

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

SIRSI CORPORATION d/b/a
SIRSIDYNIX,

Plaintiff,

v.

MOTION TO DISMISS,

ANSWER AND

COUNTERCLAIMS

CRAVEN-PAMLICO-CARTERET REGIONAL
LIBRARY SYSTEM,

Defendant.

MOTION TO DISMISS

Rule 12(b)(6) Motion to Dismiss

1. Plaintiff filed a breach of contract claim alleging that Defendant entered into a Master Software License and Services Agreement (hereinafter “Master Agreement”) with Plaintiff and then breached the terms of the Master Agreement.
2. The alleged Master Agreement appears to be comprised of three separate and distinct multipage documents entitled;
 - a. Master Software License and Services Agreement, (Exhibit A)
 - b. Schedule 1: Sirsi Dynix Quote, (Exhibit B)

- c. SAAS Schedule. (Exhibit C)
3. Exhibits B and C appear to be incorporated by reference into Exhibit A, which in turn comprises what appears to be the integrated Master Agreement.
 4. Plaintiff further alleges that “after entering into the Master Agreement with SirsiDynix, CPC Regional asked to delay implementation of the Symphony system due to funding issues. SirsiDynix agreed to these delays.” (Comp. Paragraph 9)
 5. Plaintiff fails to allege a date upon which the Master Agreement was to have been implemented by the Parties or the date upon which performance of the Master Agreement was to have been rendered by the parties.
 6. The Master Agreement contains a defined term entitled the “Go Live Date” which purports to be the date which prescribes the beginning of the alleged Contract.
 7. The Go Live Date is defined by Plaintiff twice in the Master Agreement, as either;
 - a. the date on which the SirsiDynix Software is placed into operational use for normal daily business, including searching the public access catalog and circulating materials; or; (Exhibit B)
 - b. the date on which the SirsiDynix Software is available for operational use for normal daily business, including searching the public access catalog and circulating materials. (Exhibit C)
 8. Plaintiff’s two definitions of a “Go Live Date” conflict with one another and are

irreconcilable.

9. Neither definition prescribes an actual date for either party's performance and the Master Agreement is devoid of any terms defining the date for performance.
10. The Go Live Date never occurred.
11. Under the first definition of Go Live Date, the Symphony software was never "placed" into service by the parties, therefore no contract could have commenced.
12. Plaintiff's Complaint fails to allege that there was a meeting of the minds on a date for performance of the contract.
13. Defendant never paid for and Plaintiff never installed its Symphony software (the software contemplated in the Master Agreement hereinafter referred to as "Symphony") on Defendant's server, therefore it was never "placed" into service and therefore a condition precedent to the formation of the contract never occurred.
14. Additionally, Plaintiff alleges that it agreed to "delay" implementation of the Master Agreement due to funding issues.(Comp. paragraph 9)
15. Plaintiff does not allege the time frame for the alleged delayed implementation.
16. Plaintiff fully acknowledges that at the time it allegedly entered into the Master Agreement it knew Defendant did not have sufficient funds for to purchase Symphony.

17. Plaintiff alleges facts sufficient for this court to determine that the delay was for an indeterminate duration continuing indefinitely until the Library's funding issues were resolved.
18. Plaintiff does not allege that the funding issues were resolved or that it revoked its agreement to delay the implementation.
19. A document purporting to be a contract, and which does not state a date certain for the parties to perform and which does not contain a timeframe within which to perform is illusory and is not a contract.
20. Plaintiff alleges that the first time it notified Defendant of the alleged breach of the Master Agreement was on February 14, 2011, approximately two years after Defendant allegedly entered into the Contract.
21. Plaintiff has not alleged facts sufficient to establish that the Parties had a meeting of the minds on a date for performance of the Contract, therefore Plaintiff cannot establish a breach of contract.
22. Plaintiff has not alleged facts sufficient to establish that Defendant owes damages due to a breach of contract.
23. The Master Agreement is void for vagueness in that;
 - a. The Parties never agreed upon a date for implementation of the contract;
 - b. The Plaintiff admittedly agreed to an indefinite delay of implementation of the contract.
24. The Master Agreement is void in that it contains a conflicting definition of the term "Go

Live Date” which is a material term in the Master Agreement.

25. As a matter of law and based solely on the Complaint, it is impossible to determine when or if a valid contract was formed, when performance of the contract was due by the parties, and when or if an actual breach occurred.
26. The conflicting definitions of the Go Live Date are irreconcilable, create multiple possible times for performance of the contracts, and are indefinite.
27. The conflicting Go Live Dates must be construed against the Plaintiff.
28. The conflicting Go Live Dates, the fact that no actual performance date was set, and Plaintiff’s agreement to indefinitely suspend perform, prevented the parties reaching a meeting of the minds on implementation of the Master Agreement, therefore no contract was formed.
29. Because there was never a Go Live Date, according to the Plaintiff’s definition of the term, the Contract complained upon was never performed by either party, and the executed documents of the Master Agreement never constituted a binding contract between the parties.
30. Because the Plaintiff has failed to allege facts sufficient for this Court to infer a valid Contract was formed Plaintiff cannot prove a breach of contract, and has therefore failed to state a claim upon which relief can be granted.

WHEREFORE, Defendant respectfully urges this Court to dismiss this action.

Now comes Craven-Pamlico-Carteret Regional Library System, (“CPC”) Answering Plaintiff Sirsi Corporation d/b/a SirsiDynix (“SirsiDynix”) Complaint as follows;

PARTIES

1. Paragraph 1 is Admitted upon information and belief.
2. Paragraph 2 is Admitted.

JURISDICTION AND VENUE

3. Paragraph 3 is Admitted.
4. Paragraph 4 is Admitted.

FACTUAL ALLEGATIONS

5. In Paragraph 5 it is Admitted that on or about February 3, 2009, representatives of SirsiDynix held a phone conversation with CPC to discuss a preexisting software/service agreement which was entered into in or around 1999. Admitted that during the course of the conversation the representative from SirsiDynix attempted to up-sell CPC on a SirsiDynix product titled "Symphony". Admitted that SirsiDynix offered to provide, and provided, a quote to CPC for Symphony. Denied as to any allegation not admitted.

6. In Paragraph 6 it is Admitted that on or about February 5, 2009, SirsiDynix sent CPC Regional a quote that outlined the costs related with the migration to the Symphony System.

7. Paragraph 7 is Denied.

8. Paragraph 8 is Denied.

9. In Paragraph 9 it is Admitted that Defendant informed Plaintiff that it could not enter into a contract to purchase Plaintiff's product due to funding issues. Admitted that Plaintiff agreed to indefinitely delay the alleged Master Agreement due to Defendant's funding issues. Denied as to

all allegations not Admitted. Denied that the Master Agreement was more than an agreement to hold the quote.

10. Paragraph 10 is Denied in whole and denied in part.

11. Paragraph 11 is Denied.

12. Paragraph 12 is Denied.

13. In Paragraph 13 it is Admitted that in November, 2010, CPC had a preexisting maintenance contract not associated with the contract complained of herein, and Jackie Beach, informed SirsiDynix that CPC would no longer be utilizing SirsiDynix for the preexisting maintenance contract. Admitted that from April 2009 until December 2010 SirsiDynix was in regular communication with Defendant regarding the maintenance contract. Admitted that CPC provided SirsiDynix proper notice of cancellation of the preexisting maintenance contract. Denied as to any allegation not specifically admitted herein.

14. In Paragraph 14 it is Admitted that nearly two years after the Parties allegedly entered into an the Master Agreement SirsiDynix informed CPC that it had breached the terms of the Master Agreement on the Symphony contract. Denied that a valid contract existed. Denied as to all allegations not specifically admitted herein.

15. In Paragraph 15 it is Denied that any amounts are owed under the alleged Master Agreement for the Symphony contract. Denied as to all allegations not specifically admitted herein.

16. Paragraph 16 is Denied. Defendant reserves the right to assert Sovereign Immunity Defense.

17. Paragraph 17 Contains no allegations. The denials and allegations contained in the paragraphs above are realleged.

18. Paragraph 18 is Denied.

19. Paragraph 19 is Denied.

20. Paragraph 20 is Denied.

21. Paragraph 21 is Denied.

22. Paragraph 22 is Denied.

23. Paragraph 23 contains no allegations. The denials and allegations contained in the paragraphs above are realleged.

24. Paragraph 24 is Denied.

25. Paragraph 25 is Denied.

26. Paragraph 26 is Denied.

27. Paragraph 27 is Denied.

**FIRST COUNTERCLAIM
UNFAIR AND DECEPTIVE TRADE PRACTICES
N.C.G.S. § 75-1.1, ET SEQ.**

28. The allegations and denials contained in the Answer, in the Motion to Dismiss, and in the other paragraphs above are incorporated herein as if fully plead.

29. Prior to December 2010 Defendant, a library, used SirsiDynix software to for its computing needs.

30. Defendant (hereinafter “CPC” or the “Library”) had used Plaintiff’s software for approximately 13 years prior to December 2010.

31. CPC and Plaintiff had a service/maintenance agreement on the sirsi software and server whereby Plaintiff would, on a monthly basis, maintain the software on CPC’s server. CPC paid a substantial monthly fee for the service.

32. In or around February 2009 Plaintiff approached the Library and tried to up-sell it on its new “Symphony” software which is the subject matter of the Master Agreement.

33. CPC informed Plaintiff that it would be happy to look at a quote for the new software.

34. The Library received the quote from Plaintiff on or about February 4, 2009, and promptly informed Plaintiff that it could not afford the Symphony software due to budgetary constraints.

35. In or around April 2009, the Library’s hardware began showing signs that it had outlived its useful service life.

36. Because Plaintiff had a service agreement with Defendant, and maintained the server and software on a regular basis, Plaintiff knew that the hardware and the software were nearing the end of their useful service lives.

37. In or around April 2009, Plaintiff informed the Library that the quote would be running out in June and could not be maintained past June of 2009, however if the Library signed the Master Agreement Plaintiff could hold the quote indefinitely.

38. The Library specifically inquired whether the three part, multipage, Master Agreement was a binding contract and was informed by Plaintiff that the Master Agreement was merely a document which allowed them to hold the quoted price for the Library.

39. The Library reasonably relied upon the representations made by Plaintiff and informed the Plaintiff in no uncertain terms that it could not afford the Symphony software.

40. Plaintiff’s Complaint acknowledges that the Library informed them that the Library could not afford the Symphony software.

41. Upon information and belief, a representative of Plaintiff’s company contacted Defendant under the guise of having Defendant sign the Master Agreement in order to reserve for an indefinite period

the quote price for Defendant, should they decide to purchase the Symphony product from SirsiDynix at a later date.

42. On or about April 15, 2009, Defendant signed the Master Agreement due to the false representation that same would hold the quoted price indefinitely and that it was not a contract.

43. The multipage Master Agreement is a complex document which relies upon multiple interrelated cross references to create a fully integrated contract.

44. Upon information and belief, Plaintiff deceitfully misrepresented the Master Agreement as an agreement to indefinitely hold the quoted price, when in fact Plaintiff intended to use it as a binding contract and to hold Defendant liable for same.

45. Defendant took Plaintiff's misrepresentation as truth, and signed the Master Agreement under the good faith belief that it was not entering a contract, but merely signing a document to hold the quoted price should they ever decide to purchase the Symphony software.

46. Upon information and belief, Plaintiff willfully, intentionally, and wrongfully misrepresented and mischaracterized what the Agreement was to induce Defendant into signing the Master Agreement.

47. In or around June 2009 the Library's anachronistic server went down and needed to be replaced.

48. The Library informed Plaintiff of the downed server and the need to quickly replace the server but they did not have the money for a new server.

49. The Library went back to manually checking out books while the server was down.

50. In or around June 2009 the Library found an old server at East Carolina University which was not being used and the University agreed to donate the server to the Library.

51. In or around June 2009 the Library hired Plaintiff to transfer the old software from the old

server and put the software on the replacement server.

52. Plaintiff transferred the old software, which they had licensed to the Library, to the replacement server.

53. Plaintiff did not attempt to transfer the Symphony software to the server, nor did it demand that the Symphony software be placed on the server, even though Plaintiff had full access to the server.

54. The Library and Plaintiff then entered into a new monthly service agreement for the server using the old software.

55. From June 2009 through December 2010 the Library was in regular contact with Plaintiff about the service agreement and the Plaintiff did not make any demands during that period for the Library to install the Symphony software package.

56. In or around December 2010 the Library informed Plaintiff that it no longer needed Plaintiff's services to maintain the software on the server because the Library was going to switch to an inexpensive cloud based library management system which would do away with the need to maintain a server and software.

57. In or around February 14, 2011, Plaintiff responded to the Library's termination of the service contract by, for the first time, informing the Library that the Master Agreement it signed was actually a contract.

58. From April 2009 through December 2010 the Plaintiff made no demands upon the Library to enforce the alleged Master Agreement because it knew that the Master Agreement was merely an agreement to hold a price for the Library.

59. Plaintiff knew that the terms in the Master Agreement and the terms of the alleged contract were not performed by either party.

60. Plaintiff's Complaint acknowledges that it "agreed" to indefinitely delay the implementation of the Master Agreement due to the Library's lack of funds to purchase the Symphony software.

61. Plaintiff, who knew that the Master Agreement was merely an agreement to hold the quote, filed this Complaint in retaliation for Defendant signing a contract with "Online Computer Library Center, Inc."

62. No valid contract was ever consummated between Plaintiff and Defendant therefore there has been no breach of contract by Defendant.

63. Plaintiff has violated N.C.G.S. § 75-1.1, et seq., and committed an unfair or deceptive act or practice, by deceitfully misrepresenting and mischaracterizing to the Library that the Master Agreement was merely an agreement to hold a quoted price, when in fact two years later they asserted such agreement was a Contract.

64. Plaintiff's actions have a tendency to deceive, and did in fact deceive Defendant.

65. Plaintiff's actions constitute unfair or deceptive acts and/or practices.

66. Plaintiff's actions are in and/or affect commerce.

67. Defendant was actually injured by Plaintiff's actions, and Plaintiff was the proximate cause of Defendant's damages.

68. Defendant is entitled to treble damages pursuant to N.C.G.S. § 75-16.

69. Defendant is entitled to Attorney's Fees pursuant to N.C.G.S. § 75-16.1.

**SECOND COUNTERCLAIM
NEGLIGENT MISREPRESENTATION**

70. The allegations and denials contained in the Answer, in the Motion to Dismiss, and in the other paragraphs above are incorporated herein as if fully plead.

71. Upon information and belief, Plaintiff, engaged in the day to day business of selling and maintaining software, did falsely state to Defendant that the Agreement Plaintiff requested Defendant to sign was simply to place an indefinite hold on an otherwise expiring quote.

72. Plaintiff had a duty to explain the nature of their products honestly and in good faith to the Library.

73. Defendants justifiably relied on Plaintiff's assertion that the signed Master Agreement was simply an agreement to hold the quoted price.

74. Plaintiff, however, falsely or negligently misrepresented the characteristics of the Agreement, as Plaintiff in fact intended to treat the Agreement as a binding Contract.

75. Defendants justifiably relied on such misrepresentation to their detriment, as they have since entered into a binding agreement with Online Computer Library Center, Inc. for use of the Cloud software, and are being held accountable on a Contract that they were unaware existed for over two years, in the amount of \$146,844.80.

76. Defendant relied on this information prepared without reasonable care, as, under information and belief, it took Plaintiff's blatant misrepresentation as true.

77. Defendant's Master Agreement contains two definitions for "Go Live Date" and those definitions are irreconcilable.

78. The Master Agreement's conflicting definitions prevented the formation of a binding contract because there was no meeting of the minds on a performance date.

79. Defendant justifiably relied on Plaintiff's misrepresentation as Plaintiff is engaged in the business of selling such products and software, and therefore possessed superior knowledge and experience in dealing with these Agreements and extensions of quote time periods, and nothing in their routine business

interactions regarding the Agreement put Defendant, a business entity of ordinary prudence, on alert so as to arouse its suspicion.

80. Upon information and belief, Defendant did inquire with Plaintiff on more than one occasion as to what the Agreement would provide, and was informed that it would simply hold the quoted price past its expiration date of June 10, 2009.

81. Defendant justifiably relied on Plaintiff's representation that it was not a Contract for purchase.

82. Defendant relied to its detriment, as Defendant is now being held accountable for damages in the amount of \$146,844.80.

83. Plaintiff failed to prepare information regarding the type of document it was requesting Defendant sign without reasonable care.

84. Plaintiff owed Defendant a duty of care as a business with superior knowledge and expertise in such transactions.

**FIRST AFFIRMATIVE DEFENSE
FAILURE TO MITIGATE DAMAGES**

85. The allegations and denials contained in the Answer, in the Motion to Dismiss, and in the other paragraphs above are incorporated herein as if fully plead.

86. Upon information and belief, Plaintiff negligently and deceitfully misrepresented an Agreement as one to extend a quoted price, when in fact they characterized same as a binding Contract.

87. Plaintiff was engaged in a monthly maintenance contract on non-SirsiDynix Software with Defendant from in or about May 2010 through December 2010.

88. Plaintiff alleges Defendant entered into a binding Contract on or about April 27, 2009 to provide Defendant with Symphony software and maintenance of same.

89. Plaintiff was engaged in routine business contacts with Defendant on the maintenance contract for software unrelated to the matter herein.

90. Upon information and belief, Plaintiff did not ever mention the Contract to Defendant about May 2009 through December 2010.

91. Plaintiff failed to attempt to collect any unpaid amount on the alleged Contract from the date of signing up through and until the filing of its Complaint on or about February 14, 2011.

92. Plaintiff failed to exercise fair and reasonable prudence to reduce its damages by not only failing to inform Defendant that such contract existed.

93. Plaintiff further failed to exercise fair and reasonable prudence to reduce its damages by failing to attempt to collect unpaid balances on such alleged contract from Defendant, and instead waiting a period of approximately two years to allege a breach had occurred.

**SECOND AFFIRMATIVE DEFENSE
DOCTRINE OF WAIVER AND LACHES**

94. The allegations and denials contained in the Answer, in the Motion to Dismiss, and in the other paragraphs above are incorporated herein as if fully plead.

95. Plaintiff alleges that Defendant signed a binding Contract with Plaintiff for the purchase of Symphony software and maintenance thereof, on or about April 27, 2009.

96. Defendant alleges Plaintiff negligently and deceitfully misrepresented that it was simply an Agreement to indefinitely hold the previously quoted price, and not a Contract.

97. Defendant engaged in its day to day business using non-SirsiDynix software, with Plaintiff engaged in a monthly maintenance contract on same, for a period of two years, up to and until it purchased Cloud Software from Online Computer Library Center, Inc., under the belief that the signed Agreement was not a contract.

98. Upon information and belief, Plaintiff knew that it intended to characterize the Agreement it had represented as a “quote holder” to Defendant as a legally binding Contract since April 27, 2009.

99. Plaintiff alleges that it “agreed” delay implementation of the Master Agreement due to the Library’s funding issues.

100. The Library’s funding issues never resolved themselves.

101. Plaintiff’s agreement to delay implementation of the alleged contract pending resolution of funding issues constitutes a waiver of their right to enforce the alleged Master Agreement.

102. Plaintiff continued to engage in routine business with Defendant without mentioning the existence of the alleged contract.

103. Plaintiff waited approximately two years to assert that a Contract allegedly existed between Plaintiff and Defendant, despite knowledge that they intended to treat the Agreement as such since April of 2009.

104. Plaintiff waited until Defendant had engaged in a contract with a competing company to provide software and maintenance for Defendant to assert that a Contract existed.

105. Plaintiff waited approximately two years to assert a claim for breach of contract, which caused injury to Defendant. Defendant was unaware such a contract existed and entered into a business contract with a competing company under the belief that they had every right to do so, as Plaintiff not once raised that a Contract between Plaintiff and Defendant allegedly existed until Defendant entered into a contract with a competing company.

106. Plaintiff’s delay in asserting a contract existed, and that Defendant allegedly breached same, has resulted in a change in the relations of the parties.

107. Plaintiff’s delay in asserting a claim was unreasonable, and upon information and belief,

Plaintiff has not and cannot provide a reasonable justification for the two year delay.

108. Plaintiff's delay in asserting a claim has injured Defendant.

109. Plaintiff was aware of the existence of the grounds for their claim since April of 2009.

110. Plaintiff's Complaint should be barred under the doctrine of Laches.

111. By agreeing to an indefinite delay in executing the Master Agreement pending the resolution of the Library's funding issues, and by waiving enforcement of its alleged rights to implement the contract, Plaintiff has waived its rights under the contract, and this action should be dismissed.

Wherefore, Defendant respectfully requests the Court:

1. Dismiss Plaintiff's Complaint with prejudice.
2. Award no judgment to Plaintiff.
3. For Damages in excess of \$75,000.00 for the Defendant.
4. For Treble Damages as plead.
5. For Punitive Damages.
6. For reasonable attorney fees as allowed by statute or in the discretion of the court.
7. For a jury trial on all issues so triable.
8. For other such relief as this court deems equitable.

This the 16 day of June, 2011.

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