

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
Civil Action No. 4:11-cv-00059-BO

SIRSI CORPORATION d/b/a )  
SIRSIDYNIX, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CRAVEN-PAMLICO-CARTERET )  
REGIONAL LIBRARY SYSTEM, )  
 )  
Defendant. )

**PLAINTIFF’S RESPONSE IN  
OPPOSITION TO DEFENDANT’S  
MOTION TO DISMISS**

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Plaintiff Sirsi Corporation d/b/a SirsiDynix (“SirsiDynix”) responds in opposition to the Motion to Dismiss filed by Craven-Pamlico-Carteret Regional Library System (“CPC Regional”) as follows:

**STATEMENT OF THE CASE**

Plaintiff SirsiDynix instituted this action on April 15, 2011 by filing its Complaint in the United States District Court for the Eastern District of North Carolina. The Complaint alleged that CPC Regional breached the terms of a Master Software License and Services Agreement (“Master Agreement”) with SirsiDynix and the accompany duty of good faith and fair dealing. SirsiDynix seeks to recover \$146,844.80, the full value of the Master Agreement.

On June 16, 2011 filed a document entitled “Answer, Counterclaim, and Motion to Dismiss.” The Court filed a Notice of Deficiency on June 17, 2011 that struck this document because Motions cannot be included with an Answer.

CPC Regional subsequently filed an Answer and Counterclaim on June 17, 2011. The Answer denies the material allegations of the Complaint, raises several affirmative defenses, and includes counterclaims. The Counterclaims allege that SirsiDynix, through its employees, engaged in negligent misrepresentation and violated North Carolina's Unfair and Deceptive Trade Practice Act, by misrepresenting the true nature of the Master Agreement. CPC Regional contends that this 23 page document was merely price quote that would lock in a price for some unspecified period of time.

CPC Regional also filed a Motion to Dismiss for Failure to State a Claim on June 17, 2011. The Motion to Dismiss was unaccompanied by a brief. On June 20, 2011 the Court filed a Notice of Deficiency, alerting CPC Regional that all motions must be accompanied by a supporting memorandum. CPC Regional's filed its Memorandum in Support of its Motion to Dismiss on July 5, 2011.

Another Notice of Deficiency was issued on July 6, 2011 due to a lack of a certificate of service on the memorandum. This deficiency was corrected the same day.

### **STATEMENT OF THE ALLEGATIONS**

On or about February 3, 2009, representatives from SirsiDynix and CPC Regional discussed CPC Regional's needs with respect to library management tools. Compl. ¶ 5. During the course of this conversation, the representative from CPC Regional requested a quote related to the cost of transitioning from their existing library management system, also a SirsiDynix product, to SirsiDynix's Symphony system. Compl. ¶ 5.

On February 5, 2009, SirsiDynix sent CPC Regional a quote that outlined the costs related with the migration to the Symphony System. Compl. ¶ 6.

On April 29, 2009, SirsiDynix and CPC Regional entered into the Master Agreement. Compl. ¶ 7. A copy of the Master Agreement is attached hereto as Exhibit A.<sup>1</sup> Under the terms of the Master Agreement, SirsiDynix granted CPC Regional a limited, non-exclusive, personal, non-transferable license to utilize SirsiDynix software in the operations of the CPC Regional libraries. Compl. ¶ 7. SirsiDynix also agreed to provide various services related to the implementation, maintenance, and upgrading of the licensed software. Compl. ¶ 7.

The Master Agreement placed a number of requirements on CPC Regional, including, the requirement that (1) CPC Regional “shall provide SirsiDynix with good faith cooperation and access to such information, facilities, and equipment as may be reasonably required by SirsiDynix in order to provide the Services[;]” (2) CPC Regional “agrees to provide SirsiDynix with access to and use of [CPC Regional’s] personnel, facilities and equipment to the extent necessary for SirsiDynix to perform the Services[;]” and (3) [f]or installation of the System, [CPC Regional’s] shall ensure that SirsiDynix’s assigned technical personnel are able to access the System remotely.” *See Ex. A at 3 §§ 6(A) and (B).*

The “Services” referred to in the preceding paragraph, as defined in Section 1 of the Master Agreement, included:

- Professional services such as “consulting, data services, site planning, configuration, integration and deployment of the Software,” *see Ex. A. at 1 §1 “Professional Services”;*
- Training services such as “training courses for [CPC Regional’s] personnel,” *see Ex. A. at 1 §1 “Training Services”;*

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<sup>1</sup> The Court may consider the Master Agreement without converting this motion from a Rule 12(b) motion to a Rule 56 motion because it was referred to in the Complaint and its authenticity is not in question. *Witthohn v. Fed. Ins. Co.*, 164 Fed. Appx. 395, 396–97 (4th Cir. 2006).

- SaaS services, including provision of the SirsiDynix Software from a server farm; *see* Ex. A. at 8 §1 “SaaS Services”;
- Support Services, including, “assistance and workarounds for solving known problems,” error correction, and updates to the SirsiDynix software, *see* Ex. A at 1 §1 “Support”; and/or
- Training Services, comprised of training courses for CPC Regional’s personnel, *see* Ex. A at 1 §1 “Training Services & at 2 § 4(B).

In return for the license and services provided by SirsiDynix, CPC Regional was to pay SirsiDynix a total of \$146,844.80 over the three year term of the Master Agreement. Compl. ¶ 8. However, the agreement provided that “[i]n the event of any delay in [CPC Regional’s] performance of any of the obligations set forth [in the Agreement] or any other delays caused by Customer, the milestones and fees ... shall be adjusted as reasonably necessary to account for such delays[.]” *See* Ex. A. at 2-3 § 4(C).

After entering into the Master Agreement with SirsiDynix, CPC Regional asked to delay implementation of the Symphony system due to funding issues. Compl. ¶ 9. SirsiDynix agreed to these delays. Compl. ¶ 9.

However, when SirsiDynix attempted to follow up with CPC Regional regarding implementation, CPC Regional refused to respond or proceed with the implementation. Compl. ¶ 10. In addition to failing to respond to communications from SirsiDynix, CPC Regional failed to pay the amounts due under the Master Agreement. Compl. ¶ 10.

During this time, although CPC Regional already had a binding contract with SirsiDynix for library management software, CPC Regional was engaged in negotiations with the Online

Computer Library Center, Inc. (“OCLC”) to license a competing library management system. Compl. ¶ 11.

In late 2009, CPC Regional entered into an agreement to utilize OCLC’s Web-scale management services as their library management system. Compl. ¶ 12.

In November, 2010, Jackie Beach, Director of CPC Regional, informed SirsiDynix that, due to its contract with OCLC, CPC Regional would no longer be working with SirsiDynix. Compl. ¶ 13.

On February 14, 2011, SirsiDynix informed CPC Regional that they had breached the terms of the Master Agreement and requested that CPC Regional cure the breach. Compl. ¶ 14.

As of the date of this filing, CPC Regional has refused to cure the breach or pay the amounts due under the Master Agreement. Compl. ¶ 15.

## **ARGUMENT**

### **I. CPC REGIONAL’S MOTION SHOULD BE DISMISSED DUE TO FAILURE TO COMPLY WITH THE LOCAL RULES**

The Court should deny CPC Regional’s Motion to Dismiss because it failed to comply with the local rules regarding filing of motions and supporting memoranda. CPC Regional filed a Motion to Dismiss for Failure to State a Claim on June 17, 2011. The Motion to Dismiss was unaccompanied by a memorandum. On June 20, 2011 the Court filed a notice of deficiency, alerting CPC Regional that all motions must be accompanied by a supporting memorandum. CPC Regional’s filed its Memorandum in Support of its Motion to Dismiss on July 5, 2011.

Local Civil Rule 7.1(d) requires that all motions, except for those grantable by the clerk, must be accompanied by a supporting memorandum. The failure to comply with this rule allows the Court to deny the Motion. *Cassell v. Monroe*, 5:10-CT-3023, 2010 WL 5125339, \*2

(E.D.N.C. Dec. 7, 2010) (denying a motion, in part, for failing to comply with Rule 7.1(d)) (Boyle, J.) (unpublished cases are attached as Exhibit B); *Sager v. Standard Ins. Co.*, 5:08-CV-628, 2010 WL 2772433, \*1 (E.D.N.C. July 12, 2010) (same); *John v. Harrison*, 5:09-CV-315-FL, 2010 WL 28657 (E.D.N.C. Jan. 5, 2010) (adopting magistrate opinion that denied a motion for failure to comply with Rule 7.1(d)); *Higgins v. Spence & Spence, P.A.*, 5:07-CV-33, 2009 WL 536069 (E.D.N.C. Mar. 3, 2009) (declining to consider a motion due to failure to include a supporting memoranda and finding that a later filed memoranda did not cure the breach of local rules); *Masinick v. Am. Craftsmen, Inc.*, No. 5:07-CV-461, 2008 WL 483456, at \*2 (E.D.N.C. Feb. 19, 2008) (denying a motion, in part, for failing to comply with Rule 7.1(d)); *Nationwide Mut. Ins. Co. v. McMahon*, 365 F.Supp.2d 671, 673 (E.D.N.C. 2005) (denying pro se party's motion due to failure to file a supporting memoranda). Here, CPC Regional failed to comply with the provisions of the local rules regarding supporting memoranda and waited several weeks after being notified about the deficiency to remedy it. This unexplained and unexcused violation of the local rules should result in the denial of CPC Regional's Motion to Dismiss.

**II. IN ORDER TO SURVIVE A MOTION TO DISMISS, A COMPLAINT MUST STATE A FACIALLY PLAUSIBLE CLAIM FOR RELIEF.**

In order to withstand a motion to dismiss, a complaint must allege sufficient facts to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 1951 (2009). Courts considering a motion to dismiss pursuant to Rule 12(b)(6) must engage in a two-step process for determining whether a complaint meets the plausibility standard. *Id.* at 1949-50. First, a court should identify those allegations which are factual, and therefore entitled to the presumption of truthfulness, and those which, because they are merely conclusions, are not entitled to be assumed true. *Id.* at 1951. Second, a court should assume the truth of well-pleaded

factual allegations, if any, and then determine whether these well-pleaded allegations plausibly give rise to a claim for relief. *Id.* at 1950.

SirsiDynix's Complaint contains numerous factual allegations that, as explained below, when accepted as true give rise to a plausible claim that CPC Regional breached its contract with SirsiDynix. Given that SirsiDynix's Complaint meets the standard set out in *Iqbal*, CPC Regional's Motion to Dismiss should be denied.

**II. SIRSIDYNIX'S COMPLAINT STATES A FACIALLY PLAUSIBLE CLAIM FOR RELIEF FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.**

To state a claim for breach of contract under North Carolina law, “the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach.” *Capparelli v. AmeriFirst Home Improvement Fin. Co.*, 535 F.Supp.2d 554, 563 (E.D.N.C.2008) (quoting *Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997)). CPC Regional admits in its Memoranda that, at least for purposes of this Motion to Dismiss, a valid contract existed between the parties. *See* Mem. in Supp. at 8 (“the court must accept for true that a valid contract existed...”). Additionally, SirsiDynix's allegation that, if a breach occurred, it incurred damages have gone unchallenged. Compl. ¶ 22 & 27. Therefore, the only question left for this Court's consideration is whether SirsiDynix has alleged facts that state a plausible claim for breach of the Master Agreement.

In its attempt to establish that a breach of the Master Agreement did not occur, CPC Regional argues that the parties never agreed to a Go Live Date which would “trigger the beginning of the contract” and “serve as the time that ‘100% of total services and first year subscription fees were due.[’]” Mem. in Supp. at 8. Plaintiff then asserts that the Agreement

between the parties contains three conflicting definitions of the term Go Live Date, but only lists two. Mem. in Supp. at 8.

However, this argument fails for three primary reasons. First, CPC Regional cannot rely on the failure to reach the Go Live Date as a defense because this failure was due to their own conduct. Second, CPC Regional breached numerous other terms of the agreement. Finally, CPC Regional repudiated and breached the Master Agreement when it affirmatively indicated that it was no longer going to work with SirsiDynix despite the existence of the contract. These reasons, either individually or in the aggregate, are sufficient to defeat CPC Regional's Motion to Dismiss.

**A. CPC REGIONAL CANNOT AVOID ITS RESPONSIBILITIES UNDER THE MASTER AGREEMENT WHEN THE FAILURE TO REACH THE GO LIVE DATE WAS CAUSED BY CPC REGIONAL'S OWN ACTS.**

SirsiDynix's Complaint is based, in large part, on CPC Regional's failure to respond to SirsiDynix's communications and failure to proceed with the software implementation process. Compl. ¶¶ 10, 20. Without CPC Regional's cooperation in the implementation process, which was explicitly required by the Master Agreement, *see* Ex. A at 3 §§ 6(A) & (B), it would be impossible to reach the Go Live Date, which was defined as the date when the SirsiDynix Software was placed "into operational use for normal daily business[.]" *see* Ex. A. at 1 §1 "Go Live Date." Thus, CPC Regional cannot rely on the failure to reach the Go Live Date to avoid the contract because, under North Carolina law, "[o]ne who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance." *Mezzanotte v. Freeland*, 20 N.C. App. 11, 19, 200 S.E.2d 410, 416 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).



**B. CPC REGIONAL FAILED TO ADHERE TO NUMEROUS PROVISIONS OF THE MASTER AGREEMENT**

Moreover, CPC Regional had more responsibilities under the Master Agreement than merely making payment after reaching the Go Live Date. CPC Regional was required to be a willing and active participant in the implementation process and make payments throughout the life of the Master Agreement. CPC Regional's failure to do so constituted a material breach of the Master Agreement that supports a claim for breach of contract and require that CPC Regional's Motion to Dismiss be denied.

The Master Agreement demonstrates that the implementation process is a cooperative effort between SirsiDynix and CPC Regional and that CPC Regional was contractually bound to cooperate in this process. *See* Ex. A at 3 §§ 6(A) & 6(B). The Services Section of Schedule 1 to the Master Agreement demonstrates that the parties would have to work together throughout the implementation process. For example:

- Under the heading of “Data Services – Horizon-to-SirsiDynix Symphony, Crescendo”, the parties were to engage in various consulting calls, extract information from CPC Regional's existing system, and conduct a test of the system. *See* Ex. A at 15.
- Under the heading of “Consulting – Horizon-to-SirsiDynix Symphony, Crescendo/Virtuoso, Core Implementation and Profiling/Set-up, Distance” a SirsiDynix consultant was to work with CPC Regional's “project team to provide expert guidance with setting up and configuring a comprehensive, yet concise, policy structure as well as preparing for Go-Live.” *See* Ex. A at 15.
- Under the heading of “Consulting – Horizon-to-SirsiDynix Symphony, Go-Live, On-site, Not to Exceed 3 Days, Travel expenses included” SirsiDynix was to provide an “On-Site

Go Live Consultant ... to have an expert available to answer questions from members of the library staff, assist the System Administrator and make sure the staff is prepared to handle the day-today tasks [of] using the new software.” *See* Ex. A at 15.

- Additionally, under the heading of “Product Delivery – Horizon-to-SirsiDynix Symphony Core Software Installation – SaaS” SirsiDynix was to install the SirsiDynix Software. *See* Ex. A at 16.

CPC Regional’s breached its contractual duty to be a cooperative partner in this process by failing to respond to SirsiDynix’s communications and failing to proceed with the software implementation process, Compl. ¶¶ 10, 20. Therefore, SirsiDynix has alleged sufficient facts to demonstrate that there has been a breach of the terms of the Master Agreement and CPC Regional’s Motion to Dismiss should be denied.

Additionally, payments were due under the Master Agreement at various times from the date the contract was signed to the Go Live Date. Some fees were due at the time of execution of the agreement, some fees were due upon the delivery of hardware to CPC Regional, some fees were due upon the delivery of software to CPC Regional, some fees were due upon the loading of data into the new system, some fees were due upon the “initial live use of SaaS Services,” and some fees were due on the Go Live Date. *See* Ex. A at 19. While SirsiDynix agreed to delay the implementation process due to funding issues, the Master Agreement specifically provides that such delays merely postpone deadlines and payments and does not eliminate them. *See* Ex. A at 2-3 § 4(C). By failing to respond to SirsiDynix’s communications, failure to proceed with the software implementation process, and failing to pay sums due, CPC Regional breached its obligations under the Master Agreement. Compl. ¶¶ 10, 19 &20. Therefore, SirsiDynix alleged

sufficient facts to demonstrate that there has been a breach of the terms of the Master Agreement and CPC Regional's Motion to Dismiss should be denied.

**C. CPC REGIONAL REPUDIATED THE MASTER AGREEMENT WHEN IT AFFIRMATIVELY STATED THAT IT WOULD NO LONGER WORK WITH SIRSIDYNIX**

Breaches of contract can arise in a number of varieties. While the more well known variety arises "when a party fails to perform a contractual duty which has become absolute .... [a] [b]reach may also occur by repudiation. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties." *Millis Construction v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987). Here, after entering into a valid contract with SirsiDynix and prior to the completion of its duties there under, CPC Regional, "informed SirsiDynix that due to its contract with [a competitor of SirsiDynix], CPC Regional would no longer be working with SirsiDynix." Compl. ¶¶ 7, 9, 10, & 13. This affirmative statement of CPC Regional's intent to not honor its responsibilities under the Master Agreement constitute a repudiation of the Master Agreement and form part of the basis for SirsiDynix's claim for breach of contract. Compl. ¶ 20. Therefore, SirsiDynix alleged sufficient facts to demonstrate that there has been a breach of the terms of the Master Agreement and CPC Regional's Motion to Dismiss should be denied.

**D. THE ALLEGED VAGUENESS OF CONTRACTUAL TERMS IS AN ISSUE OF FACT TO BE DECIDED AT A LATER STAGE OF THIS LITIGATION**

CPC Regional argues that the Master Agreement contains conflicting definitions of the term "Go Live Date" such that the entire agreement is invalid. A review of the plain language of the Master Agreement demonstrates that there are no material differences in the definitions that would be relevant to this litigation. In any event, even if CPC Regional is correct, "ambiguities

must be resolved and the contract interpreted by the fact finder. *Pacific AG Group v. H. Ghesquiere Farms, Inc.*, 5:05-CV-809, 2007 WL 2410595, \*3 (E.D.N.C. Aug. 21, 2007) (citing *Int'l Paper Co. v. Corporex Constructors*, 385 S.E.2d 553, 556, 96 N.C. App. 312, 317 (1989)). Thus, this alleged ambiguity is not a ground upon which SirsiDynix's Complaint may be dismissed.

**III. THE MASTER SERVICE AGREEMENT IS NOT ILLUSORY BECAUSE IT CONTAINS CLEAR, CERTAIN, AND CONCRETE DUTIES FOR EACH PARTY**

Despite previously admitting in its Memorandum that, at least for purposes of this Motion to Dismiss, a valid contract existed between the parties, *see* Mem. in Supp. at 8 (“the court must accept for true that a valid contract existed...”), CPC Regional proceeds to argue that the Complaint should be dismissed because the Master Agreement was invalid because it was illusory. As an initial matter, the court should disregard this argument, because CPC Regional should not be allowed to argue inconsistent theories in its motion to dismiss. However, if the Court is inclined to consider this inconsistent argument, the argument that the Master Agreement is illusory should be rejected because the parties respective duties and responsibilities are clear, certain, and concrete. The only factors that made performance of the contract uncertain is CPC Regional's failure to communicate with SirsiDynix and its failure to participate in the implementation process.

North Carolina law provides that “consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract.” *Huttenstine v. Mast*, 537 F. Supp. 2d 795, 801 (E.D.N.C. 2008) (quoting *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 619 S.E.2d 577, 582 (2005)). Courts will not enforce contracts based upon illusory consideration. *Id.* However, in interpreting whether a contract is supported by valid consideration “a court is to

interpret contract terms in a way that does not render a contract void or [of] doubtful validity.”

*Id.*

Here, there is no indication that the consideration provided by either party to enter into the Master Agreement may be withdrawn on a whim such that it is insufficient to support the Master Agreement. Instead, a review of the Master Agreement shows that the parties respective duties and responsibilities are clear, certain, and concrete. *See Ex. A passim.* In exchange for various payments from CPC Regional, SirsiDynix would provide a variety of services related to the implementation and maintenance of the SirsiDynix Software. In the third paragraph of the first page of the Master Agreement, it provides that the Master Agreement is “a binding agreement between the parties” and, later on, provides specific conditions for termination of the agreement which are based upon a breach of the agreement by one of the parties. *See Ex. A at 1 & 5 § 14(B).*

Moreover, contrary to CPC Regional’s assertion, an agreement to delay implementation of the software does not render the Master Agreement illusory. Instead, delays in the implementation process are contemplated by and specifically provided for in the Master Agreement. *See Ex. A at 2-3 § 4(C).* Any delays in the implementation process merely require adjustments in the overall implementation schedule. *Id.* There is nothing in the Master Agreement that allows either party to withdraw from the Master Agreement or avoid their contractual responsibilities on a whim.

Similarly, there is nothing in North Carolina case law that would allow this Court to find the Master Agreement illusory. CPC Regional cites no cases, and the undersigned has been unable to locate any cases, that hold that agreeing to delay performance of an otherwise valid contract renders a contract illusory and unenforceable.

The primary case relied upon by CPC Regional in support of its argument that the Master Agreement is illusory is factually and legally distinct from this matter. In *Milner Airco, Inc. of Charlotte, NC v. Morris*, 111 N.C. App. 866, 433 S.E.2d 811 (1993), a current employee was required to sign an employment contract that contained a non-compete agreement. *Id.* at 867, 433 S.E.2d at 812. The only consideration set forth in the employment contract was that the potential existed that the employee would be promoted some day. *Id.* at 869, 433 S.E.2d at 813. The Court of Appeals found that the employment agreement a was illusory because the employer “made no new promise he was required to keep in return for the promise not to compete.” *Id.* at 870, 433 S.E.2d 814.

Here, the Master Agreement contains promises that both parties were required to keep. SirsiDynix was required to implement the Symphony software and CPC Regional was supposed to cooperate in this process and make various payments along the way. CPC Regional’s failure to honor its promises gave rise to this suit. The presence of clear, certain, and concrete contractual duties on the part of both parties and the requirement that a court is to interpret contract terms in a way that does not render a contract void or of doubtful validity yields only one conclusion: the Master Agreement is not illusory and CPC Regional’s Motion to Dismiss should be denied.

#### **REQUEST FOR LEAVE TO AMEND**

Although SirsiDynix believes it has alleged sufficient factual allegations to state a claim for relief, in the event the Court finds any of the allegations to be factually deficient, SirsiDynix requests leave to amend its Complaint to add additional factual allegations.

**CONCLUSION**

Based upon the foregoing arguments and authorities, CPC Regional's Motion to Dismiss should be denied.

This the 22nd day of July, 2011.

**WOMBLE CARLYLE SANDRIDGE & RICE**  
*A Professional Limited Liability Company*

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**CERTIFICATE OF SERVICE**

This is to certify that on July 22, 2011, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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