

1 arguments presented to the Court **NOW FINDS AND RULES AS**
2 **FOLLOWS:**

3 The Court hereby **DENIES IN PART AND GRANTS IN PART**
4 Defendants Kreyziu and Code Rebel's (hereinafter
5 collectively referred to as "Movants") Motion.

6 **I. Background**

7 Defendant Code Rebel is a Hawaii limited liability
8 company maintained and located in the State of Hawaii.
9 Defendant Code Rebel lists various customers on its
10 website that have California businesses and
11 headquarters. Defendant Kreyziu is a resident of
12 Hawaii and a managing member of Defendant Code Rebel.
13 Defendant Vladimir Bickov ("Bickov"), who is not a
14 party to this Motion, is a resident of Australia and a
15 Citizen of Ukraine. Defendant Bickov has not been
16 served with a Complaint, but he consented to the
17 removal of this present action to Federal court.

18 Plaintiff/Non-Movant Aqua Connect, Inc.
19 ("Plaintiff") is a software company. Plaintiff sells
20 and markets software known as Aqua Connect Terminal
21 Server ("ACTS"). Plaintiff is a Nevada corporation
22 with its principal place of business in Los Angeles
23 County, California.

24 Plaintiff's claims arise out of the alleged reverse
25 engineering of ACTS and the subsequent sale of
26 infringing software by the three Defendants. On July
27 20, 2011, Movants, Defendants Code Rebel and Kreyziu,
28 filed the present Motion [5].

1 **II. Legal Standard**

2 **A. Motion to Dismiss for Lack of Personal**
3 **Jurisdiction Pursuant to Federal Rule of Civil**
4 **Procedure 12(b)(2)**

5 Although the plaintiff has the burden of proving
6 personal jurisdiction, to defeat a motion to dismiss,
7 the plaintiff need only make a prima facie showing of
8 jurisdictional facts. In re Pintlar Corp., 133 F.3d
9 1141, 1144 (9th Cir. 1998)(citing Farmers Ins. Exch. v.
10 Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912
11 (9th Cir. 1990)). The plaintiff need only allege facts
12 which, if true, would support a finding of
13 jurisdiction. Ballard v. Savage, 65 F.3d 1495, 1498
14 (9th Cir. 1995)(citing Data Disc v. Sys. Tech. Assoc.,
15 557 F.2d 1280, 1285 (9th Cir. 1977)).

16 The exercise of personal jurisdiction over a
17 nonresident defendant requires the presence of two
18 factors. The forum state's laws must provide a basis
19 for exercising personal jurisdiction, and the assertion
20 of personal jurisdiction must comport with due process.
21 Hirsch v. Blue Cross, Blue Shield, 800 F.2d 1474, 1477
22 (9th Cir. 1986). The California long-arm statute
23 permits the exercise of jurisdiction "on any basis not
24 inconsistent with the Constitution . . . of the United
25 States." Cal. Civ. Proc. Code § 410.10. This statute
26 renders the state and federal limits of jurisdiction
27 coextensive. Roth v. Garcia Marquez, 942 F.2d 617, 620
28 (9th Cir. 1991). Thus, only a due process analysis is

1 required.

2 Due process requires that a defendant have "certain
3 minimum contacts with [the forum] such that the
4 maintenance of the suit does not offend traditional
5 notions of fair play and substantial justice." Int'l
6 Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The
7 defendant's contacts must be "such that the [defendant]
8 should reasonably anticipate being haled into court
9 there." World-Wide Volkswagen Corp. v. Woodson, 444
10 U.S. 286, 297 (1980). Depending upon the nature and
11 scope of the defendant's contacts with the forum,
12 jurisdiction may be general or specific to the cause of
13 action. Roth, 942 F.2d at 620 (citing Data Disc, 557
14 F.2d at 1287).

15 In the area of personal jurisdiction and the
16 Internet, the Ninth Circuit has adopted the test set
17 forth in Zippo Manufacturing Co. v. Zippo Dot Com,
18 Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). See Gator.Com
19 Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1079-80 (9th
20 Cir. 2003)(citing the "sliding scale" test set forth in
21 Zippo as a test "that both our own and other circuits
22 have applied to Internet-based companies."). In Zippo,
23 the court categorized Internet use and the exercise of
24 personal jurisdiction along the following spectrum:

25 At one end of the spectrum are situations where a
26 defendant clearly does business over the Internet.
27 If the defendant enters into contracts with
28 residents of a foreign jurisdiction that involve
the knowing and repeated transmission of computer

1 files over the Internet, personal jurisdiction is
2 proper. At the opposite end are situations where a
3 defendant has simply posted information on an
4 Internet [website] which is accessible to users in
5 foreign jurisdictions. A passive [website] that
6 does little more than make information available to
7 those who are interested in it is not grounds for
8 the exercise personal jurisdiction. The middle
9 ground is occupied by interactive [website] where a
10 user can exchange information with the host
11 computer. In these cases, the exercise of
12 jurisdiction is determined by examining the level
13 of interactivity and commercial nature of the
14 exchange of information that occurs on the
15 [website].

16 Zippo, 952 F. Supp. at 1124 (citations omitted).

17 **B. Motion to Dismiss Pursuant to Federal Rule of**
18 **Civil Procedure 12(b)(6)**

19 In a motion to dismiss brought under Federal Rule
20 of Civil Procedure 12(b)(6), the Court must presume all
21 non-conclusory, factual allegations of the complaint to
22 be true and draw all reasonable inferences in favor of
23 the non-moving party. Klarfeld v. United States, 944
24 F.2d 583, 585 (9th Cir. 1991). After accepting as true
25 all non-conclusory statements and drawing all
26 reasonable inferences in favor of the non-moving party,
27 the Court must determine whether the complaint alleges
28 a plausible claim for relief. See Ashcroft v. Iqbal,
129 S. Ct. 1937, 1940-41 (2009).

A dismissal can be based on the lack of cognizable
legal theory or the lack of sufficient facts alleged

1 under a cognizable legal theory. See Balistreri v.
2 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
3 1990). However, a party is not required to state the
4 legal basis for his claim, only the facts underlying
5 it. See McCalden v. Cal. Library Ass'n, 955 F.2d 1214,
6 1223 (9th Cir. 1990).

7 Additionally, claims of fraud must satisfy not only
8 Rule 12(b)(6), but also the heightened pleading
9 standard of Rule 9(b). In alleging fraud or mistake, a
10 party must state with particularity the circumstances
11 constituting fraud or mistake. Fed. R. Civ. P. 9(b).

12 The heightened pleading standard of Rule 9(b) is
13 designed "to give defendants notice of the particular
14 misconduct which is alleged to constitute the fraud
15 charged so that they can defend against the charge and
16 not just deny that they have done anything wrong."

17 Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993).

18 In order to meet this standard, the plaintiff must
19 allege the "who, what, where, when, and how" of the
20 fraudulent conduct. Vess v. Ciba-Geigy Corp. USA, 317

21 F.3d 1097, 1106 (9th Cir. 2003). The complaint must
22 "state the time, place, and specific content of the
23 false representations as well as the identities of the
24 parties to the misrepresentation." Edwards v. Marin

25 Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004). "The

26 plaintiff must set forth what is false or misleading
27 about a statement, and why it is false." Vess, 317

28 F.3d at 1106 (quoting Decker v. Glenfed, Inc., 42 F.3d

1 1541, 1548 (9th Cir. 1994)).

2 However, “[m]alice, intent, knowledge and other
3 conditions of a person’s mind may be alleged
4 generally.” Fed. R. Civ. P. 9(b); Walling v. Beverly
5 Enters., 476 F.2d 393, 397 (9th Cir. 1973).

6 Nevertheless, states of mind must still be alleged.
7 Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th
8 Cir. 1984).

9 **C. Motion for a More Definite Statement Pursuant**
10 **to Federal Rule of Civil Procedure 12(e)**

11 If a pleading to which a responsive pleading is
12 permitted is so vague or ambiguous that a party cannot
13 reasonably be required to frame a responsive pleading,
14 the party may move for a more definite statement before
15 interposing a responsive pleading. Fed. R. Civ. P.
16 12(e). A Rule 12(e) motion is proper only where the
17 complaint is so indefinite that the defendant cannot
18 ascertain the nature of the claim being asserted. See
19 Famolare, Inc. v. Edison Bros. Stores, Inc., 525 F.
20 Supp. 940, 949 (E.D. Cal. 1981).

21 Rule 12(e) motions are disfavored and rarely
22 granted. Cellars v. Pac. Coast Packaging, Inc., 189
23 F.R.D. 575, 578 (N.D. Cal. 1998). A motion for a more
24 definite statement fails where the complaint is
25 specific enough to apprise the moving party of the
26 substance of the claim being asserted. See Bureerong
27 v. Uvawas, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996).

28 ///

1 **III. Analysis**

2 **A. Plaintiff's Request for Judicial Notice**

3 As a preliminary matter, Plaintiff requests the
4 Court take Judicial Notice that a "213" area code is a
5 Los Angeles, California area code. This request,
6 however, is **DENIED AS MOOT** because such information is
7 not necessary to the Court's analysis.

8 **B. Plaintiff's Motion to Dismiss Defendant Kryeziu**
9 **for Lack of Personal Jurisdiction**

10 The Court finds that Plaintiff has met its burden
11 to defeat Movants' Motion to Dismiss by making out a
12 prima facie showing of the Court's personal
13 jurisdiction over Defendant Kryeziu. Plaintiff
14 premises personal jurisdiction primarily on an
15 allegation that Defendant Kryeziu sold infringing
16 products to this state and participated in injuring
17 Plaintiff, a California resident, by conspiring to
18 reverse engineer Plaintiff's software. The Court finds
19 that these contacts with California are sufficient for
20 the Court to exert specific jurisdiction over Defendant
21 Kryeziu.

22 Specific jurisdiction exists if the cause of action
23 arises out of or is related to the defendant's forum
24 activities. Hirsch v. Blue Cross, Blue Shield, 800
25 F.2d 1474, 1477 (9th Cir. 1986). The Ninth Circuit has
26 formulated a three-prong test here in order to
27 determine whether the exercise of specific jurisdiction
28 comports with due process and therefore exists over the

1 defendant: 1) the defendant must purposefully avail
2 himself of the privilege of conducting activities in
3 the forum by some affirmative act or conduct; 2) the
4 plaintiff's claim must arise out of, or result from,
5 the defendant's forum-related contacts; and 3) the
6 extension of jurisdiction must be "reasonable." Roth,
7 942 F.2d at 620-21; see Haisten v. Grass Valley Med.
8 Reimbursement Fund, 784 F.2d 1392, 1397 (9th Cir.
9 1986).

10 The plaintiff bears the burden of satisfying the
11 first two prongs of this specific jurisdiction test.
12 Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990).
13 If the plaintiff fails to satisfy either of these
14 prongs, then personal jurisdiction is not established
15 in the forum state. Schwarzenegger v. Fred Martin
16 Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). "If the
17 plaintiff succeeds in satisfying both of the first two
18 prongs, the burden then shifts to the defendant to
19 'present a compelling case' that the exercise of
20 jurisdiction would not be reasonable." Id.

21 Here, the Court finds that Plaintiff has satisfied
22 all three prongs, and therefore the Court has specific
23 jurisdiction over Defendant Kryeziu.

24 **1. Purposeful Availment**

25 The Court finds that Defendant Kryeziu has
26 purposefully availed himself of the privilege of
27 conducting activities in California.

28 Purposeful availment "examines whether the

1 defendant's contact with the forum are attributable to
2 his own actions or are solely the actions of the
3 plaintiff." Sinatra v. National Enquirer, 854 F.2d
4 1191, 1195 (9th Cir. 1998). To show purposeful
5 availment, a plaintiff must show that the defendant
6 "engage[d] in some form of affirmative conduct allowing
7 or promoting the transaction of business within the
8 forum state." Gray & Co. v. Firstenberg Machinery Co.,
9 915 v. F.2d 758, 760 (9th Cir. 1990).

10 Here, the Complaint alleges that Defendant Kryeziu
11 personally participated in and encouraged both the
12 alleged reverse engineering and infringing sales on
13 which Plaintiff relies to establish personal
14 jurisdiction. Compl. ¶¶ 7, 9, 11. Furthermore,
15 Defendant Kryeziu states in his declaration that he is
16 "the Managing Member" of Defendant Code Rebel.
17 Declaration of Arben Kreyziu ("Kreyeziu Decl."), ¶2.
18 Moreover, Movants do not offer any evidence rebutting
19 Plaintiff's allegations that Defendant Kryeziu
20 participated in and encouraged the reverse engineering
21 and the infringing sales. As such, the Court accepts
22 Plaintiff's allegations as true for the purposes of
23 this motion. See Doe v. Unocal Corp., 248 F.3d 915,
24 922 (9th Cir. 2001) ("Where not directly controverted,
25 plaintiff's version of the facts is taken as true for
26 the purposes of a 12(b)(2) motion to dismiss").

27 ///

28 ///

1 **a. The Fiduciary Shield Doctrine**

2 Movants do argue, however, that Defendant Kryeziu's
3 activities on behalf of Defendant Code Rebel should not
4 be considered Defendant Kryeziu's own personal contacts
5 with California. Although Movants do not use the term,
6 they appear to rely of the fiduciary shield doctrine.
7 Colt Studio, Inc. v. Badpuppy Enter., 75 F. Supp. 2d
8 1104, 1111 (C.D. Cal. 1999). Under the fiduciary
9 shield doctrine, "officers, directors, agents and
10 employees" of a corporation are not necessarily subject
11 to a given jurisdiction based on the corporation's
12 contacts with that jurisdiction. Id.

13 The Court finds that the fiduciary shield doctrine
14 does not apply to Defendant Kryeziu given that a
15 corporate officer's contacts on behalf of a corporation
16 are sufficient to subject the officer to personal
17 jurisdiction where the officer is a "primary
18 participant in the alleged wrongdoing or had control
19 of, and direct participation in the alleged
20 activities." Allstar Marketing Group, LLC v. Your
21 Store Online, LLC, 666 F. Supp. 2d 1109, 1120 (C.D.
22 Cal. 2009).

23 As noted, the Court accepts, for the purposes of
24 analyzing jurisdiction, the uncontroverted allegation
25 that Defendant Kryeziu personally participated and
26 encouraged the reverse engineering and the sale of
27 infringing products to California. This is "sufficient
28 to establish that [he was] the moving force behind the

1 infringing activity." Id. (holding that a corporate
2 officer was the moving force behind an infringing
3 activity when the officer personally participated and
4 encouraged the sale of infringing products to the forum
5 state). Accordingly, the Court consider the reverse
6 engineering and the infringing sales for the purposes
7 of analyzing Defendant Kryeziu's contacts with the
8 fourm. Because these activities occurred via Defendant
9 Code Rebel's website, the Court examines them in the
10 context of law governing personal jurisdiction based on
11 Internet activity.

12 ***b. Defendant Kryeziu's Activities via***
13 ***Defendant Code Rebel's Website***

14 In the Internet context, "the Ninth Circuit
15 utilizes a sliding scale analysis under which 'passive'
16 websites do not create sufficient contacts to establish
17 purposeful availment, whereas interactive websites may
18 create sufficient contacts, depending on how
19 interactive the website is. See Gator.Com Corp. v.
20 L.L. Bean, Inc., 341 F.3d 1072, 1079-80 (9th Cir. 2003)
21 (citing the "sliding scale" test as a test "that both
22 our own and other circuits have applied to
23 Internet-based companies."). Here, Plaintiff alleges
24 that, through their website, Movants solicited business
25 from California customers and regularly sold infringing
26 products to California in the State. Declaration of
27 Michael K. Hagemann ("Hagemann Decl."), ¶¶2-10.

28 As the Court finds that Movants once again offer no

1 conflicting evidence, the Court accepts this allegation
2 as true for the purposes of analyzing personal
3 jurisdiction on a Motion to Dismiss. Based on the
4 allegation, the Court finds that by operating a highly
5 commercial website through which regular sales of
6 allegedly infringing software are made to customers in
7 this state, Defendant Kryeziu, through Defendant Code
8 Rebel, purposefully availed himself of the benefits of
9 doing business in California, such that he should
10 reasonably anticipate being haled into court here.
11 Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1978
12 (finding purposeful availment where NeatO's website
13 allowed California consumers to purchase NeatO's
14 products over the Internet).

15 **2. Whether Plaintiff's Claims Arise Out**
16 **of Defendant Kryeziu's Contacts**

17 The Court finds that Plaintiff's claims arise out
18 of Defendant Kreyziu's forum related activities.

19 A lawsuit arises out of a defendant's contacts with
20 a forum state if there is a direct nexus between the
21 cause of action being asserted and the defendant's
22 activities in the forum. See Shute v. Carnival Cruise
23 Lines, 897 F.2d 377, 385 (9th Cir. 1990), rev'd on
24 other grounds, 499 U.S. 585 (1991). The Ninth Circuit
25 follows a "but for test" in determining whether an
26 action arises out of the defendant's contacts with the
27 forum state. Ballard v. Savage, 65 F.3d 1495, 1500
28 (9th Cir. 1995).

1 Here, Defendant Kryeziu's contacts with the forum
2 are (1) the sale of allegedly infringing products to
3 customers in this state and (2) conspiracy to
4 fraudulently induce Plaintiff, a California citizen,
5 into granting Defendant Kryeziu access to Plaintiff's
6 software for reverse engineering. These contacts are
7 sufficient to satisfy the arising out of requirement
8 given that "but for" the sale of products to California
9 citizens and reverse engineering of Plaintiff's
10 software, Plaintiff would not have been allegedly
11 injured. Allstar, 666 F. Supp. 2d at 1123 (finding that
12 lawsuit would not have occurred "but for" defendant's
13 interactive website and direct sales to California
14 customers).

15 **3. Exercising Jurisdiction over Defendant**
16 **Kryeziu is Reasonable**

17 The Court finds that the final prong of the Ninth
18 Circuit three-part test for specific jurisdiction is
19 satisfied as exercising jurisdiction over Defendant
20 Kryeziu is reasonable.

21 Reasonableness is assessed by the following
22 factors: (1) the extent of the defendants' purposeful
23 interjection into the forum; (2) the burden on the
24 defendant in litigating in the forum; (3) the extent of
25 conflict with the sovereignty of the defendant's state;
26 (4) the forum state's interest in adjudicating the
27 dispute; (5) the most efficient judicial resolution of
28 the controversy; (6) the importance of the forum to the

1 plaintiff's interest in convenient and effective
2 relief; and (7) the existence of an alternative forum.
3 Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-
4 88 (9th Cir. 1993). The burden to establish
5 unreasonableness, however, once the other prongs of the
6 personal jurisdiction test are established, is on the
7 defendant. Id. at 1487.

8 Addressing the first factor, the Ninth Circuit has
9 held that this factor "parallels the question of
10 minimum contacts" in determining the reasonableness of
11 exercising specific jurisdiction. Amoco Egypt Oil Co.
12 v. Leonis Nav. Co., Inc., 1 F.3d 848, 852 (9th Cir.
13 1993); Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th
14 Cir. 1991) ("In light of the first prong of purposeful
15 availment, analysis of this first factor in the third
16 prong would be redundant"). As such, because Defendant
17 Kryeziu purposefully availed himself on California by
18 serving as the driving force behind the activities of
19 Defendant Code Rebel in California, the Court finds
20 that Defendant Kryeziu purposefully interjected himself
21 on California, supporting a finding of reasonableness.

22 The second factor, the burden on a defendant in
23 litigating in the forum, must be examined in light of
24 the corresponding burden on a plaintiff. Sinatra v.
25 National Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir.
26 1988). The Court finds that there is little burden on
27 Defendant Kryeziu to defend the action in this forum.
28 As the alleged sole manager and member of Defendant

1 Code Rebel, whose jurisdiction has not been challenged
2 by Movants, Defendant Kryeziu will be litigating in
3 California regardless of the Court's jurisdiction on
4 him.

5 The third factor involves evaluating the extent of
6 any conflict with the sovereignty of Defendant
7 Kryeziu's home state. Here, Defendant Kryeziu is a
8 citizen of Hawaii rather than a foreign nation. As
9 such, "[a]ny conflicting sovereignty interests [can be]
10 accommodated through choice-of-law rules." Nissan
11 Motor Co. Ltd. v. Nissan Computer Corp., 89 F. Supp. 2d
12 1154, 1161 (C.D. Cal. 2000) (citing Gray & Co. v.
13 Firstenberg Machinery Co., 913 F.2d 758, 761 (9th Cir.
14 1990)). As a consequence, the Court finds this factor
15 of little importance in its determination of
16 reasonableness.

17 The fourth factor considers California's interest
18 in adjudicating the controversy. Here, when the
19 alleged false promise/fraud and reverse engineering
20 occurred and when the lawsuit was brought, Plaintiff
21 had its principal place of business in California and
22 was a citizen of California. 28 U.S.C. § 1332(c)(1)
23 (deeming a corporation to be a citizen where it has its
24 principal place of business). As such, because
25 California maintains a strong interest in redressing
26 the injury of its resident/citizen, the Court finds
27 this factor weighs in favor of Plaintiff. See
28 Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316,

1 1323 (9th Cir. 1998).

2 The fifth factor - the most efficient judicial
3 resolution of the controversy - primarily focuses on
4 the location of the evidence and the witnesses. Core-
5 Vent Corp., 11 F.3d at 1489. Here, while Movants
6 contend that their documents and evidence are located
7 in Hawaii, Plaintiff contends that its documents and
8 evidence are located primarily in California.
9 Consequently, in terms of the evidence and witnesses,
10 this factor is neutral in assessing the reasonableness.
11 However, as stated above, the personal jurisdiction of
12 Defendant Code Rebel has not been challenged in this
13 case. As such, litigation will proceed against
14 Defendant Code Rebel in California regardless of the
15 outcome of this Motion. It would be contrary to
16 principals of judicial economy to have a separate
17 proceeding in Defendant Kryeziu's home state of Hawaii.
18 Accordingly, the Court finds this factor weighs in
19 favor of Plaintiff.

20 The sixth factor is the importance of the forum to
21 a plaintiff's interest in convenient and effective
22 relief. Nothing in the papers establishes that
23 effective relief is not available to Plaintiff in
24 Hawaii, Defendant Kryeziu's preferred choice of forum.
25 While litigating in Hawaii would no doubt inconvenience
26 Plaintiff, "neither the Supreme Court nor [the Ninth
27 Circuit] has given much weight to inconvenience to the
28 Plaintiff." Ziegler v. Indian River County, 64 F.3d

1 470, 476 (9th Cir. 1995). The Court finds this factor
2 therefore tips only slightly in favor of Plaintiff.

3 The final factor - the availability of an
4 alternative forum - is the only factor that tips toward
5 Movants. Plaintiff "must carry the burden of proving
6 the unavailability of an alternative forum." Pacific
7 Alt. Trading Co. v. M/V Main Exp., 758 F.2d 1325, 1331
8 (9th Cir. 1985). Here, the Court finds that this
9 factor favors Movants as Plaintiff has not demonstrated
10 or even argued that Hawaii is not a viable and
11 available venue for litigating this suit.

12 As such, five out of the seven factors favor
13 Plaintiff, one is neutral, and only one favors Movants.
14 Although Movants argue that litigating in California
15 will inconvenience Defendant Kryeziu, the Court finds
16 that this is not sufficient, given the balance of the
17 remaining factors to establish that exercising personal
18 jurisdiction over Defendant Kryeziu would be
19 reasonable.

20 In sum, because all three requirements - purposeful
21 availment, arising out of, and reasonableness - weigh
22 in favor of a finding of specific jurisdiction, the
23 Court finds that it is appropriate to exercise personal
24 jurisdiction over Defendant Kryeziu. As such, the
25 Court **DENIES** Movants' Motion to Dismiss Defendant
26 Kryeziu for Lack of Personal Jurisdiction.

27 ///

28 ///

1 **C. Motion to Dismiss Pursuant to Federal Rule of**
2 **Civil Procedure 12(b)(6)**

3 **1. Plaintiff's Second Cause of Action - False**
4 **Promise**

5 The Court **DENIES** Movants' Motion to Dismiss
6 Plaintiff's Second Cause of Action for False Promise.

7 Movants argue that Plaintiff's Second Cause of
8 Action for False Promise, which is a type of fraud,
9 should be dismissed because the claim fails to satisfy
10 the heightened pleading requirements for fraud pursuant
11 to Federal Rule of Civil Procedure 9(b).

12 Under California law, "[t]he elements of fraud,
13 which give rise to the tort action for deceit, are (a)
14 misrepresentation (false representation, concealment,
15 or nondisclosure); (b) knowledge of falsity (or
16 'scienter'); (c) intent to defraud, i.e., to induce
17 reliance; (d) justifiable reliance; and (e) resulting
18 damage." Lazar v. Super. Ct., 12 Cal. 4th 631, 638
19 (1996). According to rule 9(b), the allegations of
20 false promise must be accompanied by the who, what,
21 where, when, and how of the fraud charged. See Vess,
22 317 F.3d at 1106.

23 The Court finds that Plaintiff has sufficiently
24 pled with particularity the elements of fraud under
25 California law. Plaintiff's Complaint pleads with
26 particularity facts indicating Movants made material
27 misrepresentations as to its intent to contract with
28 Plaintiff, and that Plaintiff reasonably relied on the

1 misrepresentations to its detriment.

2 The Court finds that Plaintiff has also
3 sufficiently pled the scienter requirement of fraud by
4 averring generally facts which indicate Movants knew
5 their misrepresentations were false at the time of
6 contracting¹. See Locke v. Warner Bros., Inc., 57 Cal.
7 App. 4th 354, 368 (Ct. App. 1997)(holding "[f]raudulent
8 intent must often be established by circumstantial
9 evidence, and may be inferred from such circumstances
10 as defendant's . . . failure even to attempt
11 performance . . .").

12 Therefore, the Court finds Plaintiff has pled with
13 particularity the elements of a fraud claim under Rule
14 9(b), and Movants' Motion to Dismiss for failure to
15 state a claim for fraud is hereby **DENIED**.

16 **2. Plaintiff's Third Cause of Action -**
17 **Inducing Breach of Contract**

18 The Court **GRANTS** Movants' Motion to Dismiss
19 Plaintiff's Third Cause of Action for Inducing Breach
20 of Contract (also known as interfering with the
21 performance of a contract).

22 Only a "stranger to a contract may be liable in
23 tort for intentionally interfering with the performance
24 of the contract." Pacific Gas & Electric Co. v. Bear
25 Stearns & Co., 50 Cal. 3d 1118, 1296 (1990); Applied
26 Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th

27
28 ¹Compl. ¶¶ 4, 12, 23.

1 503, 514 (1994) (holding that "interference with a
2 contract does not lie against a party to the contract"
3 and that liability "falls only on strangers-interlopers
4 who have no legitimate interest in the scope of course
5 of the contract's performance."). Here, the Complaint
6 specifically alleges that Movants were interested
7 parties to an End User License Agreement contract². As
8 such, the Court finds that the Complaint fails to set
9 forth facts averring that Movants were strangers to the
10 contract.

11 Accordingly, the Court **GRANTS** Movants' Motion to
12 Dismiss Plaintiff's Third Cause of Action of Inducing
13 Breach of Contract. However, because the Plaintiff may
14 be able to allege additional facts to support this
15 Claim, the Court **DISMISSES with 20 days leave to amend**
16 Plaintiff's Third Cause of Action of Inducing Breach of
17 Contract.

18 **3. Plaintiff's Fourth Cause of Action -**
19 **Misappropriation of Trade Secrets**

20 The Court **GRANTS** Movants' Motion to Dismiss
21 Plaintiff's Fourth Cause of Action for Misappropriation
22 of Trade Secrets.

23 To prove an action for misappropriation of trade
24 secrets, "a plaintiff must establish (among other
25 things) that the defendant improperly 'used' the
26 plaintiff's trade secret." Sargent Fletcher, Inc. v.

27
28 ²Compl. ¶¶ 15, 21.

1 Able Corp., 110 Cal. App. 4th 1658, 1668.

2 The Court finds that the Complaint fails to set
3 forth sufficient facts to establish that Movants
4 "improperly used" Plaintiff's trade secret. The only
5 allegation that Plaintiff asserts in its Complaint the
6 alleged improper use is "acquir[ing] the secret by
7 reverse engineering." Compl. ¶43. Under the
8 California Civil Code, however, reverse engineering
9 cannot be the only allegation of "improper" use in an
10 action for misappropriation of trade secrets. Cal.
11 Civ. Code §3246.1(a) ("Reverse engineering . . . alone
12 shall not be considered improper means"); see also ABBA
13 Rubber Co. v. Seaquist, 235 Cal. App. 3d 1, 21-22, fn.
14 9 (Ct. App. 1991).

15 Accordingly, the Court **GRANTS** Movants' Motion to
16 Dismiss Plaintiff's Fourth Cause of Action for
17 Misappropriation of Trade Secrets. However, because
18 the Plaintiff may be able to allege additional facts to
19 support this Claim, the Court **DISMISSES with 20 days**
20 **leave to amend** Plaintiff's Fourth Cause of Action for
21 Misappropriation of Trade Secrets.

22 **4. Plaintiff's Seventh Cause of Action -**
23 **Fraudulent Transfer**

24 The Court **GRANTS** Movants' Motion to Dismiss
25 Plaintiff's Seventh Cause of Action for Fraudulent
26 Transfer.

27 To support a cognizable fraudulent transfer claim,
28 California Civil Code §3439.04 provides that a

1 plaintiff must allege that it has a "claim" against a
2 defendant. A "claim" is defined as a "right to
3 payment." Cal. Civ. Code §3439.01(b). Plaintiff,
4 however, only asserts that it "has a right to payment"
5 from the Movants. The Court finds that this is just a
6 "formulaic recitation of the elements" of the cause of
7 action for fraudulent transfer. See Bell Atl. Corp. v.
8 Twombly, 127 S. Ct. 1955, 1964-65 (2007). The Court
9 finds that Plaintiff's Complaint is deficient because
10 it does not provide any additional facts for how
11 Plaintiff currently has a right to payment from
12 Movants.

13 Accordingly, the Court **GRANTS** Movants' Motion to
14 Dismiss Plaintiff's Seventh Cause of Action for
15 Fraudulent Transfer. However, because Plaintiff may be
16 able to allege additional facts to support this Claim,
17 the Court **DISMISSES with 20 days leave to amend**
18 Plaintiff's Seventh Cause of Action for Fraudulent
19 Transfer.

20 **D. Movants' Motion For A More Definite Statement**

21 Finally, the Court **DENIES** Movants' Motion for a
22 More Definite Statement Pursuant to Federal Rule of
23 Civil Procedure 12(e). As noted above, Plaintiff has
24 set forth sufficient facts with regard to its Second
25 Cause of Action for False Promise. The Motion for a
26 More Definite Statement is moot as to Plaintiff's
27 Third, Fourth, and Seventh Causes of Action as the
28 Court **GRANTS** Movants' Motion to Dismiss for those

1 claims.

2 **III. Conclusion**

3 For the reasons stated above, the Court **DENIES IN**
4 **PART AND GRANTS IN PART** Movants' Motion to Dismiss
5 Complaint for Lack of Personal Jurisdiction [FRCP
6 12(b)(2)], for Failure to State a Claim [FRCP
7 12(b)(6)], or in the alternative, for a More Definite
8 Statement [FRCP 12(e)].

9

10 DATED: September 26, 2011

11 **IT IS SO ORDERED.**

12

RONALD S.W. LEW

13

14

HONORABLE RONALD S.W. LEW

15

Senior, U.S. District Court Judge

16

17

18

19

20

21

22

23

24

25

26

27

28