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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

AQUA CONNECT, INC., a	)	CV 11-5764-RSWL (MANx)
Nevada Corporation,	)	
	)	<b>ORDER re: Defendants</b>
Plaintiff,	)	<b>Arben Kryeziu and Code</b>
	)	<b>Rebel, LLC's Motion to</b>
v.	)	<b>Dismiss First Amended</b>
	)	<b>Complaint for Failure to</b>
CODE REBEL, LLC, a Hawaii	)	<b>State a Claim [25]</b>
Limited Liability Company;	)	
ARBEN KRYEZIU, an	)	
individual; VLADIMIR	)	
BICKOV, an individual; and	)	
DOES 1 through 300,	)	
inclusive,	)	
	)	
Defendants.	)	

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Before the Court is Defendants Arben Kryeziu and Code Rebel, LLC's (hereinafter collectively referred to as "Movants") Motion to Dismiss First Amended Complaint for Failure to State a Claim [25]. This Motion was set for hearing on December 20, 2011 and taken under submission on December 9, 2011. Having reviewed all the papers and arguments submitted pertaining to this Motion, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **GRANTS** Movants' Motion to Dismiss

1 First Amended Complaint for Failure to State a Claim.

2 **I. BACKGROUND**

3 On May 25, 2011, Plaintiff Aqua Connect, Inc.  
4 ("Plaintiff") filed this Action against Defendants Code  
5 Rebel, LLC, Arben Kryeziu, and Vladimir Bickov in the  
6 Superior Court of California, County of Los Angeles  
7 [1]. The original Complaint had seven different  
8 claims. On July 13, 2011, the Action was removed to  
9 this Court [1].

10 On July 20, 2011, in response to the original  
11 Complaint, Movants filed a motion to dismiss this case  
12 based on lack of personal jurisdiction and failure to  
13 state a claim for four of the seven claims [5]. On  
14 September 26, 2011, this Court issued an Order denying  
15 in part and granting in part the Movants' motion to  
16 dismiss [18]. This Court denied Movants' motion as it  
17 pertained to personal jurisdiction and Plaintiff's  
18 False Promise claim. This Court granted, however, with  
19 leave to amend, Movants' motion to dismiss as to  
20 Plaintiff's third, fourth, and seventh claims, which  
21 were claims for inducing breach of contract,  
22 misappropriation of trade secrets, and fraudulent  
23 transfer, respectively.

24 On October 20, 2011, Plaintiff filed its First  
25 Amended Complaint ("FAC") [23]. In its FAC, Plaintiff  
26 dropped its inducing breach of contract and fraudulent  
27 transfer claims. However, Plaintiff made alterations  
28 to its misappropriation of trade secret claim, which is

1 the third claim in Plaintiff's FAC.

2 On November 14, 2011, Movants filed the present  
3 Motion to Dismiss First Amended Complaint [25].

4 Movants only request that the Court dismiss Plaintiff's  
5 misappropriation of trade secret claim.

6 **II. ANALYSIS**

7 Under Federal Rule of Civil Procedure 12(b)(6), a  
8 dismissal can be based on the lack of cognizable legal  
9 theory or the lack of sufficient facts alleged under a  
10 cognizable legal theory. Fed. R. Civ. P. 12(b)(6); see  
11 also Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
12 699 (9th Cir. 1990). A party need not, however, state  
13 the legal basis for his claim, only the facts  
14 underlying it. McCalden v. California Library Ass'n,  
15 955 F.2d 1214, 1223 (9th Cir. 1990).

16 In the present Motion, Defendant has moved the  
17 Court to dismiss Plaintiff's Misappropriation of Trade  
18 Secret Claim. In its FAC, Plaintiff alleges that  
19 Movants downloaded a trial version of Plaintiff's Aqua  
20 Connect Terminal Server software ("ACTS") and  
21 subsequently reverse engineered ACTS in violation of  
22 the End User License Agreement ("EULA"), which Movants  
23 had to agree to in order to use the trial version of  
24 ACTS. Plaintiff alleges that Movants misappropriated  
25 the trade secrets within ACTS and used that information  
26 to create and distribute a competing software product.

27 To state a cause of action for misappropriation of  
28 a trade secret under California law, a plaintiff must

1 plead that (1) the plaintiff owned a trade secret, (2)  
2 the defendant acquired, disclosed, or used the  
3 plaintiff's trade secret through improper means, and  
4 (3) the defendant's actions damaged the plaintiff.  
5 Civ. Code § 3426.1; Cytodyn, Inc. v. Amerimmune Pharm.,  
6 Inc., 160 Cal. App. 4th 288, 297 (Ct. App. 2008).

7 "Improper means" includes theft, bribery,  
8 misrepresentation, breach or inducement of a breach of  
9 a duty to maintain secrecy, or espionage through  
10 electronic or other means," but "[r]everse engineering  
11 or independent derivation alone shall not be considered  
12 improper means." Civ. Code. § 3426.1(a); Sargent  
13 Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658,  
14 1666 (Ct. App. 2003).

15 This Court finds that the FAC does not support a  
16 legally cognizable trade misappropriation claim because  
17 the only improper means pled in the FAC is reverse  
18 engineering, which according to California law, "shall  
19 not be considered improper means" by itself. Plaintiff  
20 argues that the EULA form contract and its alleged  
21 breach by Movants can legally convert the alleged  
22 reverse engineering into an "improper means" of  
23 acquiring Plaintiff's trade secret. The Court finds,  
24 however, that Plaintiff's argument lacks merit.  
25 Justice Moreno in his concurrence to a California  
26 Supreme Court decision, states that "nowhere has it  
27 been recognized that a party wishing to protect  
28 proprietary information may employ a consumer form

1 contract to, in effect, change the statutory definition  
2 of 'improper means' under trade secret law to include  
3 reverse engineering, so that an alleged trade secret  
4 holder may bring an action." DVD Copy Control Ass'n,  
5 Inc. v. Bunner, 31 Cal. 4th 864, 901 n.5 (2003)(Moreno,  
6 J., concurring).

7 An analysis of the statutory language of the  
8 California Uniform Trade Secret Act corroborates  
9 Justice Moreno's concurrence. Civil Code section  
10 3426.1, subdivision (a) specifically states that  
11 "[r]everse engineering alone shall not be considered  
12 improper means." Thus, from the plain language of the  
13 statute, reverse engineering must be combined with some  
14 other improper action in order for it to form the basis  
15 of a cognizable misappropriation claim. The  
16 Legislative Committee Comments clarifies that the word  
17 "alone" refers to the fact that the reverse engineered  
18 item would have to be obtained "by a fair and honest  
19 means, such as purchase of the item on the open market  
20 for reverse engineering to be lawful." Civil Code §  
21 3426.1 (Legislative Committee Comment). Accordingly,  
22 reverse engineering is not an improper means of  
23 acquiring trade secret information when defendants  
24 acquire the item, from which the information is  
25 derived, through fair and honest means. Here, the  
26 Court finds that the FAC is insufficiently pled because  
27 it does not allege that the ACTS trial software was  
28 obtained through unfair or dishonest means. FAC ¶ 8

1 (alleging that Movants acquired ACTS by downloading a  
2 trial version of ACTS). Though a breach of the EULA  
3 may support a cognizable breach of contract claim, the  
4 Court finds that the mere presence of the EULA does not  
5 convert reverse engineering into an "improper means"  
6 within the definition of California trade secret law.

7 In the alternative, Plaintiff argues that a  
8 cognizable misappropriation of trade secret claim does  
9 not always require a pleading of "improper means."

10 Plaintiff claims that the statutory language of the  
11 California Civil Code allows a person to be liable for  
12 misappropriation of a trade secret when that person  
13 discloses or uses a trade secret acquired (1) under  
14 circumstances giving rise to a duty to maintain secrecy  
15 or (2) derived from a person who owed a duty to  
16 maintain the secrecy of the trade secret. Civ. Code §  
17 3426.1. Plaintiff argues that the EULA created a "duty  
18 to maintain secrecy," which was allegedly breached when  
19 Movants reverse engineered ACTS. The Court finds,  
20 however, that Plaintiff's argument lacks merit.

21 California Court have found that this "duty to maintain  
22 secrecy" generally exists in the context of a fiduciary  
23 duty or an employment agreement to maintain the  
24 confidentiality of company trade secrets. See Ali v.  
25 Fasteners for Retail, Inc., 544 F. Supp. 2d 1064, 1070  
26 (allowing a trade secret claim to proceed in the  
27 context of a fiduciary relationship); Ralph Andrews  
28 Prod., Inc. v. Paramount, Pictures Corp., 222 Cal. App.

1 3d 676, 682-83 (analyzing liability context of a  
2 competitor who hires a former employee of another  
3 company who is likely to disclose trade secrets).

4 On the contrary, California courts have not found  
5 that this "duty to maintain secrecy" arises from a form  
6 license agreement as Plaintiff pleads in the FAC.  
7 Confirming this notion is the fact that Plaintiff does  
8 not cite to any cases to support its proposition.  
9 Thus, the Court find that in order to support a legally  
10 cognizable claim, the FAC must plead that Movants  
11 "acquired, disclosed, or used the plaintiff's trade  
12 secret through improper means." Cytodyn, Inc., 160  
13 Cal. App. 4th at 297 (enumerating the required elements  
14 for a trade secret misappropriation claim).

15 Here, the Court finds that the FAC has only pled  
16 that Movants acquired Plaintiff's trade secret through  
17 "reverse engineering." As such, this Court finds that  
18 Plaintiff has not pled sufficient facts to support a  
19 cognizable trade secret misappropriation claim.

### 20 **III. CONCLUSION**

21 For the reasons stated above, the Court **GRANTS**  
22 Movants' Motion to Dismiss First Amended Complaint for  
23 Failure to State a Claim. Accordingly, the Court  
24 hereby **DISMISSES** Plaintiff's Misappropriation of Trade  
25 Secret Claim, which is Plaintiff's Third Claim in its  
26 FAC, **without leave to amend**. The Court dismisses  
27 without leave to amend because the Court finds that no

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1 additional facts can be alleged to support a legally  
2 cognizable misappropriation of trade secret claim.

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**IT IS SO ORDERED.**

DATED: February 13, 2012

RONALD S.W. LEW



**HONORABLE RONALD S.W. LEW**  
Senior, U.S. District Court Judge