

ON TO AUGUST 19

The Honorable Robert Lasnick

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03-CV-00003-BR

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. 003-0003

SUPPLEMENTAL BRIEF IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT: GRANTING SPECIFIC  
PERFORMANCE

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 Supplemental Brief in support of summary judgment.

"Thendic" gratefully acknowledges the issues raised by this Court in its Order dated December 19, 2003 and appreciates the opportunity to resolve any lingering questions the Court may have.

PLAINTIFFS' SUPPLEMENTAL  
BRIEF IN SUPPORT OF SUMMARY JUDGMENT Page -1-

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I ISSUES

1. Does Appendix A or the *Fifth Recital* of the OEM Software Agreement limit or otherwise exclude integration of Amiga DE into a "select group of products" not inclusive of Pegasos? A. No
2. Is the term "installed" under the definition of "Thendic Products" fatal to "Thendic's" motion for summary judgment? A. No.
3. Per Appendix A of the OEM Software Agreement, is Amiga's consent required for integration of "Thendic" products not expressly listed? A. No. Consent is not required per the plain terms "other" and "future products". If consent is required it cannot be unreasonably withheld by Amiga.
4. To find that Amiga reasonably failed to grant consent, Amiga must have alleged this as an affirmative defense, which it did not and must have put forth specific, admissible evidence establishing the reasonableness of its non-consent. Amiga has failed to do either.
5. "Thendic" can establish that its numerous requests for Amiga integration of its DE Operating System were reasonable pursuant to Appendix A of the OEM Software Agreement should the Court determine that "Thendic" has this burden.

II. ARGUMENT

I Neither Appendix A Nor the *Fifth Recital* Limits or Otherwise Excludes Integration of Amiga DE Into a Select Group of Products – Not Inclusive of Pegasos

This Court's Order dated December 19, 2003 focuses on the *FIFTH RECITAL*, Page 1,

Section 2:

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

The Court poses the question whether the Fifth Recital is "simply a shorthand notation for a *select group of products*, only one of which is identified by name." *Order P. 2, L. 12-14 (emph. added)*. "Thendic" respectfully answers this in the negative. Since the Court's Order also

1 recognizes "Thendic's" understanding and reliance upon the terms "other" and "future products"  
2 as terms that run against a "select group" theory the parties must determine whether an  
3 ambiguity, in fact, exists and if it does, determine the effect of that ambiguity.  
4

5 "The reviewing court strives to ascertain the meaning of what is written in the contract, and  
6 not what the parties intended to be written." *Go2Net Inc., v. CI Host, Inc.*, 115 Wn.App 73, 85, 60  
7 P.3d 1245 (Div. 1, 2003); *Bort v. Parker*, 110 Wn.App 561, 574, 42 P.3d 980 (2002) citing  
8 *Confederated Tribes of Chehalis Resv. V. Johnson*, 135 Wn.2d 734, 752, 958 P.2d 260 (1998). A  
9 contract is ambiguous only when its terms are uncertain or are capable of being understood as  
10 having more than one meaning. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App 416,  
11 421, 909 P.2d 1323 (1995). "An ambiguity will not be read into a contract where it can be  
12 reasonably avoided by reading the contract as a whole." *Carlstrom v. Hanline*, 98 Wn.App 780,  
13 784, 990 P.2d 986 (2000). In the instant, ambiguity can be avoided by reading the contract as a  
14 whole-looking at the other recitals, Appendix A and substantive paragraphs within the Agreement  
15 e.g., ¶ 5.1 ("Amiga's, and at all times shall remain, responsible for integrating its DE Operating  
16 System,...into any of Thendic's products.").

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20 A. There Can Be No "Select Group"

21 The term "other" in the Fifth Recital clearly indicates that which is not yet defined but  
22 exists, and the term "future products" indicates that which has yet to come into existence.  
23 McEwen has proffered a "select group" theory and presumably "Thendic" too might hope that  
24 the Fifth Recital and by implication the entirety of the OEM Agreement refers only to "Thendic"  
25 products running on a Windows CE based operating system. *See Declaration of Hughes in*  
26 *Support of Summary Judgment, P. 3, L. 25-27, (Ex. 2 Dep. McEwen P. 46-47, L. 20-2; P. 54-56*

1 L. 17-16). To support this "select group" theory the Agreement must be read in a manner  
2 whereby products not running on a Windows CE based operating system are precluded by the  
3 OEM Software License Agreement. However, the plain language of Appendix A thoroughly  
4 rebuts that presumption.  
5

6 Specifically, the fifth Product listed on Appendix A – WINDOWS CE TERMINAL on  
7 the "SMARTBOY" states in part "The terminal will be configured in two models one running on  
8 Windows CE...*and a second ...running on Amiga DE.*" Moreover, all of the other products  
9 listed on Appendix A ran off of a Non-Windows CE based operating system. *Declaration of*  
10 *Buck, P. 2 L 5-6.* Since the Fifth Recital cannot connote a "select group," the terms "other" and  
11 "future products" must be given their unmistakable meaning thus spoiling any "select group"  
12 theory.  
13

14 Moreover, language of the contract, when taken as whole further fails to support a notion  
15 for a "select group" of integrated products separate and apart from Pegasos. In fact, per the OEM  
16 Software License Agreement one and only one of the listed "Thendic" products was to be  
17 exclusively utilizing a Windows CE based Operating System. The Fourth Recital makes that  
18 quite clear when it states: "WHEREAS, Thendic is in the process of developing a Windows CE  
19 based handheld, multimedia gaming device." Reference to any product within that one Recital is  
20 to a single "gaming device" and not to "Thendic's" products at large.  
21

22 In contrast the remaining substantive Recitals and contract provisions underscore  
23 "Thendic's" understanding and highlight the mutual intent behind the integration clause ("other"  
24 ... and "future products") allowing for Amiga DE integration into all of "Thendic's" present and  
25  
26

1 future products and thus not simply based on whether a particular "Thendic" product utilized  
2 Window CE.

3         The *First Recital* references "a wide range of computing devices" the *Third Recital*  
4 references CASHBOY and further states in part "Thendic's products...". Finally, the *Fifth*  
5 *Recital* as previously analyzed refers to integration of both "other" and "future products". The  
6 OEM Software License Agreement further states in part: Amiga is, and at all times shall remain  
7 responsible for integrating its DE Operating System... into any of Thendic's products." See  
8 *Portion of OEM Software License Agreement, Page 6, Paragraph 5.1 (emphasis added).*  
9

10         Since the Fourth Recital is clearly limited to integrate Amiga DE into a single Windows  
11 CE based handheld gaming device it cannot and should not control the remainder of the  
12 Agreement when the Agreement speaks to and about other identified as well as unidentified  
13 products. The Fourth Recital taken as a whole and read in conjunction with Appendix A, the  
14 other identified Recitals and identified substantive provisions simply cannot not lead the trier of  
15 fact to find that ambiguity continues to exist to support a "select group of products" of which  
16 Pegasos is not included.  
17  
18

19         A.     If an Ambiguity Exists a Question of Fact Arises As to Intent Only If Admissible  
20 Contradictory Evidence Is Introduced to Clarify the Ambiguity and Shed Light on  
21 the Mutual Intent of the Parties

22         If after reviewing the contract as a whole, the Court finds the scope of products to  
23 be integrated to be ambiguous the Court must then review any and all admissible, contradictory  
24 evidence to clarify the ambiguity. *Turner v. Wexler*, 14 Wn.App 143, 147, 538 P.2d 877 (Div. 3,  
25 1975); *Nashem v. Jacobson* 6 Wn.App 363, 367, 492 P.2d 1043 (1972). In the instant, Amiga-as  
26 it remains un-represented by counsel, cannot produce any admissible, contradictory evidence to  
27

1 clarify the scope of the agreement. Thus, this Court is only left with evidence corroborating  
2 "Thendic's" theory. Specifically, the *Turner* Court held "[i]f there is an ambiguity present *and*  
3 contradictory evidence is introduced to clarify the ambiguity a question of fact would be created  
4 which may not be resolve at summary judgment." *Nashem* at 367. The inverse is equally  
5 compelling as in the present where no required contradictory evidence is presented, the Court  
6 must resolve the ambiguity based on the only proffered explanation of the parties mutual intent,  
7 provided that explanation is reasonable.  
8

9  
10 Quite simply, the only evidence regarding mutual intent of the products to be integrated  
11 must lead the Court to find that Pegasos was a product to be integrated with Amiga's DE  
12 Operating System.

13  
14 2. The Term "Installed" Under the Definition of "Thendic Products" is Not Fatal to  
15 "Thendic's" Motion for Summary Judgment

16 The Court's Order states: "The reference to installation in the first sentence [of the  
17 definition of the defined term "Thendic Products"] creates problems for plaintiffs because, as  
18 they have adequately established, the Licensed Software has not been installed into Pegasos."  
19 See Order (Page 2, Line 22-24). "Thendic" will concede, as it must, that Pegasos was not an  
20 existing "Thendic Product" at the time the Agreement was executed and it will concede that it  
21 has not had the requested "Licensed Software" installed into any of its Pegasos units.  
22

23 The Court's correctly questions whether Pegasos-a non-installed product could ever be a "Thendic  
24 Product" since Amiga DE (the Licensed Software) has not been installed into it.

25 "Thendic Products" – shall mean all devices developed,  
26 manufactured, or sold by Thendic ...anytime during the course of this  
27 Agreement into which the 'Licensed Product' is installed. A list of the  
currently existing Thendic Products is attached as Appendix A."

1           See term "Thendic Products" in OEM Software Licensing Agreement  
2           ¶ 3.7

3           However, since not a single unit of any of the products listed on Appendix A has had  
4 Licensed Software installed into them, the entire subset of "Thendic Products" by definition  
5 would be non-definable, void and by definition a "Thendic Product" could never be found to be  
6 one of the products listed on Appendix A. See Declaration of Buck, P. 2 L. 10-12. Court's are  
7 loathe to allow for an interpretation that would negate the entirety of the agreement. Neither  
8 courts nor parties can ignore the rule of contractual construction where "an interpretation ought  
9 not be adopted which would render the document meaningless." *Gray v. Travelers Indemnity*  
10 *Company*, 280 F.2d 549 (9<sup>th</sup> Cir. 1960); citing *Andrew Jergens Co. v. Woodbury, Inc., D.C. Del.*  
11 *1921*, 273F.952, 959, *affirmed* 3 Cir. , 1922, 279 F. 1016, *cert. denied* 1922, 260 U.S. 728 , 43  
12 S.Ct. 92, 67 L.Ed. 484; *Peavy-Byrnes Lumber Co., Inc. v Long-Bell Lumber Co. D.C.W.D.La.*  
13 *1944*, 55 F.Supp 654, 659 *affirmed* 5 Cir. 1945, 150 F.2d 49; *Thomas Hoist Co. v. William J.*  
14 *Newman Co.*, 1937, 365 Ill. 160, 6 N.E.2d 171, 174.

15           Rather, a more measured assessment and the only rational interpretation of the term  
16 "installed" contained within the term "Thendic Products" comes from reviewing the term  
17 "Licensed Software" defined in part by stating: "Once a version of the DE Operating System has  
18 been integrated into a Thendic Product, it shall be considered Licensed Software [as that term is  
19 defined] for the duration of this agreement..." See § 3.1 "Licensed Software" OEM Software  
20 *License Agreement*. It becomes self-evident that no product was to be a "Licensed Product" until  
21 installation of the "Licensed Software" had occurred. Thus, the term "installed" as a term within  
22 "Thendic Product" better refers to and contemplates all products that are entitled to have  
23 "Licensed Software" installed into them over the course of the Agreement.

1           Accordingly, the term "installed" simply fails to support a "select group" theory that  
2 somehow limits the integration of "Thendic" products to exclude the Pegasos.

3  
4       3.     Amiga's Consent Is Not Required For Integration of Products

5           Consent is not required per the plain terms "other" and "future products" set forth in the  
6 *Fifth Recital OEM Software Agreement*. "The essential feature of a contract is the promise, and  
7 whenever the court can collect from the instrument an agreement to do or not to do a certain thing,  
8 it amounts to a covenant, whether it be contained in the recital or in any other part of the  
9 instrument." *First Nat'l Bank & Trust Co. of Minn. v. United States Trust Co.*, 184 Wash 212,  
10 219, 50 P.2d 904 (1935). While it is undeniable that "Thendic" has repeatedly sought Amiga's  
11 consent to integrate its DE Operating System into Pegasos, such consent was not required. *See*  
12 *Fifth Recital* and ¶ 5.1 (placing entire burden of integration "into any of Thendic's products"  
13 squarely on Amiga's shoulders).

14  
15           "Thendic" contends that Appendix A is what it purports to be - a list of then existing  
16 "Thendic" products with a cursory narrative of the product and its functionality. *Declaration of*  
17 *Buck*, P. 2, L. 1-2. Consent was never required as "Thendic" could always do what it has been  
18 forced to do-obtain specific performance despite any explicit consent by Amiga. *See OEM*  
19 *Software Agreement*, P. 13 ¶ 11.5. As a list, Appendix A merely contained a mechanism that  
20 allowed "Thendic" the right, should it choose, to enlarge that list. However, expansion of that list  
21 had no bearing on "Thendic's" right to integrate its products or future products. Assuming,  
22 consent was requested, as it was, the burden was Amiga's to show that the request to integrate a  
23 product, in this case, Pegasos, was "unreasonable". *See portion of OEM Software Agreement*,

1 *Appendix A § 2: "Amiga will not unreasonably withhold consent to expand the list of Thendic*  
2 *Products."*

3  
4 A. Alternatively, if Consent is Required, Amiga Waived This Affirmative Defense  
5 Because it Has an Affirmative Duty to Consent to Reasonable Requests

6 "In pleading to a preceding pleading, a party shall set forth affirmatively ... any  
7 other matter constituting an avoidance or affirmative defense." FRCP 8(c). "Federal Rule of Civil  
8 Procedure 8(c) requires the defendant to plead affirmatively "any ... matter constituting an  
9 avoidance or affirmative defense." Where a defendant fails to raise the defense in a pretrial order  
10 or prior to trial, the defense is waived; *Sram Corporation v. Shimano, Inc.*, 25 Fed. Appx, 626,  
11 629, 2002 WL 54776 (9<sup>th</sup> Cir. Cal.); *See Northwest Acceptance Corp., v. Lynnwood Equip. Inc.*,  
12 841 F.2d 918, 924 (9<sup>th</sup> Cir. 1988).

14 In the present, Amiga has utterly failed to raise any affirmative defense which claims that  
15 "Thendic's" request for consent was unreasonable. Accordingly, any such assertion that  
16 "Thendic's request for consent to integrate its Pegasos with the Amiga DE Operating System was  
17 unreasonable has been waived and must, as a matter of law, be deemed reasonable.

19 B. Alternatively, if Amiga is Required to Establish Consent it Will Establish its  
20 Requests For Integration Were Reasonable

21 Amiga's DE Operating System is intended to be used by computing platforms. In  
22 fact, Amiga's DE Operating System was specifically designed, developed and created for  
23 integration into hardware such as the products that "Thendic" manufactures. Thus, the "Thendic"  
24 products at issue require an Operating System, and Amiga's Operating System requires product  
25 integration in order to ultimately create viable computing platforms. Evidencing Amiga's need for  
26 compatible hardware, such as "Thendic's," to accompany Amiga's DE Operating System and  
27

1 evidencing a willingness to actually integrate, Amiga created a partnership with ltech, a company  
2 supplying directly competitive hardware to that of "Thendic" subsequent to signing the OEM  
3 Software License Agreement with "Thendic." See Declaration of Bill Buck, P.2, L. 13-18. The  
4 reasonableness of "Thendic's" numerous requests is clear based on the intended use of Amiga's  
5 DE Operating System and, furthermore, based upon Amiga's own actions seeking similar  
6 integration elsewhere. Accordingly, "Thendic's" requests for integration are reasonable.  
7

### 8 III. CONCLUSION

9  
10 For the foregoing reasons, "Thendic" respectfully requests that this Court find in its favor and  
11 grant summary judgment and an Order of Specific Performance as requested leaving open the  
12 opportunity for additional briefing as to fees and costs incurred in prosecuting its claims and  
13 defending against Amiga's counterclaim(s).  
14

15 Dated this 12<sup>th</sup> day of January, 2004.

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17 **Law Office of Richard Hughes**

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22 Richard L. Hughes, WSBA #22897  
23 Attorney for "Thendic"  
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