deposition day.

SAP has engaged in Herculean efforts to find, review, and produce relevant documents. It produced the bulk of its key documents many months ago. Further, SAP has gone to great lengths to get Waste Management's documents reviewed quickly. It has continually employed 25-30 contract attorneys to review documents for more than 6 months, since September 2008, incurring millions in fees to contract attorneys. SAP has also engaged an electronic data vendor, who followed a strict protocol for data collection, review and production. Thus far SAP has spent over a million dollars in fees to that vendor. These costs do not include SAP's fees to its outside counsel—Morgan Lewis. Morgan Lewis lawyers interviewed over 100 SAP employees with potentially responsive information to ensure a complete collection from each person. Morgan Lewis has supervised the contract attorneys, facilitated the document production, and spent thousands of hours reviewing documents itself. As stated, and unlike WM, Morgan Lewis made a concerted effort to get the most important documents produced first. SAP served timely responses to interrogatories, requests for admission and requests for production of documents, and these have been updated as appropriate and when the information has become known. SAP has already produced two key witnesses for depositions, and provided dates for eight more depositions, consistent with the Court's order.

In contrast to SAP's efforts, WM has been abusing the discovery process and showing a complete lack of professionalism, by taking unsupportable legal positions in refusing to produce documents, by forcing SAP to file motions to compel to obtain documents that are clearly discoverable in accordance with the parties' Rule 11 agreement and the discovery rules, and by representing to SAP and the court dates by which it will accomplish its production when it knows that such statements are not correct. With respect to document production, WM is attempting to sandbag SAP. WM is the party who started this lawsuit, yet it still has not

substantially completed its production and just dumped **over 8.6 million pages** of documents on SAP in the last two weeks. This conduct is particularly improper given WM's repeated misrepresentations to the Court concerning the status of its production in conjunction with its attempt to keep the current case schedule. WM told the Court in October that it would be substantially complete with its document production by November 2008. That was wildly incorrect. Since then, SAP has repeatedly asked WM when it expected its document production to be substantially complete and have been repeatedly assured it would be a matter of weeks. WM has continued to misstate the status of its production. On March 3, 2009, it claimed that "[w]ith the exception of very few documents, Waste Management has produced all responsive email correspondence and attachments." *See* Plaintiffs' Motion to Compel Deposition at p. 2. It repeated this assertion to this Court on March 13. This assertion was also false. WM has produced approximately 575,000 pages of emails and attachments since last week.

In an attempt to withhold documents, Waste Management is espousing legal positions that are flat out wrong. WM refused to produce documents from Fred Forman, telling SAP that Fred Forman was a consulting only expert, and therefore, his documents are privileged and not discoverable. SAP was forced to file a motion to compel, and only then did WM produce certain of his documents, now claiming that it had never said he was a consulting only expert. Instead, WM has concocted another incredulous theory — that he is a third party, independent consultant who had privileged conversations with WM's attorneys even though they do not represent him.

WM's misconduct is calculated gamesmanship, and it is causing serious prejudice to SAP. As previously stated, the timing of WM's production of documents has inhibited SAP's ability to prepare its witnesses and to take depositions of WM's witnesses. Indeed, the first deposition of a WM employee (Kevin Heard) was to occur on April 1, but had to be postponed


because, among the 8.6 million pages of documents that Waste Management dumped on SAP were hundreds (if not thousands) of documents that relate to Mr. Heard. In addition to its own documents, WM has consistently tried to prevent SAP from taking discovery from third parties, including Fred Forman (its technical consultant), Deloitte (which provided consulting services on the project), and Locke Lidell (WM's law firm that helped it negotiate the license agreement with SAP).

Regarding scheduling WM witnesses for deposition, SAP has always worked with WM. For the deposition of WM's employee, Mr. Twomey, WM gave SAP the date of April 10. WM thereafter stated that it may wish to postpone Mr. Twomey's deposition because the date offered is Good Friday. Rather than filing a motion for sanctions insisting that the deposition go forward, SAP simply agreed to reschedule if Mr. Twomey so desired.

In sum, for the reasons outlined above, SAP has fully complied with the Court's March 13, 2009 order and all discovery obligations. If any party should be criticized by the Court for gamesmanship in discovery in this case, it is Waste Management. There is simply no basis for WM's motion, and it should be denied.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic mail on April 2, 2009.



Lauren B. Hoffer

Unofficial Copy Office of Clerk Daniel D. Hoffer