

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendant.

NO. 03-00003

**AMIGA, INC.'S MOTION FOR RELIEF
FROM JUDGMENT**

NOTE ON MOTION CALENDAR:
April 9, 2004

I. RELIEF REQUESTED

Plaintiffs presented misleading information to this Court, misrepresented facts in public forums, brought this lawsuit for an improper purpose and misused Amiga's trademarks. Based on Plaintiffs' misconduct, this Court should grant Amiga, Inc. ("Amiga") relief from the Summary Judgment Order entered on February 19, 2004 and amended on March 12, 2004 (the "Order") under Federal Rule of Civil Procedure 60(b). The Order should be vacated or altered as described in this Motion.

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II. RELEVANT FACTS

A. Plaintiffs have misled this Court by presenting a fabricated e-mail as fact and not informing the Court when e-mail's falseness was confirmed.

In their Motion to Modify Order Granting Specific Performance ("Modification Motion"), Plaintiffs relied heavily on an e-mail Mr. Buck testified was written by Amiga's Chief Technology Officer (Exhibit 2 to Declaration of Bill Buck in Support of Modification Motion). Plaintiffs argued that the e-mail was strong evidence that this Court should modify its February 19, 2004 Summary Judgment Order. Plaintiffs failed to inform this Court that the e-mail had been posted on a public bulletin board or that many, many users questioned the authenticity of the e-mail in the days after it was posted. See Amiga's Response to Modification Motion, pp. 8-11; Declaration of Ray A. Akey in Support of Amiga, Inc.'s Response to Motion to Modify Order Granting Specific Performance ("Akey Modification Decl.>").¹ In the time between the original posting of the forged e-mail on February 25, and the date on which Mr. Buck signed his declaration in support of the Modification Motion, on March 1, more than 100 messages were posted on public bulletin boards regarding the e-mail, many of the messages questioning the authenticity of the e-mail. Akey Modification Decl.

Although Mr. Buck himself posted to these same public bulletin boards at least nine times between February 25 and March 1, he chose to give the Court limited information and present the e-mail as absolute fact. Even more distressing, Plaintiffs did not provide the Court with updated information when the true author of the e-mail admitted the e-mail was a forgery on March 4, 2004 – three days after Mr. Buck signed his declaration in support of the Modification Motion – despite the fact that Mr. Buck publicly posted a minimum of seven times on these boards from March 4 until March 9. Akey Modification Decl. Mr. Buck continued to allow this

¹ Amiga timely filed its Response to the Modification Motion and supporting declarations, including Mr. Akey's supporting declaration, on March 15, 2004.

1 Court to believe that Amiga, through Mr. Moss, had sent the e-mail. At a minimum, Mr. Buck's
2 conduct was reckless, perhaps it was perjury.

3 Shockingly, Plaintiffs offer no explanation for this misleading conduct in their Reply in
4 Support of Motion to Modify the Order of Specific Performance submitted on March 18, 2004.
5 The only information Plaintiffs offer in response to this serious situation is Mr. Buck's testimony
6 that "I believe the email attributed to 'Fleecy Moss' was and still is from Fleecy Moss." March
7 17, 2004 Declaration of Bill Buck, ¶ 11. In making that statement, Plaintiffs completely ignore
8 the evidence offered by Amiga in their Response to Plaintiffs' Motion to Modify the Order of
9 Specific Performance that indicates unequivocally the e-mail was not from Fleecy Moss.
10 Plaintiffs also have no explanation for why they did not at least inform the Court of the source of
11 the e-mail or of the many, many people that had questioned the authenticity of the e-mail before
12 Mr. Buck signed his declaration. Plaintiffs' misconduct related to its request that the original
13 Order entered by this Court be made significantly broader warrants vacation of the Order.

14 **B. Plaintiffs brought this lawsuit for an improper purpose.**

15 On April 27, 2003, Mr. Buck posted the following on a public bulletin board that
16 indicates Mr. Buck brought this lawsuit for an improper purpose:

17 The whole AmigaDE lawsuit was just a means to shut Bill McEwen up and force
18 Amiga Inc into a settlement that might include us obtaining rights to the Amiga
trademarks and the classic OS.

19 Akey Modification Decl., Exh. B.

20 On March 11, 2004, Mr. Buck posted the following, reemphasizing that he understands
21 the difference between AmigaDE and the Amiga OS:

- 22 1. AmigaDE as it exists today has a few shared libraries from Intent 1.0. There is
23 not much more.
- 24 2. Amiga DE will not be integrated into MorphOS [an operating system in which
25 Mr. Buck has had involvement] in any way. MorphOS does not need anything
26 from DE or whatever DE was supposed to become. We do not want the "name".
You can have it! :-)

1 Akey Modification Decl., Exh. C. These and other public comments by Mr. Buck indicate he
2 knows he licensed AmigaDE, not the Amiga OS. Thus, he knew the only proper subject of this
3 lawsuit was Amiga DE.

4 However, Plaintiffs ignored the requirement that a lawsuit must be brought for a proper
5 purpose and filed suit anyway to gain leverage to push Amiga to settle and transfer rights to the
6 Amiga Operating System and Amiga trademarks and “shut Bill McEwen up.” Plaintiffs’ abuse
7 of the judicial system by bringing a lawsuit for improper purposes is conduct that justifies
8 relieving Amiga of the Summary Judgment Order.

9 **C. Plaintiffs have misrepresented this Court’s actions and rulings in public forums.**

10 Although this Court’s February 19, 2004 Summary Judgment Order was the first
11 substantive ruling in this case, on August 20, 2003 Mr. Buck proclaimed victory on a public
12 bulletin board, he stated: “To avoid any further confusion, the legal process has been settled in
13 our favor. Can we move on now?” Declaration of Ray A. Akey in Support of Amiga’s Motion
14 for Relief from Judgment (“Akey Decl.”), Exh. A1. Statements like this by Plaintiffs raise
15 serious concerns that Plaintiffs will make up their own version of facts regarding this Court’s
16 actions and rulings to serve their purposes.

17 Recently, Mr. Buck has made statements that raise similar concerns as does Plaintiffs’
18 proclamation of victory in this lawsuit more than six months before any substantive ruling in this
19 case. Four days after this Court entered its Order, which granted specific performance of the
20 License Agreement, Mr. Buck represented the Court’s Order as being so broad that it gave him
21 rights to future versions of Amiga’s Operating Systems that do not yet exist, and the right to
22 interfere with agreements between Amiga and third parties that are in no way related to
23 AmigaDE. In a post to a public bulletin board on February 23, 2004, Mr. Buck stated:

24 The result is significant. As mentioned, we will now put in motion the following
25 series of events:

- 26 1. Genesi will enforce the “upgrade” clauses to OS 4.2 and beyond.

1 2. The Hyperion Eyetech OS 4.0 Agreement will be declared “null and void
2 and of no force or effect.”

3 3. We will sublicense under the Agreement and the ruling.

4 And...

5 4. We can sublicense Hyperion for less then they agreed to pay -- that is, if
6 we can get along.

7 Akey Decl., Exh. B1. Mr. Buck’s previous statements indicate Plaintiffs are willing to
8 misrepresent this Court’s actions and orders to attempt to get what they truly want from
9 Amiga – much more than what the License Agreement contemplated. It appears the only
10 way to stop Plaintiffs’ attempts to grab more than what they are entitled to is to vacate the
11 Summary Judgment Order.

12 **D. Plaintiffs have misrepresented their rights to and misused Amiga’s property.**

13 Plaintiffs have claimed complete control and ownership of AmigaDE rather than the
14 “license” to use AmigaDE as provided under the License Agreement. For example, on March
15 10, 2004, Mr. Buck posted the following message on a public bulletin board indicating he would
16 sell Amiga’s intellectual property on easy terms and allow others to use it however they saw fit:

17 When a judgment is reached on the modification to modify of the current VALID
18 and LEGALLY BINDING order, our intent (whoops, another Freudian slip!J) is
19 to organize the mess of the Amiga market today so it can be something. The
20 Agreement allows for the improvement of DE. Great! Here is your chance all
21 you die-hard Amiga fans. Make it something! Combine it with whatever is out
22 there and being developed. Create your dream for “Amiga” – go for it! We will
 not stop you and \$4.50 from every copy of the OS sold will go back to an escrow
 account to pay creditors of Amiga Inc. If you really get organized you might even
 restore the Company to good health. Send us an email, we will grant you a
 sublicense -- on easy terms.

23 Akey Decl., Exh. C1. Plaintiffs refuse to accept that the License Agreement transfers a limited
24 license to use AmigaDE and Amiga Marks in limited ways. Indeed, Mr. Buck’s comments seem
25 to indicate that he thinks he owns Amiga and will take charge of distributing royalties to Amiga
26

1 creditors. All indications are that Mr. Buck refuses to accept that Plaintiffs rights are limited to
2 those provided in the License Agreement.

3 Indeed, Plaintiffs have already misused Amiga trademarks. The License Agreement
4 granted Thendic limited rights to use Amiga Marks in the marketing, sale and distribution of
5 Thendic products in which AmigaDE is integrated. If Thendic seeks to use Amiga Marks in
6 other ways, it must obtain prior written consent from Amiga. License Agreement, ¶ 6.3.

7 Plaintiffs have illegally used Amiga Marks. For example, Plaintiff Genesi has improperly used
8 Amiga Marks² on their website. Declaration of Bill McEwen in Support of Amiga's Motion for
9 Relief from Judgment, Exh. 1.

10 **E. Plaintiffs have threatened to interfere with Amiga's business relationships and**
11 **contracts.**

12 Not only have Plaintiffs misused Amiga's trademarks and misrepresented the scope of
13 the License Agreement, Plaintiffs also threaten interference with Amiga's contracts and business
14 expectancies with third parties. For example, after entry of the Summary Judgment Order,
15 Mr. Buck posted the following on a public bulletin board regarding Amiga's partner, Hyperion,
16 which is responsible for the development and distribution of Amiga OS 4.0:³

17 As the license is validated under US law Hyperion will not have any recourse
18 unless Amiga Inc. gets our written consent, which will not happen. However we
19 will sublicense (as we can under the Agreement) Hyperion for less than they
20 would have paid Amiga and the customer/community will benefit from the lower
21 prices. Of course, Amiga Inc. could appeal but it is not likely given their general
22 disregard for the Court.

23 Akey Decl., Exh. D1.

24 ² While limited resources have prevented Amiga from taking legal action to address these violations, KMOS, Inc.,
25 which now owns the Amiga OS and has rights to use certain Amiga trademarks, has the necessary resources to
26 prosecute violators and will do so whenever and wherever necessary to prevent any misuse of any intellectual
property, including the unauthorized display of trademarks and the compilation or other misuse of source code, and
commercial interference aimed at or threatened toward KMOS and/or its commercial or distribution partners.
Declaration of Garry Hare in Support of Motion for Relief from Judgment.

³ See Declaration of Evert Carton in Support of Amiga's Response to Modification Motion.

1 Mr. Buck also indicates he intends to give away Amiga's and others' intellectual property
2 by making it open source. In this regard, on February 23, 2004, he posted on a public bulletin
3 board: "In the meantime, we will publish OPA and life can go on for all concerned. It will be
4 quite easy to port OS 4.0 then and 4.2 will come now even sooner with OPA." Akey Decl., Exh.
5 D1. In addition, Mr. Buck previously disclosed plans to do whatever it took to use the Amiga
6 name.

7 On May 4, 2003, Mr. Buck posted the following on a public bulletin board: "In the
8 meantime, we legally purchased a few hundred copies of OS 3.9 which if we wanted to we could
9 bundle with the Pegasos -- just to put an Amiga label on the package." Akey Decl., Exh. E1.
10 Plaintiffs' willingness to interfere with other parties' commercial and intellectual property rights
11 itself provides a basis upon which relief from judgment may be granted.

12 **F. Amiga cannot perform until it receives technical information from Thendic.**

13 The License Agreement leaves no doubt that before Amiga can take any steps to perform
14 under the License Agreement, Thendic must provide Amiga with technical information regarding
15 the device on which Thendic wants AmigaDE integrated. ¶ 5.1. Thendic has never provided
16 Amiga with any hardware schematics, product specifications or sample devices that would have
17 allowed Amiga to integrate AmigaDE into any Thendic product. McEwen Modification Decl.
18 Even when requested during the course of this litigation, Thendic provided no technical
19 information regarding the device on which they claim they want AmigaDE integrated. Without
20 product specifications, it is impossible for Amiga to even begin to perform under the License
21 Agreement. McEwen Modification Decl. At a minimum the Order should be altered to require
22 Thendic to provide Amiga with technical information regarding its Pegasos device before Amiga
23 is required to integrate AmigaDE. Any other result is asking Amiga to do the impossible.

24 **III. AUTHORITY**

25 Pursuant to Federal Rule of Civil Procedure 60(b), this Court may relieve Amiga, Inc.
26 from the summary judgment order entered in this case due to the misrepresentations and

1 misconduct by the Plaintiffs and for any other reason justifying relief. Levander v. Prober, 180
2 F.3d 1114, (9th Cir. 1999) (holding courts may use their inherent power to protect integrity by
3 vacating or amending judgments). Here, in an attempt to significantly enlarge the scope of the
4 original Order, Plaintiffs presented information to the Court that they knew was in serious
5 question when presented and was confirmed to be false a few days later.

6 Never did Plaintiffs update the Court or provide complete information that would have
7 allowed the Court to appropriately weigh the information. Instead, Plaintiffs sat back and
8 undoubtedly assumed Amiga would not be able to obtain counsel and respond, which would
9 have left the Court to rely on the fabricated information in making a decision. Allowing litigants
10 to engage in such conduct and still obtain any of the relief they have requested puts the integrity
11 of the Courts in jeopardy. Because of Plaintiffs' misleading conduct toward the Court, improper
12 purpose for bringing this suit, misrepresentations to the public, misuse of Amiga's property, and
13 improper interference with Amiga's business relationships, this Court should vacate the Order.

14 IV. CONCLUSION

15 Plaintiffs' conduct in and related to this lawsuit warrants vacation of the Order. This
16 Court should not validate Plaintiffs' misconduct by keeping the Order in place. Based on
17 Plaintiffs' pattern of conduct, there can be little doubt that if the Order remains in place, these
18 parties will be repeatedly back before this Court and other courts to attempt to fully resolve the
19 issues between them. Amiga requests that this Court vacate or appropriately alter its Order based
20 on the Plaintiffs' misconduct.

21
22 DATED this 19th day of March, 2004.

23 CAIRNCROSS & HEMPELMANN, P.S.

24
25 /s/ Diana S. Shukis

26 Diana S. Shukis, WSBA No. 29716
Attorneys for Defendant