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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

and

HYPERION VOF, a Belgium corporation,

Defendant.

CAUSE NO. CV07-0631RSM

**AMIGA, INC.’S REPLY AND
DEFENSES TO COUNTERCLAIMS**

Comes now Plaintiff/Counterclaim Defendant, Amiga, Inc. (“Amiga”), as and for its Reply to and Defenses against the Counterclaims of Hyperion VOF (“Hyperion”) contained in Hyperion’s Answer to the Amended Complaint, Affirmative Defenses and Counterclaims (Dkt# 105) (the "Counterclaims"), and respectfully avers as follows.

1. Answering Paragraph 1 of the Counterclaims, admits that this Court has jurisdiction over this action, but denies that Hyperion correctly states the bases therefor.

2. Answering Paragraph 2 of the Counterclaims, admits that Hyperion has stipulated to jurisdiction and venue in this District but denies that venue is proper in this District on the Counterclaims alleged by Hyperion and otherwise denies the allegations in Paragraph 2.

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2 3. Answering Paragraph 3 of the Counterclaims, denies that Amiga “purports to be a
3 Delaware corporation” and avers that Amiga is a Delaware corporation.

4 4. Denies knowledge or information sufficient to form a belief as to the truth of the
5 allegations in Paragraph 4 of the Counterclaims.

6 5. Admits the allegations in Paragraph 5 of the Counterclaims.

7 6. Admits the allegations in Paragraph 6 of the Counterclaims.

8 7. Denies the allegations in Paragraph 7 of the Counterclaims.

9 8. Denies the allegations in Paragraph 8 of the Counterclaims.

10 9. Denies the allegations in Paragraph 9 of the Counterclaims.

11 10. Answering Paragraph 10 of the Counterclaims, states that it is impossible to
12 respond because the allegation assumes that Amiga Washington, as defined, was insolvent, and
13 this assumption is not correct.

14 11. Answering Paragraph 11 of the Counterclaims, denies knowledge or information
15 sufficient to form a belief as to Hyperion’s knowledge and denies so much of the allegations in
16 Paragraph 11 as asserts that Amiga Washington was insolvent.

17 12. Answering Paragraph 12 of the Counterclaims, admits that there was an
18 agreement entered into on April 24, 2003 by Hyperion and Itec LLC, states that this agreement
19 speaks for itself, and respectfully invites the Court’s attention to that document for the complete
20 terms thereof.

21 13. Denies the allegations in Paragraph 13 of the Counterclaims and avers that no
22 such consent was required.

23 14. Denies the allegations in Paragraph 14 of the Counterclaims and avers that no
24 such consent was required.

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15. Denies the allegations in Paragraph 15 of the Counterclaims.

16. Denies the allegations in Paragraph 16 of the Counterclaims.

17. Denies the allegations in Paragraph 17 of the Counterclaims.

18. Denies the allegations in Paragraph 18 of the Counterclaims.

19. Denies the allegations in Paragraph 19 of the Counterclaims.

20. Denies the allegations in Paragraph 20 of the Counterclaims.

21. Denies the allegations in Paragraph 21 of the Counterclaims.

22. Answering Paragraph 22 of the Counterclaims, states that the documents referenced therein speak for themselves, respectfully invites the Court’s attention to those documents for the complete terms thereof, and denies the remaining allegations in said Paragraph 22.

23. Answering Paragraph 23 of the Counterclaims, respectfully refers the Court to the Itec/KMOS Contract (as there defined), for the complete terms thereof, denies the implications that Hyperion purports to draw therefrom, and denies the remaining allegations in said Paragraph 23.

24. Denies the allegations in Paragraph 24 of the Counterclaims and states that all requisite consents were obtained.

25. Answering Paragraph 25 of the Counterclaims, states that the document was attached to the McEwen declaration in error, is not relevant hereto, does not purport to show what Hyperion claims it shows, and otherwise denies the remaining allegations in said Paragraph 28.

26. Denies the allegations in Paragraph 26 of the Counterclaims.

27. Denies the allegations in Paragraph 27 of the Counterclaims.

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28. Denies the allegations in Paragraph 28 of the Counterclaims.

29. Denies the allegations in Paragraph 29 of the Counterclaims.

30. Admits the allegations in Paragraph 30 of the Counterclaims.

31. Admits so much of Paragraph 31 of the Counterclaims as alleges that KMOS merely changed its name to Amiga and that, as such, Amiga is KMOS, Inc.’s lawful successor, and denies the remaining allegations in said Paragraph 31.

32. Answering Paragraph 32 of the Counterclaims, states that it pleads a false hypothetical to which no response is possible or required and otherwise denies the allegations contained in said Paragraph 35 of the Counterclaims.

33. Denies the allegations in Paragraph 33 of the Counterclaims insofar as they pertain to Hyperion’s prior and intended future conduct and insofar as said Paragraph 36 alleges that Amiga has no valid basis upon which to terminate the Licensing Agreement.

34. Denies the allegations in Paragraph 34 of the Counterclaims.

35. Denies the allegations in Paragraph 35 of the Counterclaims.

36. Denies the allegations in Paragraph 36 of the Counterclaims.

In response to Hyperion’s purported “Cause No. 1”, Amiga repeats and realleges its responses to Paragraphs 1-36 of the Counterclaims as if restated in full herein.

37. Answering Paragraph 37 of the Counterclaims, admits that Hyperion seeks a declaratory judgment under the November 3, 2001 Agreement, but denies that it is entitled to the declaratory relief prayed for; to any part thereof; or to any other relief.

38. Denies the allegations in Paragraph 38 of the Counterclaims.

In response to Hyperion’s purported “Cause No. 2”, Amiga repeats and realleges its responses to Paragraphs 1-38 of the Counterclaims as if restated in full herein.

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39. Denies the allegations in Paragraph 39 of the Counterclaims.

40. Denies the allegations in Paragraph 40 of the Counterclaims.

41. Denies the allegations in Paragraph 41 of the Counterclaims.

42. Denies the allegations in Paragraph 42 of the Counterclaims.

43. Denies the allegations in Paragraph 43 of the Counterclaims.

44. Denies the allegations in Paragraph 44 of the Counterclaims.

45. Denies the allegations in Paragraph 45 of the Counterclaims.

46. Denies the allegations in Paragraph 46 of the Counterclaims.

47. Denies the allegations in Paragraph 47 of the Counterclaims.

48. Answering Paragraph 48 of the Counterclaims, denies that Hyperion is entitled to any other relief.

In response to Hyperion’s purported “Cause No. 3”, Amiga repeats and realleges its responses to Paragraphs 1-48 of the Counterclaims as if restated in full herein.

49. Answering the allegations in Paragraph 49 of the Counterclaims, states that the Itec/KMOS Contract was, in fact, entered into on October 10, 2003 and denies there remaining allegations in said Paragraph 49.

50. Denies the allegations in Paragraph 50 of the Counterclaims.

51. Denies the allegations in Paragraph 51 of the Counterclaims.

52. Denies the allegations in Paragraph 52 of the Counterclaims.

53. Answering Paragraph 53 of the Counterclaims, denies that Hyperion is entitled to the relief sought, to any part thereof, or to any other relief.

54. Answering Paragraph 54 of the Counterclaims, denies that Hyperion is entitled to any other relief.

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In response to Hyperion’s purported “Cause No. 4”, Amiga repeats and realleges its responses to Paragraphs 1-54 of the Counterclaims as if restated in full herein.

55. Paragraph 55 contains an assertion of law to which no responsive pleading is required.

56. Denies the allegations in Paragraph 56 of the Counterclaims.

57. Denies the allegations in Paragraph 57 of the Counterclaims.

58. Paragraph 58 is incomprehensible, and no responsive pleading can be framed thereto. To the extent that it purports to allege that in discovery “additional breaches of contract by Amiga may be discovered”, Amiga denies said allegation; to the extent that it purports to allege that in discovery “additional breaches of contract by Hyperion may be discovered”, Amiga admits such allegation.

59. Answering Paragraph 59 of the Counterclaims, denies that Hyperion is entitled to the relief there sought; to any part thereof; or to any other relief.

In response to Hyperion’s purported “Cause No. 5”, Amiga repeats and realleges its responses to Paragraphs 1-59 of the Counterclaims as if restated in full herein.

60. Answering Paragraph 60 of the Counterclaims, denies that Amiga has made the misrepresentations pled therein or any other misrepresentations.

61. Denies the allegations in Paragraph 61 of the Counterclaims.

62. Denies the allegations in Paragraph 62 of the Counterclaims.

In response to Hyperion’s purported “Cause No. 6”, Amiga repeats and realleges its responses to Paragraphs 1-62 of the Counterclaims as if restated in full herein.

63. Denies the allegations in Paragraph 63 of the Counterclaims.

64. Denies the allegations in Paragraph 64 of the Counterclaims.

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2 65. Denies the allegations in Paragraph 65 of the Counterclaims.

3 66. Denies the allegations in Paragraph 66 of the Counterclaims.

4 67. Denies the allegations in Paragraph 67 of the Counterclaims.

5 68. Denies the allegations in Paragraph 68 of the Counterclaims.

6 69. Denies the allegations in Paragraph 69 of the Counterclaims.

7 70. Admits so much of Paragraph 70 as alleges that Hyperion is asking the Court to
8 enjoin Amiga from continuing specified acts and to award Hyperion monetary damages, but
9 denies that Hyperion is entitled to such relief to any part thereof, or to any other relief.

10 In response to Hyperion’s purported “Cause No. 7”, Amiga repeats and realleges its
11 responses to Paragraphs 1-70 of the Counterclaims as if restated in full herein.

12 71. Denies the allegations in Paragraph 71 of the Counterclaims.

13 72. Denies the allegations in Paragraph 72 of the Counterclaims.

14 73. Denies so much of Paragraph 73 as alleges that Amiga has engaged in acts
15 constituting a false designation of origin or that it has violated the Lanham Act or any other
16 applicable law.

17 In response to Hyperion’s purported “Cause No. 8”, Amiga repeats and realleges its
18 responses to Paragraphs 1-73 of the Counterclaims as if restated in full herein.

19 74. Answering Paragraph 74 of the Counterclaims, states that said Paragraph 74
20 contains an assertion of law to which no responsive pleading is required and that the document
21 referenced therein speaks for itself, and respectfully invites the Court’s attention to that
22 document for the complete terms thereof.

23 75. Answering Paragraph 75 of the Counterclaims, states that the document
24 referenced therein speaks for itself, and respectfully invites the Court’s attention to that

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2 **IN AND FOR A SECOND DEFENSE**

3 81. Hyperion lacks standing to bring the claims alleged in the Counterclaims.

4 **IN AND FOR A THIRD DEFENSE**

5 82. Hyperion has failed to join Amiga One Partners and Eyetech Group, Ltd., each of
6 whom is a necessary and/or indispensable party to the Counterclaims.

7 **IN AND FOR A FOURTH DEFENSE**

8 83. All or part of Hyperion's Counterclaims are barred by the applicable statutes of
9 limitation and/or the doctrine of laches.

10 **IN AND FOR A FIFTH DEFENSE**

11 84. All or part of Hyperion's Counterclaims are barred by the doctrines of waiver,
12 estoppel, ratification, acquiescence, novation and/or like doctrines.

13 **IN AND FOR A SIXTH DEFENSE**

14 85. Amiga pleads the defense of payment.

15 **IN AND FOR A SEVENTH DEFENSE**

16 86. All or part of Hyperion's Counterclaims are barred by its prior, material breach of
17 the agreements alleged in its Counterclaims.

18 **IN AND FOR AN EIGHTH DEFENSE**

19 87. All or part of Hyperion's Counterclaims are barred by the doctrine of unclean
20 hands.

21 **IN AND FOR A NINTH DEFENSE**

22 88. To the extent that Hyperion is asking this Court to enter relief respecting
23 Hyperion's trademark rights in a country other than the United States, it is seeking relief that is
24 beyond the Court's jurisdiction to award.

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2 **IN AND FOR A TENTH DEFENSE**

3 89. To the extent that Hyperion purports to plead a fraud claim, it has failed to plead
4 it with the specificity required by R.9(b), Fed. R. Civ. Pro.

5 **IN AND FOR AN ELEVENTH DEFENSE**

6 90. To the extent that Hyperion is claiming rights under any agreement, it has failed
7 to plead that it has performed all of its obligations thereunder.

8 **IN AND FOR A TWELFTH DEFENSE**

9 91. All or part of Hyperion's Counterclaims are barred by Hyperion's failure to
10 satisfy contractual conditions precedent to the assertion of Hyperion's claims in this lawsuit.

11 **IN AND FOR A THIRTEENTH DEFENSE**

12 92. Hyperion has failed to mitigate its damages, if any, and to the extent of its failure
13 to mitigate, any damages awarded to Hyperion should be reduced accordingly.

14 **IN AND FOR A FOURTEENTH DEFENSE**

15 93. All or part of Hyperion's Counterclaims are barred by Hyperion's fault.

16 **IN AND FOR A FIFTEENTH DEFENSE**

17 94. All or part of Hyperion's Counterclaims are barred by Hyperion's failure to
18 provide reasonable and adequate notice under the agreements alleged in its Counterclaims.

19 **IN AND FOR A SIXTEENTH DEFENSE**

20 95. All or part of Hyperion's Counterclaims are barred by frustration of performance,
21 prevention, impossibility and/or impracticability.

22 **IN AND FOR A SEVENTEENTH DEFENSE**

23 96. All or part of Hyperion's Counterclaims are barred because Hyperion is not the
24 real party in interest.

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2 **IN AND FOR AN EIGHTEENTH DEFENSE**

3 97. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, all
4 transferees acted in good faith and gave reasonably equivalent value or value for all assets
5 received.

6 **IN AND FOR A NINETEENTH DEFENSE**

7 98. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, the transfers
8 resulted from the enforcement of a security interest in compliance with Article 9A of Title 62A
9 RCW and is therefore not voidable under RCW 19.41.041(a)(2) or 19.40.051.

10 **IN AND FOR A TWENTIETH DEFENSE**

11 99. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, Amiga, Inc.,
12 a Washington Corporation, was not insolvent at the time of the transfers and did not become
13 insolvent as a result of the transfers complained of.

14 **IN AND FOR A TWENTY-FIRST DEFENSE**

15 100. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, any injury
16 which Hyperion may have suffered can be adequately redressed by an award of damages.

17 **IN AND FOR A TWENTY-SECOND DEFENSE**

18 101. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, Hyperion has
19 failed to allege that statutory remedies are insufficient and/or that the relief it seeks is justified.

20 **IN AND FOR A TWENTY-THIRD DEFENSE**

21 102. With respect to Cause Nos. 2 and/or 3 of Hyperion’s Counterclaims, Amiga is
22 entitled to have any damages award against it reduced to the extent of the value it gave in the
23 transfers at issue.
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2 WHEREFORE, Plaintiff/Counterclaim Defendant Amiga, Inc. demands judgment as
3 follows:

- 4 a) Dismissing Hyperion's Counterclaims and each Cause of Action therein;
5 b) Awarding Amiga fees and expenses in bringing this suit as permitted by the
6 parties' contract and equity; and
7 c) For such other further relief as this Court deems appropriate.

8 DATED this the 2nd day of July, 2008.

9 CABLE, LANGENBACH, KINERK & BAUER, LLP

10 /s/ Lawrence R Cock
11 Lawrence R. Cock, WSBA No. 20326
12 CABLE, LANGENBACH, KINERK & BAUER, LLP
13 1000 Second Avenue Suite 3500
14 Seattle, WA 98104
15 Telephone: 206-292-8800
16 Facsimile: 206-292-0494
17 lrc@cablelang.com

18 /s/ Lance Gotthoffer
19 Lance Gotthoffer (Pro Hac Vice), NYSBA No. 1088186
20 Jeffrey M. Tamarin, (Pro Hac Vice), NYSBA No. 1935071
21 REED SMITH LLP
22 599 Lexington Avenue
23 New York, NY 10022
24 Telephone: 212-521-5400
Facsimile: 212-521-5450
lgotthoffer@reedsmith.com
jtamarin@reedsmith.com

/s/ Kenneth J. Philpot
Kenneth J. Philpot (Pro Hac Vice), NYSBA No. 62401
REED SMITH LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111-3922
Telephone: 415-543-8700
Facsimile: 415-391-8269
kphilpot@reedsmith.com

Attorneys for Plaintiff/Counterclaim Defendant Amiga, Inc.

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2 **CERTIFICATE OF SERVICE**
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4 I hereby certify that on July 3, 2008, I electronically filed the foregoing with the Clerk of
5 the Court using the CM/ECF system which will send notification of such filing to the following:

6 William A. Kinsel
7 Law Offices of William A. Kinsel, PLLC
8 Market Place Tower
9 2025 First Avenue, Suite 440
10 Seattle, WA 98121

11 Additionally, I caused the foregoing to be delivered by legal messenger to William A. Kinsel at
12 the address identified above.

13 s/ Lawrence R. Cock
14 Lawrence R. Cock, WSBA No. 20326
15 Attorney for Plaintiff/Counterclaim Defendant
16 CABLE, LANGENBACH, KINERK & BAUER, LLP
17 Suite 3500, 1000 Second Avenue Building
18 Seattle, Washington 98104-1048
19 (206) 292-8800 phone
20 (206) 292-0494 facsimile
21 irc@cablelang.com
22
23
24