

The Honorable Robert Lasnick

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

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
PLAINTIFFS' RESPONSE TO
AMIGA'S MOTION FOR RELIEF
FROM JUDGMENT



03-CV-00003-RESP

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 responds to Amiga's Motion for Relief from Judgment.

RESPONSIVE ARGUMENT

A. Criteria for Vacating a Judgment

Amiga moves to vacate this Court's Orders pursuant to FRCP 60(b) and the clauses contained therein. An Order can only be vacated for the following:

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ORIGINAL

1 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
2 evidence; (3) fraud..., misrepresentation, or other misconduct of an adverse
3 party; (4) the judgment is void; (5) the judgment has been satisfied...; (6) any
4 other reason justifying relief from the operation of judgment.
FRCP 60(b).

5 **1. Amiga Improperly Suggests Clauses 3 & 6 Justify Vacation**

6 Of the six identified reasons warranting vacation, "Thendic" presumes that Amiga
7 bases its motion on FRCP 60(b)(3) & (6), albeit not expressly stated. In any event, Amiga fails to
8 provide any case law to support its contention that the Order(s) should be vacated based on FRCP
9 60(b)(3) & (6). "Thendic" should not be required to refile unsupported accusations. Regardless,
10 "Thendic" will once again address the issues raised by Amiga.
11

12 As an initial matter, Amiga has a heavy burden of proving its assertions allegedly justifying its
13 motion by "clear and convincing evidence." *Peoples State Bank v. Hickey*, 55 Wn. App 367, 372, 777
14 P.2d 1056 (Div. 1, 1989); *Plattner. v. Strick Corp.*, 102 F.R.D. 612, 614, (N.D. Ill. 1984). This
15 burden has not been met.
16

17 Amiga alleges that (1) Thendic mislead this Court in its Motion to Modify the Order granting
18 Specific Performance; (2) misrepresented facts in public forums; (3) brought the lawsuit for an
19 improper purpose; and, (4) misused Amiga Trademarks. *Amiga's Motion for Relief from Judgment*,
20 P.1. L, 19-20.
21

22 As a preliminary matter, it must be noted and appreciated that Amiga seeks to vacate **both** the
23 modified Order granting Specific Performance as well as the original Order of Specific Performance.
24 To support this extraordinary request based on "fraud on the court", Amiga relies almost entirely on
25 alleged comments or alleged actions made by "Thendic" and/or Bill Buck *after* this Court's February
26 19, 2004 Order of Specific Performance. In fact, Amiga cites to only a few, wholly irrelevant
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1 instances where "Thendic" allegedly acted improperly, before this Court entered judgment in its favor.
2 Other purported instances warranting vacation of the judgment occurred after this Court awarded
3 Specific Performance for "Thendic" See *Declaration of Akey* Ex. A1 and E1. (The first exhibit
4 references B. Buck's belief that a settlement had been reached and the second exhibit apparently
5 references B. Buck's understanding of the License Agreement. In either case, the statements made fail
6 to support, in whole or in part, the relief Amiga now seeks.)
7

8 **B. "Thendic's" Desire to Resolve Litigation Through Settlement is not Improper**
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10 Moreover, exhibits allegedly representing B. Buck's intent to resolve litigation via settlement
11 to effectuate his understanding of the scope of the Agreement do not represent any "improper
12 purpose" as argued by Amiga. See *Amiga's Brief Section B*. To the contrary, "Thendic's" desire to
13 resolve litigation by means of settlement is in line with the other 98 percent of civil cases that are now
14 resolved without need for trial.
15

16 **C. Fraud on the Court Cannot be Established**

17 Amazingly, Amiga's brief cites only one case. *Levander v. Prober*, 180 F.3d 1114 (9th Cir.
18 1999)(supporting the proposition that a court has inherent authority to protect the integrity [of the
19 court] by vacating or amending a judgment). However, Amiga omits key portions of *Levander* which
20 are controlling ("a federal court may [only] amend a judgment or order under its inherent power when
21 the original judgment or order was obtained through fraud on the court."). *Levander* at 1119; *Cfr.*
22 *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995).
23

24 **1. Narrow Scope of Discretion**
25

26 "A court must exercise its inherent powers with restraint and discretion..." *Levander*
27 at 1119; *Chambers v. Nasco Inc.*, 501 U. S. 32, 44, 111 S. Ct 2123 (1993). "Fraud on the court..."
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1 should be read narrowly, in the interest of preserving the finality of judgments." *Levander* at 1119;
2 quoting *Toscano v. Commissioner*, 441 F.2d 930, 934 (9th Cir. 1971). Fraud on the Court "...is
3 limited to fraud which seriously affects the integrity of the normal process of adjudication." 860 F.2d
4 556, 559 (2nd Cir. Ct. Appeals, 1988)(holding that subsequent discovery of perjury by witnesses and
5 non-disclosure of relevant evidence during pre-trial discovery did not support finding of fraud
6 sufficient to set aside a judgment.) Even a judgment rendered in a proceeding in which an
7 unauthorized attorney practiced is not void or subject to reversal pursuant to FRCP 60(b). *Alexander*
8 *v. Robertson v. Protective Nat'l. Ins. Co. of Omaha*, 882 F.2d 421, 425 (9th Cir., 1989).

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10
11 Any alleged statement made out of court is simply immaterial to Amiga's request for relief as
12 it could not be characterized as "fraud on the court."

13 The only real issue before the Court is whether Bill Buck's declaration and exhibit purportedly
14 attributed to Fleecy Moss in support of "Thendic's Motion to Modify" can be characterized as "fraud
15 on the court." It cannot.

16
17 The veracity of the email attributed to Fleecy Moss is ancillary to the more salient issue of
18 whether it is admissible through Buck's declaration. First, the email itself can be offered as an
19 admission by a party opponent pursuant to ER 801(d)(2). A statement will be admissible as an
20 admission by a party opponent if the statement is offered against a party and the statement is made by
21 the party, a representative or an agent of the party. Apparent authority existed to form a belief that
22 Fleecy Moss wrote the statement in question, as it was signed "Fleecy Moss." At the time the email
23 was submitted to the Court, Bill Buck had no reason to believe the contrary. Any retraction of the
24 email, subsequent to Thendic's presentment of the quotation, is also immaterial in that Bill Buck
25 continued to question the veracity of the retraction apparently stemming from some unknown
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1 individual purportedly residing in of all places Australia. Ironically, the alleged “true author’s”
2 admission that the email was a forgery may be as untruthful as the act of initially forging an email. In
3 short, Amiga’s preeminent basis for vacating a Court’s Order is based on the credibility of a self-
4 professed “forger’s” admission.
5

6 **2. Amiga Cannot Show Injury to Court**

7 Furthermore, Amiga asserts that it has been personally harmed—not the Court.
8 “Fraud on the Court” occurs only when the alleged misconduct “harms the integrity of the judicial
9 process.” *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989). Fraud on the court embraces
10 only that species of fraud which defiles, or attempts to defile the court itself. *Gumport v. China*
11 *International Trust and Inv. Corp.*, 926 F.2d 912, 916 (9th Cir. 1991).. It cannot be that fraud has been
12 perpetrated on the Court to the extent that the “Fleecy Moss Email” was forged by a non-party, and
13 that that conduct has been brought to this Court’s attention. Amiga cannot hurdle the high standard of
14 proving fraud sufficient to warrant the extraordinary act of vacation or amendment of a final Order.
15

16 Amiga cites *Levander* as authority for vacating or amending the current Order. *Levander*
17 takes particular notice of the fact that “fraud on the court” is an extremely high standard. Indeed,
18 fraud on the court was perpetrated in *Levander*. The party’s conduct, however, was patently
19 reproachful as it was a continued effort to fraudulently conceal the location of funds from a
20 bankruptcy court. Rampant perjury coupled with overt acts of deception led the Court to conclude
21 that fraud had occurred—fraud that involved more than a single litigant, as it was a “wrong against the
22 institutions set up to protect and safeguard the public.” *Levander* at 1118.
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1 **D. Representations and Acts by "Thendic" to 3rd Persons Outside this Litigation**
2 **Fail to Provide a Basis for Vacating the Court's Order for Specific Performance**

3 Out of court statements or actions are also irrelevant in satisfying the fraud or
4 misrepresentation prong of FRCP 60(b)(3) which requires that the moving party must show that it
5 "was prevented from fully and fairly presenting its case or defense." *Peoples State Bank v. Hickey*, 55
6 Wn. App 367, 372, 777 P.2d 1056 (Div. 1, 1989); *Plattner. v. Strick Corp.*, 102 F.R.D. 612, 614,
7 (N.D. Ill. 1984)(citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421, 43 S.Ct. 458, 67
8 L.Ed. 719 (1923)); *Atchison, Topeka & Santa Fe Ry. V. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957).
9 Amiga "must demonstrate both injury and circumstance beyond its control that prevented [it] from
10 proceeding with the prosecution or defense of the action in a proper fashion." *Community Dental*
11 *Servs., v Tami*, 282 F.3d 1164, 1168, (9th Cir. 2002).

12
13
14 Even assuming "Thendic" made representations to others regarding the effect of this Court's
15 rulings, its rights to Amiga intellectual property or its intended actions as a result of this Court's
16 rulings—such representations simply do not create a basis for vacating the Court's Order for Specific
17 Performance.

18
19 **E. Savings Clause within FRCP 60(b)(6) Cannot be Established**

20 Finally, Amiga appears to invoke the "savings clause" contained within FRCP 60(b)(6).
21 "[T]his Rule [FRCP 60(b)(6)] has been used sparingly as an equitable remedy to prevent manifest
22 injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from
23 taking timely action to prevent or correct an erroneous judgment." *Westcot Intl, Inc., v. Locke, et*
24 *al.*, 236 B.R. 27, 32 (1999); *Greenwalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir.) *cert denied*, 519
25 U.S. 1102, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997)(quoting *United State v. Alpine Land & Reservoir*
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1 Co., 984 F.2d 1047, 1049 (9th Cir.) cert. denied, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993).

2 Such "manifest injustice" cannot be established.

3
4 Moreover, "clause 6 [FRCP 60b] and the preceding clauses [FRCP 60(b)(1-5) are mutually
5 exclusive; a motion brought under clause 6 must be for some reason other than the five reasons
6 preceding it under the rule." *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981) rev'd on
7 other grounds. See also *Lafarge Coseils et Etudes, S.A. v Kaiser Cement & Gypsum Corp.*, 791 F.2d
8 1334, 1338 (9th Cir. 1986). Amiga has not presented the Court with any other justification beyond
9 allegations, albeit deficient, in its attempt to satisfy FRCP 60(b)(3). Accordingly, the "savings clause"
10 contained within FRCP 60(b)(6) cannot be invoked nor can it form the basis for vacating this Court's
11 Order.
12

13 Amiga's request(s) for relief from judgment is wholly untenable. "Thendic" has continued to
14 act forthrightly in a good faith effort to resolve this matter on its merits.
15

16 **F. Amiga's Reply Cannot Raise New Facts or New Legal Arguments**

17 "Thendic" is leery that Amiga's reliance upon *Levander* as its sole basis for relief in its
18 moving brief may simply be an attempt to sandbag "Thendic" and unload new legal arguments and
19 facts not raised in its moving brief. However, Washington State courts have strictly prohibited new
20 evidence or arguments made in a reply brief. A moving party's brief that fails to address material
21 issues cannot be cured in their reply brief. *State v. Bell*, 10 Wn.App 957, 963, 521 P.2d 70 (1973).
22 "There is good reason for requiring an [party] to place his argument and supporting authority in his
23 opening brief. Unless he does so, his opponent is deprived of a fair opportunity to respond in the
24 only brief the rules authorize, namely, the answering brief. The rules do not provide that the
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1 respondent should prepare a second brief to respond to the reply brief." *State v. Bell*, at 963; *State*
2 *v. Vidal*, 82 Wn.2d 74, 508 P.2d 158 (1973).

3
4 Similarly, Federal Courts do not allow a party to ambush its opposition in its reply brief.
5 "Where new evidence is submitted with a reply brief, the court should not consider the new
6 evidence without giving the non-moving party an opportunity to respond." *American Civil*
7 *Liberties Union of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064, 1071 (Dist. Ct. Nevada,
8 1998). See *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("allowing plaintiff to submit a
9 supplemental declaration in response to defendants' new evidence in their reply"), *cert denied*, --
10 U.S. ---, 118 S.Ct. 48, 139 L.Ed.2d 14 (1997). "Thendic" suggests that this Court should adopt
11 the reasoning of the court in *State v. Bell* and not consider any new arguments, facts or issues not
12 raised in the Amiga's moving brief.
13
14

15 CONCLUSION

16 Amiga's Motion to vacate this Court's Order(s) for Specific Performance must fail. Amiga
17 basis its requested relief on an email that on its face is attributed to Amiga's Chief Technology
18 Officer, Fleecy Moss. Amiga argues that because more than one week after Bill Buck's declaration
19 was filed with this Court, an individual in Australia and not Fleecy Moss, allegedly admitted to
20 creating an email the Court should vacate both Orders for Specific Performance. There is no
21 contention that Mr. Buck knew of the alleged forged email nor is there any contention that he or
22 "Thendic" somehow conspired to create the email in question. The email issue is simply a non-issue.
23
24

25 Amiga boldly states that "Thendic's" desire to press for a settlement somehow transforms the
26 propriety of lawsuit from proper to improper. The propriety of the lawsuit was resolved by this Court
27 in "Thendic's" favor at summary judgment despite the high burden of proof required per FRCP 56.

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1 The desire for pre-trial resolution is simply not improper nor does it justify vacating the Orders in
2 question.

3 Amiga's proclamations that "Thendic" misrepresented this Court's actions and rulings,
4 misused and/or misrepresented its rights to Amiga trademarks and/or informed others of its intent to
5 enforce its rights under the "Agreement" simply does not support a motion based on FRCP 60. Since
6 there is no legal basis for these arguments, "Thendic" elects not to respond to the substantive
7 allegation(s).
8

9
10 Finally, Amiga argues that it cannot perform until it receives technical data. Amiga is
11 somehow under the mistaken belief that it is to integrate its DE Operating System into Pegasos.
12 Clearly, this Court ruled that Amiga was to actually provide "Thendic" with the information, data and
13 programs necessary for "Thendic" to integrate the DE Operating System into Pegasos or any of its
14 own products.
15

16 In short, there is no basis for vacating either of the Court's Orders for Specific Performance.
17 Amiga's Motion should be denied.

18 Dated this 5th day of April, 2004
19

20 **Law Office of Richard Hughes**

21 

22
23 Richard Hughes, WSBA #22897
24 Attorney for "Thendic"
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26
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