

The Honorable Robert Lasnick

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WESTERN DISTRICT OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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THENDIC ELECTRONICS COMPONENTS,
a foreign corporation, and GENESI SARL, a
foreign corporation,

Plaintiffs;

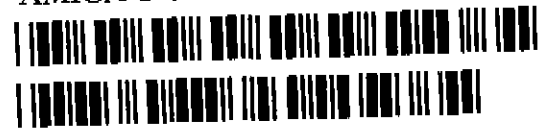
vs.

AMIGA INC., a corporation in the state of
Washington,

Defendant.

NO. 003-0003

AMENDED REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT: GRANTING SPECIFIC
PERFORMANCE AND DISMISSING
AMIGA'S COUNTERCLAIM



00-CV-00003-MISC

COME NOW THE PLAINTIFFS, Thendic and Genesi Sarl, (hereinafter "Thendic" when referring to both Plaintiffs) by and through their attorney of record, Richard Hughes and submits its Amended Reply in support of summary judgment and dismissal of Amiga's Counterclaim(s).

Once again, Bill McEwen, has engaged in improper ex-parte contact with this Court because his letter to the court dated December 8, 2003, presumably Amiga's Response, albeit deficient, was filed without perfecting service on "Thendic's" counsel. *Declaration of Hughes P. 1-2 L. 21-2.* "Thendic's" Motion must be granted for the following reasons: (1) Amiga failed to present any

material facts that preclude relief as requested by "Thendic"; (2) Amiga failed to present any legal
PLAINTIFFS' AMENDED REPLY IN
SUPPORT OF SPECIFIC
PERFORMANCE & DISMISSAL OF
COUNTERCLAIMS

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1 basis to deny relief as requested by "Thendic"; (3) Amiga failed to file any opposition in response
2 pursuant to FRCP 11; (4) Bill McEwen's letter, if considered by the Court, cannot defeat "Thendic's"
3 Motion because it is based on inadmissible supposition, hearsay and non-authenticated documents.
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5 1. Amiga's counterclaims are worthless and must be dismissed since it cannot prove
6 money damages and does not seek specific performance.

7 2. Amiga fails to cite a single authority supporting its contention that "Thendic" should
8 not be granted summary judgment.

9 3. McEwen's letter on Amiga letterhead, dated December 8, 2003 must be stricken as
10 a matter of law. FRCP 11. It states in part: "Every pleading, ... shall be signed by at least one
11 attorney of record..., or, if the party is not represented by an attorney, shall be signed by the
12 party." (*Emphasis added*). It further states: "An unsigned paper shall be stricken unless omission
13 of the signature is corrected promptly after being called to the attention of the ... party." FRCP
14 11(a). In the instant, the letter signed by McEwen does not satisfy the requirement of a signature by
15 an "attorney of record" or by a "party". Accordingly, it must be stricken. This proposition is further
16 supported by case law which holds that a corporation cannot appear in federal court without
17 representation by licensed counsel. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-202, 113
18 S.Ct. 716, 721 (1993).¹
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22 4. "Only disputes over facts that might affect the outcome of the suit under the
23 governing law will properly preclude the entry of summary judgment." *Roe v. City and County of*
24 *San Francisco*, 109 Fd. 578 at 583 (9th Cir. 1997) quoting *Anderson v. Liberty Lobby, Inc.*, 477
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27 ¹ "Thendic" is mindful that it previously argued this point and the court denied dismissal as a sanction for not having
28 counsel. However, it is prudent to reiterate this argument at this juncture in light of the procedural posture, i.e.,
summary judgment and the requirement imposed by FRCP 11.

1 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed 202 (1986). A dispute about a material fact is
2 genuine if "there is sufficient evidence favoring the non-moving party for a jury to return a verdict
3 for that party." Id at 249, 106 S.Ct at 2511. In the instant, McEwen's letter only alleges
4 misconduct by "Thendic" and attempts to support these immaterial, irrelevant accusations with
5 unauthenticated, conjecture ridden, hearsay and further makes assertions that are completely
6 impeached by his own sworn testimony. McEwen's statements are immaterial and irrelevant
7 because, at best, they support Amiga's claims for damages as sought in its counterclaim(s).
8 However, Amiga cannot sue "Thendic" for money damages due to the cap imposed by ¶11.4
9 (OEM Software Agreement). Simply, McEwen's accusations do not rebut the claim for specific
10 performance, nor do they affect the correctness of "Thendic's" Motion for Summary Judgment
11 seeking dismissal of Amiga's Counterclaims.
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14 "Thendic" will address a few of McEwen's allegations to ensure that this Court is apprised
15 of McEwen's latest tactics. Page 2, 1st paragraph of McEwen's letter is inadmissible pursuant to
16 ER 904 as it is obviously part and parcel of a settlement negotiation and should not be relied upon
17 by this Court. Page 2, 4th full paragraph of McEwen's letter stating in part: "Thendic never
18 notified Amiga of a desire to have our product loaded onto another piece of hardware." That is
19 patently untrue as "Thendic" has repeatedly notified Amiga of its desire to have DE integrated into
20 its Pegasos. *Declaration of Hughes Ex. 1 (Transcript of Bill McEwen P. 47-49, L. 3-21 and Ex. 2*
21 *(Letter from Hughes dated June 18, 2003 to Amiga's Counsel requesting Integration) and Ex. 3*
22 *(Letter from Genesi Sarl a.k.a. "Thendic" per OEM Software Agreement attached to Ex. 2) and*
23 *Ex. 4 (other exhibits referenced in McEwen's transcript-email dated October 17, '02 and*
24 *December 12, '02).* Page 2, 4th full paragraph-McEwen incorrectly asserts that "Thendic" (by
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28 PLAINTIFFS' AMENDED REPLY IN
29 SUPPORT OF SPECIFIC
PERFORMANCE & DISMISSAL OF
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1 definition Genesi Sarl) does not have a worldwide right, license and/or patent to Amiga software
2 when, in fact, it does. See *OEM Software Agreement P. 4-5 ¶¶ 4.1, 4.2 and 4.2.1 - 4.2.4*. The
3 remaining paragraphs of McEwen's letter and the exhibits identified lack the most basic
4 evidentiary indicia of trustworthiness and are inadmissible for the reasons previously stated. "A
5 trial court can consider [only] admissible evidence in ruling on a motion for summary judgment".
6 *Fraser v. Goodale*, 342, F.3d 1032 (9th Cir. 2003) quoting *Orr v. Bank of Am.*, 285 F.3d 764, 773
7 (9th Cir. 2002). Every single exhibit lacks basic authentication and is hearsay. Accordingly,
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9 McEwen's arguments fail and relief as requested by "Thendic" should be granted.

11 Specific Performance

12 "Thendic's" proposed order seeks possession of Amiga software and related Intellectual
13 Technology ("hereinafter IT") in the unfortunate event that Amiga cannot actually perform. Since
14 "Thendic" is unable to seek money damages pursuant to the OEM Software License Agreement
15 breached by Amiga² See *Declaration of Hughes, Ex. 5 (OEM Software License Agreement 11.4)*, it
16 seeks specific performance per ¶ 11.5 (OEM Software Agreement), an equitable remedy. Amiga's
17 admitted insolvency likely precludes its ability to specifically perform. However, the parties
18 agreement can only be effectuated if the Court fashions an equitable remedy that will allow "Thendic"
19 to carry out the terms of the Software Agreement.
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22 Contracts should be enforced and interpreted to effectuate the "benefit of the bargain...that
23 will, to the extent possible, put the injured party in as good a position as that party would have been in
24 had the contract been performed." *Mason v. Mortgage Am. Inc.*, 114 Wa.2d 842, 849, 792 P.2d 142
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27 ² The OEM Agreement (¶11.4) limits money damages based on royalties paid; however, Amiga's failure to integrate
28 its software has prevented all applicable "Thendic" sales. Thus, no royalties. No royalties means no money damages.
29
PLAINTIFFS' AMENDED REPLY IN SUPPORT OF SPECIFIC PERFORMANCE & DISMISSAL OF COUNTERCLAIMS

1 (1990). See *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 470 U.S. 858, 870 (S.Ct.
2 1986). In the instant, "Thendic" bargained for integration of Amiga DE software into its products.

3 Contracts are presumed to be legal and enforceable. *Walsh v. Schlecht*, 429 U.S. 401, 408
4 (1977). This being so, Amiga cannot simply leave "Thendic" without a remedy. It is well established
5 that "courts of equity have broad discretion in shaping remedies." *Sea-Land Service Inc. v. Int'l*
6 *Longshoremen's & Warehousemen's Union*, 939 F.2d 866, 870 (9th Cir. 1991). See *Bell v. Hood*, 327
7 U.S. 684, 66S.ct at 777 ("it has been the rule from the beginning that courts will be alert to adjust
8 their remedies so as to grant the necessary relief,"). "When the equitable jurisdiction of the court is
9 invoked by the parties, *whatever [emphasis added] relief the facts warrant will be granted.*" *Ban-Co*
10 *Investment Co. v. C.E. Loveless*, 22 Wa.App. 122, 135, 587 P.2d 567, 575 (1978). The Court clearly
11 has the authority to shape an equitable remedy that will allow "Thendic" to receive the benefit of its
12 bargain. "Thendic" can only receive the benefit of the bargain if rights and possession to Amiga's
13 software as requested are granted.

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17 Amiga, it seems, cannot perform without violating its employees' right to compensation;
18 however, this Court can and should effectuate the contract by granting the relief requested by
19 "Thendic". "Thendic" fully intends to uphold the Software Agreement by adhering to royalty
20 payment structure created therein, i.e. paying Amiga a royalty in the amount of \$4.50 per Licensed
21 Product sold or otherwise distributed. See *Declaration of Hughes, Ex. 5 (OEM Software Agreement*
22 *4.3.2)*.³ The remedy proposed by "Thendic" appears to be the only discernable remedy available and
23 is well within the authority of the court.
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27 ³ Thendic will seek fees and costs per OEM Software Agreement ¶ 13.10 following resolution of this matter.
28 However, any fees and costs awarded can be first paid off by royalties due Amiga.

1 For the reasons stated above, "Thendic" respectfully request sufficient temporary and/or
2 permanent rights and possession to Amiga's software and related IT as requested and dismissal of
3 Amiga's counterclaim(s).
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6 Dated this 10th day of December, 2003

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11 Richard Hughes, WSBA #22897
12 Attorney for Plaintiffs
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The Honorable Robert Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

THENDIC ELECTRONICS COMPONENTS, }
a foreign corporation, and GENESI SARL, a }
foreign corporation, }
Plaintiffs; }
vs. }
AMIGA INC., a corporation in the state of }
Washington, }
Defendant. }

NO. 003-0003L

DECLARATION OF RICHARD
HUGHES IN REPLY RE: PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

I, Richard Hughes, am over 18, reside Washington, represent "Thendic" and am competent to declare as follows:

1. Once again, Bill McEwen has failed to serve my office with a copy of correspondence and pleadings filed with this Court. His letter dated December 8, 2003 and corresponding attachments had to be personally picked up by my assistant at the federal courthouse. Copies were not in my office until approximately 2:00 p.m. Presuming no responsive documentation had been filed, I made other plans taking me out of the office. I had to return to the office in the evening and worked into the morning ultimately checking in to a local hotel and again returning to the office early this morning to complete "Thendic's" reply in a timely manner. That stated, I vehemently object to this latest abuse

DECLARATION OF RICHARD
HUGHES

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1 of procedure by Bill McEwen and ask that the Court strike all responsive pleadings, correspondence
2 and exhibits.

3 2. Attached as *Exhibit 1* is a true and accurate copy of a portion of the deposition transcript of
4 Bill McEwen.

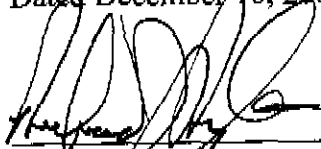
5 3. Attached as *Exhibit 2* is a true and accurate copy of a letter I drafted to Amiga's then counsel,
6 Diana Shukis requesting that her client, Amiga, integrate its software into my client's hardware
7 Pegasos. Per the face of the letter, I drafted the document to Ms. Shukis because I had been informed
8 that Amiga lost its lease and had been evicted. Also attached to *Exhibit 2* is *Exhibit 3* (a letter from
9 Bill Buck and Raquel Velasco-Directors of Genesi Sarl requesting integration as described above.).
10 *Exhibit 2 & 3* were faxed from my office to Ms. Shukis and mailed there as well.

11 4. Attached as *Exhibit 4* are true and accurate copies of emails from Bill Buck to Bill McEwen
12 dated October 17, 2003 and December 12, 2002.

13 5. Attached as *Exhibit 5* is a true and accurate copy of the OEM Software Agreement.

14 I swear under penalty of perjury that the above is true and correct to the best of my belief and
15 knowledge.

16 Dated December 10, 2003.

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19 Richard Hughes

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DECLARATION OF RICHARD
HUGHES