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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AQUA CONNECT, INC., a Nevada Corporation,)	CV 11-5764 (MANx)
)	
Plaintiff,)	
)	
v.)	ORDER re: Defendants
)	Code Rebel, LLC, Arben
CODE REBEL, LLC, a Hawaii)	Kryeziu, and Vlodymyr
Limited Liability Company;)	Bykov's Motion to
ARBEN KRYEZIU, an)	Dismiss Second Amended
individual; VOLODYMYR BYKOV)	Complaint for Failure to
a/k/a VLADIMIR BICKOV, an)	State a Claim [80]
individual; and DOES 1)	
through 10, inclusive,)	
)	
Defendants.)	
_____)	

Before the Court is Defendants Code Rebel, LLC, Arben Kryeziu, and Volodymyr Bykov's (hereinafter collectively referred to as "Defendants") Motion to Dismiss Second Amended Complaint for Failure to State a Claim [80]. This Motion was set for hearing on March 19, 2013, and taken under submission on March 14, 2013. Having reviewed all the papers and arguments submitted pertaining to this Motion, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

1 The Court hereby **DENIES** Defendants' Motion to
2 Dismiss Second Amended Complaint for Failure to State a
3 Claim.

4 **I. BACKGROUND**

5 On May 25, 2011, Plaintiff Aqua Connect, Inc.
6 ("Plaintiff") filed this Action against Defendants Code
7 Rebel, Arben Kryeziu, and Volodymyr Bykov a/k/a
8 Vladimir Bickov in the Superior Court of California,
9 County of Los Angeles [1]. On July 13, 2011, the
10 Action was removed to this Court [1].

11 Plaintiff alleges that Defendants reverse
12 engineered a fourteen-day trial version of Plaintiff's
13 software, known as Aqua Connect Terminal Server
14 ("ACTS"), and subsequently produced and distributed a
15 competing software product, in violation of an End-User
16 License Agreement ("EULA") that Defendants signed.
17 Plaintiff's Second Amended Complaint ("SAC") alleges
18 claims for (1) breach of contract; (2) false promise;
19 (3) unfair competition under California Business and
20 Professions Code § 17200; and (4) unjust enrichment.

21 Defendants filed the present Motion to Dismiss
22 Second Amended Complaint on February 15, 2013 [80].
23 Defendants only seek to dismiss Plaintiff's breach of
24 contract claim.

25 **II. ANALYSIS**

26 Under Federal Rule of Civil Procedure 12(b)(6), a
27 dismissal can be based on the lack of cognizable legal
28 theory or the lack of sufficient facts alleged under a

1 cognizable legal theory. Fed. R. Civ. P. 12(b)(6); see
2 also Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
3 699 (9th Cir. 1990). A party need not, however, state
4 the legal basis for his claim, only the facts
5 underlying it. McCalden v. California Library Ass'n,
6 955 F.2d 1214, 1223 (9th Cir. 1990).

7 Defendants argue that Plaintiff's Second Amended
8 Complaint alleges a breach of contract claim that must
9 be dismissed. Plaintiff's breach of contract claim is
10 based on Defendants' alleged breach of the EULA to
11 which agreed Defendants prior to installing the trial
12 ACTS. The relevant EULA provision states,

13 Licensee shall not, nor shall it permit, assist
14 or encourage any third party to: . . . (c)
15 reverse engineer, decompile, disassemble or
16 otherwise attempt to derive source code for the
17 Software, **except and only to the extent that**
18 **such activity is expressly permitted by**
19 **applicable law notwithstanding this limitation.**
20 . . .

21 SAC, Ex. 1, § 3 (emphasis added). Plaintiff contends
22 that Defendants breached this provision of the EULA by
23 reverse engineering the trial ACTS. See SAC ¶ 16.

24 The resolution of this Motion depends upon
25 interpreting this EULA provision. Plaintiff argues
26 that the Court should interpret the EULA provision to
27 mean that a "licensee may not reverse engineer the
28 [trial ACT] software unless the law does not allow

1 waiver of the right to reverse engineering in that
2 context," meaning that reverse engineering is
3 restricted under the EULA to the maximum extent allowed
4 by law. Pl.'s Opp'n at 2, 4. Defendants argue that
5 they have not breached the EULA. Instead, they contend
6 that reverse engineering is "permitted by applicable
7 law" under the EULA because allegedly the Copyright
8 Act, the Digital Millennium Copyright Act ("DMCA") and
9 the California Uniform Trade Secrets Act, among others,
10 allow reverse engineering.

11 For the purposes of this Motion, the Parties agree
12 that the Court should assume that Defendants have in
13 fact reverse engineered Plaintiff's product. As
14 discussed below, the Court finds that Defendants'
15 argument lacks merit.

16 "Resolution of contractual claims on a motion to
17 dismiss is proper if the terms of the contract are
18 unambiguous." Monaco v. Bear Stearns Residential
19 Mortg. Corp., 554 F.Supp.2d 1034, 1040 (C.D. Cal. 2008)
20 (citing Bedrosian v. Tenet Healthcare Corp., 208 F.3d
21 220 (9th Cir. 2000); Westlands Water Dist. v. U.S.
22 Dep't of Interior, 850 F. Supp. 1388, 1408 (E.D. Cal.
23 1994) ("A motion to dismiss cannot be granted against a
24 complaint to enforce an ambiguous contract.")). A
25 contract provision is considered ambiguous when it is
26 susceptible to two or more reasonable interpretations.
27 Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins.
28 Co., 5 Cal.4th 854, 867 (1993). "Courts will not adopt

1 a strained or absurd interpretation in order to create
2 an ambiguity where none exists." Id. Language in a
3 contract must be construed in the context of that
4 instrument as a whole, and in the circumstances of the
5 case, and cannot be found to be ambiguous in the
6 abstract. Id.; see also Bank of the West v. Superior
7 Court, 2 Cal.4th 1254, 1265 (1992).

8 The Court finds that the EULA provision at issue
9 is unambiguous because it is not susceptible to more
10 than one construction. Based on its plain language,
11 the provision means that a licensee agrees that it will
12 not reverse engineer Plaintiff's software except in
13 those specific instances expressly permitted by law.
14 Thus, unless Defendants reverse engineered in a manner
15 expressly allowed or protected by applicable law,
16 Defendants' reverse engineering constitutes a breach of
17 the EULA. Accordingly, in order to be covered under
18 the EULA exception, Defendants need to show that there
19 is law explicitly stating that Defendants' activity is
20 permissible.

21 Although Defendants' arguments are not entirely
22 clear, Defendants appear to be interpreting the EULA to
23 mean that reverse engineering is permitted under the
24 EULA if there is **any law** that permits reverse
25 engineering in **some other context**. Also, Defendants
26 seem to be contending that reverse engineering is
27 always expressly permitted by law, except in those few
28 instances that Defendants have identified where law

1 expressly prohibits reverse engineering, such as patent
2 law. However, the contract does not lend itself to
3 such an interpretation and, as further discussed below,
4 the authority cited by Defendants indicate that reverse
5 engineering is not actually permitted in every
6 circumstance. In particular, Defendants' reading of
7 the contract does not give sufficient meaning to the
8 words "except and only to the extent," which indicate
9 that the EULA prohibits reverse engineering in all
10 situations other than those specific instances allowed
11 by law.

12 Further, Defendants' proposed interpretation of the
13 EULA provision renders it ineffective and superfluous.
14 "Any contract must be construed as a whole, with the
15 various individual provisions interpreted together so
16 as to give effect to all, if reasonably possible or
17 practicable." City of Atascadero v. Merrill Lynch,
18 Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 473
19 (1998) (citations omitted). Further, "[c]ourts must
20 interpret contractual language in a manner which gives
21 force and effect to every provision, and not in a way
22 which renders some clauses nugatory, inoperative or
23 meaningless." Id. The result of Defendants' proposed
24 interpretation would be that Plaintiff could never
25 state a breach of contract claim under the EULA, even
26 though the EULA is clearly intended to proscribe
27 reverse engineering whenever possible. Defendants'
28 interpretation would also conflict with the general

1 intent of the contract, which is to limit the scope of
2 the license granted to trial ACTS software users.
3 Under the EULA, the ACTS software is provided "solely
4 for evaluation purposes . . . in order to assist in
5 Licensee's decision to purchase a license" and
6 prohibited the licensee from exercising any other
7 rights to the software, including creating derivative
8 works from the software or altering or adapting the
9 software. SAC, Ex. 1. Further, the license expired
10 after fourteen days. Id.

11 Defendants have raised and cited to laws that,
12 according to Defendants, "expressly permit" reverse
13 engineering, such as the California Uniform Trade
14 Secrets Act and the DMCA. However, these laws do not
15 support Defendants' contention that Plaintiff cannot
16 state a claim for **breach of contract**. For example, the
17 California trade secrets law does not stand for the
18 general proposition that reverse engineering is
19 "expressly permitted" by law. Rather, under the
20 California trade secret statute, reverse engineering
21 alone cannot form the basis of a cause of action for
22 misappropriation of a trade secret. Cal. Civ. Code §
23 3456.1. This was addressed in the Court's prior order
24 on Defendants' Motion to Dismiss First Amended
25 Complaint for Failure To State a Claim, which dismissed
26 Plaintiff's misappropriation of trade secrets claim
27 [30]. Plaintiff is not asserting a misappropriation of
28 trade secrets claim. Instead it is asserting a breach

1 of contract claim, which is premised on Defendants'
2 alleged reverse engineering of Plaintiff's software in
3 violation of the terms of the EULA. Even if Plaintiff
4 cannot state a claim for misappropriation of trade
5 secrets, it can still state a claim for breach of
6 contract.

7 Defendants' citation to the DMCA for the
8 proposition that reverse engineering is expressly
9 permitted by law and thus allowed under the EULA is
10 also misplaced. Among other features, the DMCA
11 penalizes individuals who circumvent technological
12 measures that are used to protect and control access to
13 copyrighted works. 17 U.S.C. § 1201. However, the
14 DMCA provides an exception by allowing reverse
15 engineering in specific instances. See id. One
16 exception, among others, is reverse engineering in
17 order to identify and analyze

18 those elements of the program that are
19 necessary to achieve interoperability of an
20 independently created computer program with
21 other programs, and that have not previously
22 been readily available to the person engaging
23 in the circumvention, to the extent any such
24 acts of identification and analysis do not
25 constitute infringement under this title.

26 17 U.S.C. § 1201. These exceptions do not affect
27 Plaintiff's breach of contract claim. Plaintiff has
28 not alleged any DMCA claim. Although reverse

1 engineering, in some cases, does not violate the DMCA,
2 reverse engineering may still breach a contract that
3 otherwise prohibits reverse engineering. In other
4 words, just because reverse engineering is permissible
5 in one context does not mean that reverse engineering
6 is generally allowed *under the language of the EULA*.

7 The Court also rejects Defendants' suggestion that
8 Plaintiff's breach of contract claim must be dismissed
9 because reverse engineering is "expressly permitted" by
10 copyright law. The primary cases addressing reverse
11 engineering in the copyright context, upon which
12 Defendants rely, do not create an absolute right to
13 reverse engineer software. Specifically, the Ninth
14 Circuit held in Sega Enterprises Ltd. v. Accolade,
15 Inc., that reverse engineering qualifies as *fair use* in
16 some specific instances, which can be a defense to a
17 claim of **copyright infringement**. 977 F.2d 1510, 1515
18 (9th Cir. 1992). The Court held that

19 the Copyright Act permits persons who are
20 neither copyright holders nor licensees to
21 disassemble a copyrighted computer program in
22 order to gain an understanding of the
23 unprotected functional elements of the program
24 . . . when the person seeking the understanding
25 has a legitimate reason for doing so and **when**
26 **no other means of access to the unprotected**
27 **elements exists.**

28 Id. (emphasis added); see also Sony Computer Entm't,

1 Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir.
2 2000). Although the case makes clear that reverse
3 engineering is permissible in some limited cases under
4 the *fair use doctrine*, the case does not generally
5 stand for the proposition that reverse engineering is a
6 right under **any** set of circumstances. Further, Sega
7 Enterprises indicates that other instances of reverse
8 engineering do not necessarily qualify as fair use
9 because courts must still weigh the statutory fair use
10 factors delineated under the Copyright Act, 17 U.S.C. §
11 107. More importantly, the Ninth Circuit in Sega
12 Enterprises did not involve an end user license
13 agreement that restricted reverse engineering. Here,
14 the EULA precludes all forms of reverse engineering
15 that are not expressly permitted by law.

16 Finally, Defendants' reliance upon Entertainment
17 Research Group, Inc. v. Genesis Creative Group, Inc.,
18 122 F.3d 1211 (9th Cir. 1997), for the proposition that
19 reverse engineering is always permitted under law is
20 also misplaced. Defendants rely upon Genesis because
21 the Ninth Circuit states there that reverse engineering
22 is legal in a product not protected by a patent.
23 Entm't Research Group, Inc., 122 F.3d at 1227.
24 However, in Genesis, the Ninth Circuit made this
25 statement while addressing a different cause of action,
26 and did not address the possibility that a contractual
27 term itself could prohibit reverse engineering. In
28 Genesis, the Ninth Circuit found that the defendant did

1 not commit the California tort of breach of confidence
2 when it reversed-engineered the plaintiff's inflatable
3 costumes. Id. at 1227-28. To prevail on a breach of
4 confidence claim, plaintiff had to demonstrate, *inter*
5 *alia*, that it conveyed confidential information to the
6 defendant. Id. at 1227. The Court noted that because
7 the plaintiff did not require previous purchasers of
8 its inflatable costumes to sign non-disclosure
9 agreements in order to prevent reverse engineering from
10 occurring, any design information that plaintiff
11 conveyed to defendant was not confidential as a matter
12 of law, and no breach of confidence occurred. Id. The
13 Ninth Circuit supported this reasoning by stating that
14 reverse engineering is legal in an unpatented product.
15 Id. This case does not stand generally for the
16 proposition that reverse engineering is expressly
17 permitted and is inapplicable here.

18 In sum, the EULA prohibits all reverse engineering,
19 except when there is explicit law that authorizes
20 Defendants' conduct. Thus, to the extent that
21 Plaintiff's breach of contract claim is based on
22 explicitly protected forms of reverse engineering,
23 Plaintiff cannot state a claim for breach of the EULA.
24 At this point, Defendants have not identified any law
25 protecting their reverse engineering activities and
26 Defendants have not shown that they have engaged in the
27 type of reverse engineering that is expressly permitted
28 by law. Therefore, their Motion to Dismiss must be

1 denied.

2 **III. CONCLUSION**

3 For the reasons stated above, the Court **DENIES**
4 Defendants' Motion to Dismiss Plaintiff's Second
5 Amended Complaint for Failure to State a Claim.

6
7 **IT IS SO ORDERED.**

8 DATED: April 4, 2013

9
10 **RONALD S.W. LEW**

11

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

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