



03-CV-00003-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THENDIC ELECTRONICS COMPONENTS,
et al.,

Plaintiffs,

v.

AMIGA INC.,

Defendant.

No. C03-0003L

ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on "Plaintiffs' Motion and Memorandum in Support of Summary Judgment: Granting Specific Performance and Dismissing Amiga's Counterclaim." By letter dated November 10, 2003, Mr. Bill McEwen, the President and Chief Executive Officer of defendant Amiga, requested an extension of time in which to retain counsel in this matter and respond to plaintiffs' motion. That request was granted, and the motion for summary judgment was renoted for consideration on December 12, 2003.

Defendant Amiga has a legal existence separate and apart from Mr. McEwen and must be represented by its own counsel. Local General Rule 2(f)(4)(B). While Mr. McEwen would have the right to appear in federal court to litigate his own interests, he "has no authority to appear as an attorney for others than himself." C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987). Despite have been instructed that Amiga could participate in this litigation only through counsel, Mr. McEwen filed a response to the motion for summary

1 judgment on behalf of the corporate entity. The response submitted on December 8, 2003, is
2 hereby STRICKEN and defendant's counterclaim is dismissed for failure to prosecute.

3 The lack of any substantive opposition notwithstanding, the Court must assure
4 itself that judgment in plaintiffs' favor is appropriate and just. Having reviewed plaintiffs'
5 arguments in light of the terms of the Licensing Agreement, it is not clear that plaintiffs are
6 entitled to the relief sought in the complaint. The "whereas" provision on which plaintiffs rely,
7 and in particular the phrase "other products," is ambiguous. The provision states:

8 WHEREAS, Thendic wishes to obtain from Amiga, and Amiga wishes to grant to
9 Thendic, a license to integrate Amiga's DE Operating System into Thendic's CE
10 based handheld, multimedia gaming device, as well as other products in Thendic's
product line, including future products.

11 This statement could, as plaintiffs argue, be interpreted to mean that the parties intended to
12 authorize the incorporation of Amiga's operating system into any and all of Thendic's products.
13 On the other hand, the statement could simply be a shorthand notation for a select group of
14 products, only one of which is identified by name.

15 Other sections of the Licensing Agreement support the second interpretation. The
16 license itself authorizes the incorporation of Amiga's operating system into "any Thendic
17 Product subject to this agreement." License Agreement at ¶ 4.2.1. Which Thendic products are
18 "subject to this agreement" is, of course, the issue that must be resolved in this litigation.
19 Looking to the definitions provided in ¶ 3.1, the term "Thendic Products" is defined to mean "all
20 devices developed, manufactured, or sold by Thendic either presently or anytime during the
21 course of this Agreement into which the Licensed Software is installed. A list of the currently
22 existing Thendic Products is attached as Appendix A." The reference to installation in the first
23 sentence creates problems for plaintiffs because, as they have adequately established, the
24 Licensed Software has not been installed into Pegasos. The possibility that Pegasos was not, at
25 the time the Licensing Agreement became effective, a "Thendic Product" is confirmed by
26

1 Appendix A. The list of "current Thendic Products as defined in Section 3.1 of the OEM
2 Software License Agreement" does not include Pegasos. While it is true that a number of
3 provisions in the contract contemplate additions to the list of "Thendic Products," there is no
4 indication that the license would automatically cover all future products. To the contrary,
5 Appendix A specifies that the list of covered products can be expanded only "with the consent of
6 Amiga." Absent evidence of such consent, one could persuasively argue that Amiga is under no
7 obligation to integrate the Licensed Software into any Thendic product not listed in Appendix A,
8 including Pegasos.

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10 For all of the foregoing reasons, plaintiffs' motion for summary judgment is
11 GRANTED in part. Defendant's counterclaim is hereby DISMISSED for failure to prosecute.
12 However, the Court declines to rule on plaintiff's request for specific performance at this time.
13 The Clerk of Court is directed to renote plaintiffs' motion for summary judgment on the Court's
14 calendar for Friday, January 16, 2004. Plaintiffs shall have until Monday, January 12, 2004, to
15 submit a memorandum in response to the issues and concerns raised in this Order. Defendant, if
16 and only if it retains counsel in the interim, may file a reply memorandum no later than 4:30 p.m.
17 on Thursday, January 15, 2004. No extensions will be given.

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19 DATED this 19th day of December, 2003.

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22 _____
23 Robert S. Lasnik
24 United States District Judge
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