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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Aqua Connect, Inc.,)	CV 11-5764 RSWL (MANx)
)	
Plaintiff,)	
)	ORDER Re: Plaintiff's
v.)	Motion To Amend
)	Complaint [58]
)	
Code Rebel LLC, Arben)	
Kryeziu, Vladimir Bickov,)	
and Does 1 through 300)	
inclusive,)	
)	
)	
Defendants.)	
)	

Before the Court is Plaintiff Aqua Connect, Inc.'s ("Plaintiff") Motion to Amend Complaint [58]. The Motion was set for hearing on January 9, 2013, and taken under submission on January 2, 2013 [72]. Having reviewed all the papers and arguments submitted pertaining to these Motions, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **GRANTS** Plaintiff's Motion.

Federal Rule of Civil Procedure 15(a) provides that once the time frame to amend a pleading as a matter of course has lapsed, a party may amend its pleading only

1 by obtaining leave of the court. Fed. R. Civ. P.
2 15(a); Lone Star Ladies Invest. Club v. Schlotzskys
3 Inc., 238 F.3d 363, 367 (5th Cir. 2001). Leave shall
4 be freely given when justice so requires. Fed. R. Civ.
5 P. 15(a). Courts consider the following factors that
6 alone, or in combination, may justify denying a motion
7 for leave to amend: undue prejudice to the opposing
8 party, undue delay, bad faith or dilatory motive,
9 futility of amendment, and whether the movant has
10 previously amended a pleading. See Eminence Capital,
11 LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir.
12 2003).

13 Plaintiff seeks to amend its First Amended
14 Complaint ("FAC") so that it could change Defendant
15 Vladimir Bickov's name to Volodymyr Bykcof a/k/a
16 Vladimir Bickov and remove the DOE defendants.
17 Plaintiff also seeks to change the operative contract
18 identified in its FAC, the End User License Agreement
19 ("EULA"), which applied to users who purchased
20 Plaintiff's software, to another similar agreement
21 called the Trial EULA, which applied to users who were
22 evaluating Plaintiff's software prior to purchasing it.

23 The Court finds that on balance the above-mentioned
24 factors weigh in favor of granting Plaintiff's present
25 request for leave to amend.

26 As to the factor of undue delay or dilatory motive,
27 the Court finds that this factor weighs in favor of
28 Plaintiff's request for leave to amend. Undue delay

1 and/or dilatory motive is typically found when the
2 party seeking leave to amend knew of the facts and
3 information supporting the basis for the amendment
4 early in the litigation. Acri v. Int'l Assoc. of
5 Machinists & Aerospace Workers, 781 F.2d 1393, 1398
6 (9th Cir. 1986); Matter of Beverly Hills Bancorp, 752
7 F.2d 1334, 1338 (9th Cir. 1984). Although Defendants
8 bemoan the fact that this amendment comes eighteen
9 months after the filing of Plaintiff's initial
10 complaint, it appears that Plaintiff did not discover
11 that Defendants agreed to the Trial EULA, rather than
12 the EULA, until the early stages of discovery.

13 Second, as to prejudice to the opposing party, the
14 Court finds that granting Plaintiff's Motion at this
15 stage will unlikely cause prejudice to Defendants.
16 Prejudice must be substantial in order to justify
17 denial of leave to amend. Morongo Band of Mission
18 Indians, 893 F.2d 1074, 1079 (9th Cir. 1990).
19 Plaintiff produced the Trial EULA in July 2012, and
20 Defendants have been able to conduct discovery on it
21 since then. Presently, the discovery cut-off in this
22 Action is not until March 11, 2013, during which
23 Defendants can conduct further discovery on the Trial
24 EULA if necessary. Further, the expert cut-off in this
25 Action is not until May 10, 2013, and the motions cut-
26 off is not until June 7, 2013.

27 Further, the Trial EULA and the EULA both contain
28 provisions forbidding reverse engineering, which forms

1 the basis of all of Plaintiff's claims, and the
2 provisions contain similar language. The Trial EULA
3 states, "Licensee shall not, nor shall it permit,
4 assist, or encourage any third party to: . . . (d)
5 reverse engineer, decompile, disassemble or otherwise
6 attempt to derive the source code for the Software. . .
7 ." The EULA states, "Licensee shall not reverse
8 engineer, reverse compile or disassemble the Software,
9 or otherwise attempt to derive the source code to the
10 Software." Defendants have not indicated how this
11 different language materially changes the claims in
12 this Action. Nevertheless, Defendants still have time
13 to analyze the differences between the EULA and the
14 Trial EULA to prepare for their defense.

15 However, the Court will allow Plaintiff to file the
16 proposed amended complaint found in **Exhibit B** attached
17 to its Motion to Amend Complaint [58] only. The
18 proposed amended complaint attached as Exhibit A
19 contains a misappropriation of trade secrets claim
20 against Defendant Bickov, using the same exact language
21 that Plaintiff had used in its FAC, that was previously
22 dismissed by the Court without leave to amend.

23 In its FAC, Plaintiff alleges that Defendants
24 downloaded a trial version of Plaintiff's ACTS and
25 subsequently reverse engineered ACTS in violation of
26 the EULA, which Defendants had to agree to in order to
27 use the trial version of ACTS. Plaintiff alleges that
28 Defendants misappropriated the trade secrets within

1 ACTS and used that information to create and distribute
2 a competing software product. In the FAC, the
3 misappropriation of trade secrets claim was pled as to
4 all Defendants in this Action, including Bickov.

5 The Court dismissed Plaintiff's Misappropriation of
6 Trade Secret claim in its February 13, 2012 Order [30].
7 In the Order, the Court held that to state a cause of
8 action for misappropriation of a trade secret under
9 California law, a plaintiff must plead that (1) the
10 plaintiff owned a trade secret, (2) the defendant
11 acquired, disclosed, or used the plaintiff's trade
12 secret through improper means, and (3) the defendant's
13 actions damaged the plaintiff. Civ. Code § 3426.1;
14 Cytodyn, Inc. v. Amerimmune Pharm., Inc., 160 Cal. App.
15 4th 288, 297 (2008). The Court reasoned that the FAC
16 did not "support a legally cognizable trade
17 misappropriation claim because the only improper means
18 pled in the FAC is reverse engineering, which according
19 to California law, 'shall not be considered improper
20 means' by itself." Order at 4. The Court dismissed
21 the claim without leave to amend because the Court
22 found that no additional facts can be alleged to
23 support a legally cognizable misappropriation of trade
24 secret claim. Id. at 7-8. Here, the proposed Second
25 Amended Complaint contained in Exhibit A to Plaintiff's
26 Motion contains the identical misappropriation of trade
27 secrets claim that was already dismissed. Plaintiff
28 has not pled any new facts in the proposed Second

1 Amended Complaint that would cause the Court to
2 reconsider its previous order. If the Court allows
3 Plaintiff to amend its complaint with Exhibit A,
4 Defendants will likely bring a motion to dismiss. The
5 proposed amended complaint found in Exhibit B conforms
6 with this Court's prior orders because it omits the
7 misappropriation of trade secrets claim.

8 Finally, Defendants sought attorney's fees as a
9 condition of allowing Plaintiff to file an amended
10 complaint. However, the Court finds that Defendants'
11 claim to attorney's fees is without merit. Defendants
12 cite to Section 1717 of the California Civil Code,
13 which awards attorney's fees to the prevailing party in
14 a breach of contract action where the contract itself
15 provides for attorney's fees. However, under
16 subdivision (b) (2) of Section 1717, "[w]here an action
17 has been voluntarily dismissed or dismissed pursuant to
18 a settlement of the case, there shall be no prevailing
19 party for purposes of this section." Cal. Civ. Code §
20 1717; Del Cerro Mobile Estates v. Proffer, 87 Cal. App.
21 4th 945, 947 (2001) (Defendant, the prevailing party,
22 was not entitled to attorney's fees on breach of
23 contract claim that plaintiff voluntarily dismissed).
24 Here, Plaintiff is not admitting that Defendants have
25 prevailed on the EULA and there was not adjudication on
26 the merits where the Court found that Defendants
27 prevailed on the EULA. The EULA is apparently not even
28 the agreement that Defendants signed. At most,

1 Plaintiff is voluntarily dismissing its claims based on
2 the EULA, which means Defendants are not entitled to
3 attorney's fees under Section 1717. Defendants have
4 not cited to any authority that would allow for
5 recovery of attorney's fees in this situation where
6 Plaintiff is merely amending its complaint to reflect
7 the actual end-user agreement that Defendants and
8 Plaintiffs signed.

9 Based on the foregoing reasons, Plaintiff's Motion
10 for Leave Amend Complaint is **GRANTED**. Plaintiff shall
11 manually file with the Clerk's Office **Exhibit B** to its
12 Motion to Amend Complaint [58] **within 20 days of this**
13 **order**.

14
15 **IT IS SO ORDERED.**

16 DATED: January 17, 2013

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18 RONALD S.W. LEW

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