

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Plaintiff Aqua Connect, Inc. hereby submits its opposition to Defendants Arben
3 Kryeziu, Vladimir Bickov, and Code Rebel, LLC's Ex Parte Application to Compel, Etc.
4

5 **I. INTRODUCTION**

6 This ex parte application has a simple resolution which has already been proposed
7 by Plaintiff on numerous occasions: Defendants can have their own expert build the
8 executables requested from the source code provided by Plaintiff. Plaintiff's offer will
9 still be on the table while this application is pending, and even if the Court denies this
10 application.

11 To summarize the ex parte application, Defendants are asking this Court to either:

12 (a) require Plaintiff to create something:

13 (i) that is not in its possession, custody, or control; **and**

14 (ii) that Defendants' own expert can create from the information supplied
15 by Plaintiff with an equal amount of effort;

16 (b) or, in the alternative, require Plaintiff to do something it has already done.

17 A request for production is not a tool to get a party to create something that is not
18 in its possession, custody, or control. Nor is a request for production an interrogatory
19 which can be rewritten *ex post facto* after the discovery cut-off. There is simply no
20 evidence that Defendants' expert cannot build the versions at issue with the information
21 provided by Plaintiff.

22 Finally, ex parte relief is completely inappropriate because approximately nine
23 months ago Plaintiff told Defendants that it had already turned over everything
24 responsive it had, and Defendants did not file a motion, nor make anything more than an
25 informal request for the executables five months later without referencing previous
26 discovery requests or responses. One month ago, Plaintiff unequivocally told Defendants
27 it wasn't going to build executables for Defendants, and that they were welcome to have
28 their own expert build them if they wanted them. Any emergency is that of Defendants'

1 own making.

2 **II. STATEMENT OF FACTS**

3 Plaintiff complaint alleges, *inter alia*, that Defendants reverse engineered
4 Plaintiff's software to create and improve a competing software product. Plaintiff's
5 software is known as Aqua Connect Terminal Server ("ACTS") and Defendants'
6 software is known as iRAPP TS. Defendants admit they downloaded and installed one
7 version of Plaintiff's software in January of 2008, version 1038, and a subsequent
8 version, version 1478, was e-mailed to Bykov in March of 2008. (Hagemann Decl. ¶ 2.)

9 On September 12, 2012, Plaintiff told Defendants it had produced every
10 responsive document. (Ex. 1.) Plaintiff further supplemented its response to Request for
11 Production Number 14 on September 14, 2012 to make it clear that it wasn't producing
12 executables. (Ex. D, [91-1 p. 27].)

13 Plaintiff has provided complete access to its source code repository to Defendants'
14 expert, Jeffrey Safire. (Hagemann Decl. ¶ 3.) Defendants' expert actually viewed
15 Plaintiff's source code for one entire day, January 29, 2013, and he has requested and
16 unilaterally cancelled several follow-up inspections. (*Id.* ¶ 4.)

17 On February 20, 2013, Defendants requested the executables via e-mail so that
18 Mr. Safire could examine them. (Ex. M, [91-1 p. 64-65].) Plaintiff's counsel responded
19 that he would check with his client. (*Id.*) To the best of Plaintiff's counsel's recollection,
20 shortly thereafter, the parties followed up telephonically regarding the executables, and
21 Plaintiff's counsel suggested that Mr. Safire build whatever versions he wished.
22 (Hagemann Decl. ¶ 5.) This point was reiterated on April 19, 2013. (Ex. K [91-1 p. 58-
23 59].) On April 30, 2013 at 6:31 pm, Plaintiff sent an e-mail unequivocally stating that it
24 wasn't going to build executables for Defendants. (Ex. 2.)

25 **III. ARGUMENT**

- 26 **a. Ex Parte Relief Is Not Appropriate Because Defendants Waited Nine**
27 **Months After The Last Supplement To Bring This Issue To The**
28 **Court's Attention**

1 On September 12, 2012, Plaintiff sent an e-mail to Defendants which said: “This
2 production should conclude the full production of all documents we agreed to produce,
3 except for those items such as source code that we invited you to inspect pursuant to the
4 protective order provisions.”

5 On September 14, 2012, Plaintiff further supplemented its response to Request for
6 Production Number 14 to clearly state what it was producing in response:

7 Notwithstanding any of the previous responses, responding party agrees to
8 produce all responsive documents in its possession, custody, or control.

9 Responding party identifies the following responsive documents in its
10 possession, custody, or control:

11 AquaConnect Terminal Server source code (available for inspection
12 pursuant to section III(E) of the protective order.)

13 There was no further supplement to Request for Production Number 14 after
14 September 14, 2012, nor any complaints from Defendants.

15 On February 20, 2013, about twenty days after Defendants’ expert, Jeffrey Safire,
16 began his inspection of Plaintiff’s source code, Defendants requested the executables via
17 e-mail so that Mr. Safire could examine them. There was no reference to Request for
18 Production Number 14, or any other discovery request. Plaintiff’s counsel responded that
19 he would check with his client. To the best of Plaintiff’s counsel’s recollection, shortly
20 thereafter, the parties followed up telephonically regarding the executables, and
21 Plaintiff’s counsel suggested that Mr. Safire build whatever versions he wished. On
22 April 19, 2013 the parties exchanged another series of e-mails in which Plaintiff
23 reiterated its position again regarding Safire being welcome to build any executables he
24 so desired. (Ex. K [91-1 p. 58-59].) On April 30, 2013 at 6:31 pm, Plaintiff sent an e-
25 mail which stated:

26 Regarding the executables of ACTS, my client conducted a diligent search
27 for any copies of the builds you requested, and couldn’t find them in its
28 possession, custody, or control. While they can theoretically re-build an
executable from source, the problem is that it would take them a substantial
amount of time. If I understand the problem right, the build links to
network directories that don’t exist anymore, and for which manual
corrections are needed, they don’t have the necessary hardware/OS
combination reasonably available to build, and they would then need to try

1 to find the appropriate XCode version to compile it. If things slow down
2 for my client, which they hope will happen in a month or two, they may be
3 able to build the versions you requested, but it's just not practical right
4 now. It is my understanding it would cost them the equivalent of
5 \$20,000.00 to build them right now. I would suggest talking to your expert
6 and see if he can build it.

7 Defendants did not follow-up for another month. Then, they sent notice of this ex
8 parte application at 10:56 pm on May 28, 2013. Plaintiff responded to the notice,
9 explaining what is explained in this opposition. (Ex. O, [91-2 p. 8].) A noticed motion
10 could have been heard already if Defendants had filed a motion after Plaintiff's
11 unambiguous refusal of their request on April 30, 2013.

12 Finally, Defendants have placed themselves in an internally inconsistent position.
13 If they argue that Plaintiff failed to comply and/or supplement Request for Production
14 Number 14, then they waited almost nine months and well after the discovery cut-off to
15 compel a response/compliance. Plaintiff's discovery response of September 14, 2012 is
16 clear and unambiguous: it was going to produce source code, not executables. If
17 Defendants argue that Plaintiff failed to comply with their informal request for
18 executables on February 20, 2013, then the delay in filing is far more reasonable, but
19 there is no basis to compel a response to an informal request.

20 **b. Plaintiff Has Already Complied With The Request, But Now**
21 **Defendants Are Implicitly Attempting To Rewrite The Request**

22 There is no dispute that Defendants' Request for Production number fourteen is a
23 request to produce electronically stored information:

24 Please produce the version of YOUR Aqua Connect Terminal Server from
25 which YOU contend CODE REBEL reverse engineered to produce its
26 "IRAPP TS" product.

27 Therefore, subparts (b)(2)(D) and (E) of Rule 34 of the Federal Rules of Civil
28 Procedure govern. Defendants requested the "versions" of Plaintiff's software at issue.
Having failed to specify executables or source code, Plaintiff elected to produce source
code from which executables could be built by Defendants. Producing the source code is
strictly superior from an information disclosure standpoint. It provides the same

1 information as the executable, plus more (the underlying source code). Further, the e-
2 mails attached by Defendants actually show how they continuously conflated “versions”
3 with “source code” with “executables.” (*See, e.g.*, Exs. F-M.)

4 All electronically stored information is merely a bunch of ones and zeros. Fed. R.
5 Evid. 201(b). In order to view the ones and zeros in a human-readable format, a viewing
6 application is required. *Id.* Even a PDF document requires a PDF viewer, such as Adobe
7 Reader, to view. *Id.* Here, the viewing application required to view AND execute the
8 “versions” at issue produced by Plaintiff is XCode and OS X version 10.5. (Ex. 2.) The
9 executables requested by Defendants are equally not human-readable, and can only be
10 executed by OS X version 10.5. Fed. R. Evid. 201(b). Other than XCode, the same
11 environment would be required to execute the source code or executable. (Ex. 2.)
12 Therefore, there is no fundamental reason why executables are superior to source code in
13 this context.

14 Further, Defendants admit they downloaded two versions of Plaintiff’s software.
15 There are potentially thousands of other versions which Defendants could have easily
16 obtained by providing false contact information to Plaintiff, on file sharing websites, or
17 from third parties. Fed. R. Evid. 201(b). Therefore, it was far more practical to provide
18 access to the entire source code repository than to produce executables. This is because
19 minor changes in the source code would be a small entry in the source code repository,
20 but could drastically change the executable. Thus, it is far more efficient, storage-wise,
21 to store source code.

22 Additionally, producing source code in lieu of executables is analogous to subpart
23 (d) of Rule 33:

24 Option to Produce Business Records. If the answer to an interrogatory may
25 be determined by examining, auditing, **compiling**, abstracting, or
26 summarizing a party’s business records (including electronically stored
27 information), and if the burden of deriving or ascertaining the answer will
28 be substantially the same for either party, the responding party may answer
by ...
(emphasis added)

1 Notwithstanding the above, because Plaintiff has a source code repository, there is
2 generally no reason to keep the executables, especially executables from five years ago,
3 well before this lawsuit was filed. Specifically, Plaintiff simply does not have the
4 executables Defendants admitted to downloading five year ago. (Ex. 2.) That being said,
5 with equal effort, either Plaintiff or Defendants can create executables from the source
6 code provided by Plaintiff. (*Id.*)

7 It is Plaintiff's position that effort should be borne by Defendants. If Defendants'
8 expert is unable to build the application from source code, then that is very telling of the
9 expert's qualifications. Even though there is no legal basis to require a party to create
10 something, from a fairness standpoint, there is no evidence that Defendants' expert
11 cannot build the versions at issue with the information provided by Plaintiff.

12 **c. There Is No Duty To Produce Something Which Is Not In The**
13 **Responding Party's Possession, Custody, Or Control**

14 A request for production can only compel, "items in the responding party's
15 possession, custody, or control." Fed. R. Civ. P. 34(a)(1). If Defendants have any
16 evidence that the executables are actually in the possession, custody, or control of
17 Plaintiff, they should have attached it to this application. If not, then there is no basis to
18 compel compliance when non-compliance has not been proven.

19 **d. There Is No Duty To Specify In A Response To A Request For**
20 **Production Each Item Which Is Not In The Possession, Custody, Or**
21 **Control Of The Responding Party**

22 Defendants fundamentally misunderstand Rule 34, and are attempting to rewrite it.
23 Requests for production are about obtaining items held by the responding party. They are
24 not interrogatories, and the response itself to a request for production is typically binary.
25 A response to a request for production is usually either:

26 (1) After a diligent search and reasonable inquiry, responding party was unable to
27 locate any responsive items in its possession, custody or control.

28 (2) Responding party agrees to produce (2) all responsive items in its possession,

1 custody, or control.

2 If there is one or more responsive items, then there would be no difference in the
3 required response between one and many responsive items. The difference would be in
4 the production: if there is more than one item, more than one item is produced.

5 Here, Plaintiff elected the latter response because there is at least one responsive
6 item: the source code. If Defendants wanted to compel only executables, then they could
7 have propounded a different request for production while discovery was open. Or, if they
8 wanted a question answered, not the production of items, they could have propounded a
9 follow-up interrogatory. Neither of these possible follow-up requests were utilized. Nor
10 can Plaintiff fathom any additional relevance to these putative follow-up requests.

11 Additionally, Plaintiff went above and beyond the response requirement, and
12 specifically listed the responsive documents, which did not include executables. Even
13 though such a response is unnecessary, it is exactly what Defendants are requesting in the
14 alternative. In other words, Plaintiff complied with Defendants' alternative request
15 almost nine months ago.

16 Presumably, Defendants want the executables first-and-foremost because it is their
17 primary request in this application. If they had spent their resources building the
18 executable instead of filing an ex parte application, they might have already built it by
19 now.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Court should deny Defendants' application as an
22 improper ex parte, and as lacking in substantive merit.

23

24 DATED: May 30, 2013

25

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorney for Plaintiff, AQUA CONNECT, INC.

26

27

28