

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiffs,

v.

HYPERION VOF, a Belgian corporation,

Defendant.

No. 07-0631-RSM

**DECLARATION OF WILLIAM A.
KINSEL IN OPPOSITION TO AMIGA
DELAWARE'S MOTION FOR
PROTECTIVE ORDER**

Note on Motion Calendar: 12/17/08

William A. Kinsel, under penalty of perjury, declares and states as follows:

1. I am counsel for defendant/counterclaim plaintiff Hyperion VOF. I am over the age of 18. I have personal knowledge of the matters stated herein and am competent to testify.

2. Prior to contacting Amiga Delaware's counsel to dispute its "Outside Counsel's Eyes Only" designations for the Cairncross document production, my legal assistant, Ms. Lori Peters, spent 3.0 hours segregating all of the merely "confidential" documents from those designated "outside counsel's eyes only," both so that Hyperion (specifically Ben Hermans and Evert Carton) could review what was designated as "confidential" and so attorney Kinsel could review what was marked for "his eyes only." One of the products of Ms. Peters' work was the list attached hereto as Exhibit 1. This list identifies each "document" marked as "outside

**DECLARATION OF WILLIAM A. KINSEL
IN OPPOSITION TO AMIGA DELAWARE'S
MOTION TO QUASH SUBPOENA - 1**

**LAW OFFICES OF
WILLIAM A. KINSEL, PLLC**

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SEATTLE, WASHINGTON 98121
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1 counsel's eyes only" in the Cairncross document production. I then spent 13.2 hours reviewing
2 each "document" that was designated as being for his eyes only. At the conclusion of that
3 process, I concluded that not one of those documents was properly restricted to the review of
4 outside counsel only. There are three entries that I put in bold type and underlined for easy
5 reference, however, as they relate to the business plans discussed in more detail in the motion.

6 3. On October 27, 2008, I wrote to Amiga Delaware and Cairncross &
7 Hempelmann to explain my conclusions and to demand under §6.2 of the Stipulated Protective
8 Order that the interested parties meet and confer to discuss the problem. A true and accurate
9 copy of that letter is attached hereto as Exhibit 2. On Friday, November 7, 2008, I met with
10 Mr. Lawrence Cock and conferred without success in an effort to resolve the present dispute.

11 4. Accordingly, on November 12, 2008, I wrote another letter invoking the judicial
12 dispute resolution process required by §6.3 of the Stipulated Protective Order. A true and
13 accurate copy of that letter is attached hereto as Exhibit 3. I spent an additional 3 hours
14 preparing these §§6.2 and 6.3 notices, i.e., Exhibits 2 and 3.

15 5. Two additional miscellaneous matters need to be addressed. First, Amiga
16 Delaware accuses Hyperion of having "unclean hands" because Hyperion failed to produce
17 some documents. In fact, Hyperion produced all responsive documents to me in 2007, and
18 after the stipulated protective order was finally entered in August 2008, I was mistakenly under
19 the impression that all of those materials had been produced to Amiga Delaware. When that
20 mistake was pointed out to me by Lawrence Cock, we promptly rectified the matter. True and
21 accurate copies of emails and correspondence regarding that exchange are attached hereto as
22 Exhibit 4. Thus, Amiga Delaware now has all documents it has requested from Hyperion, and
23 not one of those documents was marked with the restrictive "Outside Counsel's Eyes Only"
24 designation.
25
26

1 6. Amiga Delaware implies in its motion papers that Hyperion is somehow
2 interfering with the mediation process by pressing its demands to make the "outside counsel's
3 eyes only" documents available to Mr. Evert Carton and Mr. Ben Hermans for review. In fact,
4 the subpoena duces tecum for the disputed documents was served on Cairncross &
5 Hempelmann on December 21, 2007, or almost exactly one year ago. It should come as no
6 surprise to Amiga Delaware that one typical element of *successful* mediations is the possession
7 by each party concerned of the information it needs to properly assess the risks and benefits of
8 settlement versus ongoing litigation. Simply put, by refusing to give Hyperion access to these
9 materials, Amiga Delaware has frustrated that goal and made it more difficult to reach
10 settlement. For the Court's information, the mediation effort is nonetheless continuing with the
11 assistance of the Honorable Judge Kelley Arnold.
12

13 7. I have attached hereto as Exhibit 5 a true and accurate statement of legal time
14 spent reviewing the documents inappropriately designated as "Outside Attorney's Eyes Only."
15 As mentioned in paragraph 2 above, Lori Peters spent 3 hours segregating the "Outside
16 Attorney's Eyes Only" documents and preparing a list of the same. Her time appears on the
17 entries for October 6 and 7, 2008. Ms. Peters' hourly rate on this matter is \$90. Ms. Peters has
18 worked for me almost continuously since 1990, when we were both at Perkins Coie. Ms.
19 Peters is a skilled legal assistant, and I know that her rate is reasonable within the Western
20 Washington legal market.
21

22 8. As stated above in paragraph 2, I spent 13.2 hours reviewing the "Outside
23 Attorney's Eyes Only" documents that are listed on Exhibit 1 hereto. I spent those hours on
24 October 21, 23, 24, 26 and 27. I then spent an additional 3 hours preparing the §§6.2 and 6.3
25 notices to Amiga Delaware and Cairncross & Hempelmann on October 27 and November 12,
26

1 2008. Where necessary, I have indicated on Exhibit 5 the allocation of time to activities not
2 related to this motion and the underlying documents.

3 9. I spent 3.7 hours on December 11, 2008 beginning to work on the memorandum
4 and declarations in opposition to Amiga Delaware's motion for a protective order (Exhibit 5),
5 and spent an additional 5 hours completing that opposition today, on December 12, 2008.
6 Therefore, I have spent 21.9 hours of time as a result of Amiga Delaware's mass,
7 indiscriminant and improper document designations.

8 10. My hourly rate on this matter is \$190. I was admitted to the Washington bar
9 1988 and have concentrated my practice on civil litigation for that entire period. Based on my
10 personal knowledge of the hourly rates of other attorneys in this area with comparable skills
11 and experience, I know that this rate is reasonable.

12 11. I accordingly ask this Court to enter sanctions against Amiga Delaware in the
13 amount of \$5,001, payable to Hyperion, care of Kinsel Law Offices, within 10 days of entry of
14 the Court's order. Said award is based upon 24.9 hours times \$190, or \$4,731 plus 3 hours
15 times \$90, or \$270.

16
17 **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS**
18 **OF THE STATE OF WASHINGTON THAT THE FOREGOING IS**
19 **TRUE AND CORRECT.**

20 December 12, 2008
21 Date

William A. Kinsel
William A. Kinsel

22 Seattle, WA
23 Place

24 540p.doc
25
26

**LIST OF CAIRNCROSS & HEMPLEMANN
ATTORNEY EYES ONLY DOCUMENTS**

0001	1186	1395	1906	2473	3236	3761
0007	1192	1402	1917	2501	3246	3772
0044	1194	1406	1994	<u>2520</u>	3265	3786
0066	1196	1409	2019	2534	3273	3799
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0256	1208	1709	2059	2580	3344	3867
0263	1209	1717	2060	2599	3355	3883
0861	1211	1723	2068	2623	3359	3896
0898	1213	1729	2079	2634	3380	3910
0906	1217	1736	2080	2636	3383	3935
0909	1219	1741	2083	2637	3408	3960
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0983	1225	1748	2092	2734	3414	3995
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1009	1236	1769	2107	2845	3475	4049
1011	1237	1773	2110	2852	3491	4069
1016	1246	1774	2113	2865	3511	4070
1018	1249	1776	2116	2875	3532	4074
1021	1250	1780	2124	2887	3549	4075
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1037	1260	1786	2140	2926	3574	4086
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October 27, 2008

VIA EMAIL & U.S. MAIL

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Reed Smith LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111-3922

Re: **Amiga Delaware v. Hyperion**
Challenge to C & H Document Designation Under the Stipulated Protective
Order

Dear Counsel:

I am writing to object to the designation of documents as "Highly Confidential—Outside Counsel's Eyes Only" in the recent document production from Cairncross & Hempelmann. Because I am uncertain as to who actually was responsible for those designations, I am writing to each of you to inform you that Hyperion is, through this letter, commencing the formal process required to have those materials re-designated under Section 6 of the Stipulated Protective Order.

I am enclosing a list of the document designations that we challenge. For the information of those of you not involved in the production of the Cairncross documents, that firm produced its materials in PDF format on a disk. Each "document" is identified on the disk by the bates number that appears on the first page of the document. To explain, the first entry on the enclosed list is "0001." It refers to the document that begins with the page that is bates stamped C-H000001, and so forth and so on.

As you will see, the list of challenged documents is long. Unfortunately, this list encompasses **every single document** designated "Highly Confidential—Outside Counsel's Eyes Only" because none of those documents constitutes or contains trade secret information and/or other secret or sensitive information, the disclosure of which would injure a third party, or create

a substantial risk of serious injury to a party in this litigation. (See Stipulated Protective Order, §2.4.)

In fairness, there are three business plans commencing at C-H 2027, 2520 and 2935, which might under different circumstances be considered trade secret information properly subject to the "Outside Counsel's Eyes Only" designation. From what I can determine, however, those business plans were prepared in the years 2000 and 2002, or perhaps 2003, and they no longer contain any sensitive business information. Indeed, even when written those business plans were so generic as to contain nothing beyond the obvious idea that money was to be made, if a competitive product could be brought to market. Those business plans do, however, contain relevant statements that reflect on issues in dispute in this case, e.g., what Amiga Washington's overall (generic) priorities were, and when and how individuals relevant to the fraudulent conveyance claim became involved in that company. Those documents need, as a result, to be made available to my client for their review.

Again, I do not know who was responsible for the broad-brush use of the "Outside Counsel's Eyes Only" designation, but I am forced to conclude that that designation was used in violation of §5.1 ("Exercise of Restraint and Care in Designating Material for Protection") and §5.2 ("Mass, Indiscriminate, or Routinized Designations are Prohibited"). C-H 0001 is, for instance, a file folder. C-H 861 to 928 is a complete copy of the transcript and exhibits to Mr. Bill McEwen's deposition in the Thendic litigation—something which has been available only in part from the public record, yet which in total provides even stronger support for Hyperion's defense that Amiga Washington was insolvent for years during the periods relevant to this suit. Other documents are simply too numerous to list here—except by their inclusion in the enclosed list of challenged designations. I can, however, inform you that many of them are (a) routine corporate records of Amino Development/Amiga Washington, which are relevant among other things to Hyperion's claim of fraudulent conveyance (*see, e.g.*, C-H 2856), (b) additional records relevant to Amiga Washington's insolvency (*see, e.g.*, C-H 2696/2936.¹), (c), transactional documents pertinent to which trademarks Amiga Washington, and thus ultimately Amiga Delaware, may or may not have owned, and (d), documents that appear relevant to Hyperion's claim that Amiga Washington breached its warranties and representations regarding its ability to deliver the code for AmigaOS. In sum, these are relevant documents that do not contain trade secret or sensitive information, and that I need to show to my client so that its personnel can aid in the defense and prosecution of this case.

¹ A numbering error appears in the produced documents when one compares the bates number that identifies the PDF file on the disk provided by Cairncross and then looks at what actually appears on the bottom of the page. Here, the disk identifies the document as starting at C-H 2696, while the page actually reads C-H 2936. This numbering error appears to begin at C-H 2669. I would appreciate it if someone could review this issue and let me know the full extent of the problem, and if I am missing any documents as a result of those errors.

Page 3
October 27, 2008

Accordingly, and in compliance with §6.2 of the Stipulated Protective Order, I request that we meet and confer to discuss these issues by the end of the day on Friday, November 7, 2008. If we are unable to complete that process by that date, I will then present a §6.3 demand to start the formal judicial intervention process. It is my hope, however, that we will be able to resolve these issues without wasting Judge Martinez's time.

Very truly yours,

KINSEL LAW OFFICES



William A. Kinsel

Enclosure

cc: Hyperion (w/enc.)

102708c1

**LIST OF CAIRNCROSS & HEMPLEMANN
ATTORNEY EYES ONLY DOCUMENTS**

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WILLIAM A. KINSEL

ADMITTED IN:
WASHINGTON & OREGON

November 12, 2008

VIA EMAIL & U.S. MAIL

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San Francisco, CA 94111-3922

**Re: Amiga Delaware v. Hyperion
Challenge to C & H Document Designation Under the Stipulated Protective
Order**

Dear Counsel:

Lawrence Cock and I fulfilled the "meet and confer" requirement of §6.2 of the Stipulated Protective Order last Friday, when he called to respond to my October 27, 2008 challenge to the designation of documents as "Highly Confidential—Outside Counsel's Eyes Only" in the recent document production from Cairncross & Hempelmann. Lawrence indicated that you all prefer to focus on the upcoming mediation rather than to deal with the document-designation issue now. As I understood it, at least as of last Friday, Amiga had no substantive response to my objections to the document designations, except for the observation that a file folder should clearly not be subject to the "Outside Counsel's Eyes Only" designation.

Lawrence did invite me to choose some of the documents on the challenged list, and he said that Amiga would then consider whether it would waive or change its designation for those specific documents. Because I conclude that my client needs access to all of the documents, and because I do not think it appropriate for me to spend more time culling through the hundreds of pages of inappropriately-designated documents that I have already spent substantial time reviewing, we must decline that proposal.

Page 2
November 12, 2008

Accordingly, pursuant to §6.3 of the Stipulated Protective Order, I hereby provide written notice of Hyperion's objection to the application of the "Highly Confidential—Outside Counsel's Eyes Only" designation to the documents in the attached list. Furthermore, I specifically refer to an incorporate my letter of October 27 for a discussion of the bases for this objection.

Under §6.3 of the Stipulated Protective Order, either or both Amiga Delaware and Cairncross have 20 days in which to file a motion for protective order, or those designations are automatically removed. By my count, that means your motion will be due by Tuesday, December 2, 2008, or well after both the mediation and the Thanksgiving holiday. Therefore, Amiga may concentrate on the upcoming mediation, as Lawrence indicates that it wants to do, and wait to see how that process goes before putting any further effort into this matter. By serving this objection now, however, Hyperion serves its need to avoid useless delay, if in fact the mediation does not succeed.

Very truly yours,

KINSEL LAW OFFICES


William A. Kinsel

Enclosure

cc: Hyperion (w/enc.)

111208c1

**LIST OF CAIRNCROSS & HEMPLEMANN
ATTORNEY EYES ONLY DOCUMENTS**

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1139	1364	1895	2333	3212	3743	
1153	1366	1897	2345	3217	3752	
1167	1388	1904	2451	3227	3754	

Bill Kinsel

From: Bill Kinsel [wak@kinsellaw.com]
Sent: Thursday, November 13, 2008 9:40 AM
To: 'Lawrence Cock'
Cc: 'Gotthoffer, Lance'; 'Shatan, Gregory S.'; 'svanderhoef@cairncross.com'
Subject: RE: Amiga Delaware adverse Hyperion: Hyperion's Section 6.3 Objection

Hi, Lawrence:

Here are the responses to your three inquiries below:

- 1) Per my request, Hyperion has checked and confirmed that there are no additional contracts to produce. I do recollect thinking that there were earlier in the case, but that may have been my mistake. My memory on that issue is not exact enough at this point.
- 2) I am not aware of other documents that were not produced. Are you thinking of anything in particular?
- 3) My client is not willing to arrange access to the source code. We believe that your clients are generally knowledgeable of the substantial manpower that has been devoted to AmigaOS 4 to realize that a significant investment has been made that vastly exceeds the several hundred thousand dollars you mention below.

Bill

From: Lawrence Cock [mailto:lrc@cablelang.com]
Sent: Wednesday, November 12, 2008 10:26 AM
To: Bill Kinsel
Cc: Gotthoffer, Lance; Shatan, Gregory S.; svanderhoef@cairncross.com
Subject: RE: Amiga Delaware adverse Hyperion: Hyperion's Section 6.3 Objection

Bill:

Thank you for your e-mail.

Will you please address my outstanding concerns: 1) Agreements with third party developers previously withheld from production by Hyperion, 2) other documents that are responsive to our earlier requests that your client withheld on grounds that a protective order was necessary prior to production, and 3) arranging access to the source code prior to the mediation so that my clients have a chance to evaluate your client's assertion that it has performed services worth several hundred thousand dollars?

Lawrence
206-292-8800

From: Bill Kinsel [mailto:wak@kinsellaw.com]
Sent: Wednesday, November 12, 2008 10:08 AM
To: Lawrence Cock; 'Steve VanDerhoef'; 'Tamarin, Jeffrey M.'; 'Gotthoffer, Lance'; 'Philpot, Kenneth J.'
Subject: Amiga Delaware adverse Hyperion: Hyperion's Section 6.3 Objection

Counsel:

Attached you will find Hyperion's written objection under §6.3 of the Stipulated Protective Order. Your motion for a protective order, if any, must accordingly be filed by December 2, 2008. This leaves your client plenty of time to focus on the upcoming mediation, and to then turn to this matter only if necessary in light of the outcome of the November 20 mediation.

Bill Kinsel

Exhibit 4, Page 13

12/11/2008

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Bill Kinsel

From: Lawrence Cock [lrc@cablelang.com]
Sent: Tuesday, November 18, 2008 1:08 PM
To: Bill Kinsel
Subject: Documents - follow up

Bill:

In your June 18, 2007 letter, you declined to produce documents H 1 – 170, H182 – 476, and H558 – 586. You stated that a protective order needed to be entered before producing those documents. Because a protective order has been entered, I again request that you produce these documents in advance of the settlement conference. Because you referred to them by bates stamp numbers, I assume you have them in your office, numbered, and ready for production.

Sincerely,

Lawrence Cock
c/o Cable, Langenbach, Kinerk & Bauer, LLP
1000 Second Ave., Suite 3500
Seattle, WA 98104
LRC@CableLang.com

206-292-8800

KINSEL LAW OFFICES, PLLC

MARKET PLACE TOWER
2025 FIRST AVENUE, SUITE 440
SEATTLE, WASHINGTON 98121

TEL (206) 706-8148
FAX (206) 374-3201

December 2, 2008

VIA MESSENGER

Lawrence R. Cock, Esq.
Cable, Langenbach, Kinerk & Bauer, LLP
1000 Second Avenue, Suite 3500
Seattle, WA 98104

Re: Amiga Delaware v. Hyperion VOF
Hyperion's Responses to Amiga Delaware's First Request for Production

Dear Mr. Cock:

Enclosed please find the copy set of documents responsive to Amiga Delaware's First Request for Production. These documents have been Bates number stamped H 0001 - H 0586. Please note that H 0001 - 0170, H 0182 - 0476 and H 0558 - 0586 have been stamped "Confidential" in accordance with the Stipulated Protective Order entered in this matter.

If you have any questions on the enclosed, please contact Bill Kinsel or his assistant, Lori Peters.

Very truly yours,

KINSEL LAW OFFICES

Judy Monson

Judy Monson,
Legal Assistant to William A. Kinsel

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21 DEC
2008
KINSEL LAW OFFICES

Enclosures

1011c

16349



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FAX: 360-357-3302
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MESSANGER SERVICE LAST DAY	FIRM NAME Kinsell Law Offices	PHONE 206-706-8148	EXT.#	EMAIL (SECRETARY) judy@kinsellaw.com
DATE/TIME 12/3/08 by 4:30 pm	ADDRESS 2025 First Avenue, Suite 440	ATTY WAK	SECRETARY Judy	
	CASE NAME Amiga Delaware v. Hyperion VOF	YOUR ABC ACCT. NO 100813		
	CAUSE NO. CV 07-0631-RSM	CLIENT MATER # 822.001	DATE 12/2/2008	

DOCUMENTS

Cover letter w/copy for conforming and stack of production documents.

SIGNATURE REQUIRED ON DOCUMENTS	<input checked="" type="checkbox"/> RETURN CONFORMED ABC SLIP ONLY	<input checked="" type="checkbox"/> RETURN CONFORMED COPY	CONFORM ORIGINAL DO NOT FILE
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OTHER INSTRUCTIONS

Please deliver the cover letter and stack of production documents and return stamped cover page to me.

1 Lawrence R. Cock, Esq. Cable, Langenbach, Kinerk & Bauer, LLP 1000 Second Avenue, Suite 3500 Seattle, WA 98104 <i>Rec'd 931 12/3</i>	3
2	4 BULK CHARGE <i>6</i>

FILING	COUNTY	SUPERIOR COURT	DISTRICT COURT (INDICATE DISTRICT)	AUDITOR	APPEALS		FEDERAL COURT		SEA	TAC	STATE SUPREME COURT	SEC STATE CORP.
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*** Summary by Working Team ***

Exhibit 5, Page 18

ite	Matter	Client	Matter Description	Law Type	Hours	Rate	Total
utry#	Task	Explanation					
awyer: LJP	- Lori J. Peters						
st 6/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			0.40	90.00	36.00
019	BW	Begin reviewing Cairncross & Hempelmann documents to identify the "attorney eyes only" documents.					
awyer: WAK	- William A. Kinsel						
st 6/2008 822.001		Redacted				190.00	
045	BW						
awyer: LJP	- Lori J. Peters						
st 7/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			2.60	90.00	234.00
020	BW	Finish reviewing the Cairncross & Hempelmann documents to identify the "attorney eyes only" documents. Copy the "confidential" documents onto a separate CD for forwarding to Ben and Evert.					
awyer: WAK	- William A. Kinsel						
st 15/2008 822.001		Redacted					
047	BW						
st 20/2008 822.001		Redacted					
0179	BW						
st 21/2008 822.001	Hyperion VOF	Redacted			2.00	190.00	380.00
0381	BW	Begin review of the outside Attorney's Eyes Only documents received from Cairncross.			1.7		
st 22/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit					
0210	BW	Redacted					
st 23/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			1.90	190.00	361.00
0231	BW	Complete the review of McEwen's deposition transcript in the Thendic matter. Continue review of the "outside attorney's eyes only" documents.					
st 24/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			5.00	190.00	950.00
0242	BW	Redacted			4.5		
st 25/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			3.80	190.00	722.00
0246	BW	Continue reviewing the "outside attorney's eyes only" documents.					
st 27/2008 822.001	Hyperion VOF	Amiga, Inc. v. Hyperion VOF U.S. District Court, Western District o lit			3.30	190.00	627.00
0382	BW	Complete the review of the documents recently received from Cairncross and Hempelmann. Review the provisions of the Stipulated Protective Order regarding challenging improper "Outside Attorney's Eyes Only" designations. Prepare a letter to opposing counsel and Cairncross and Hempelmann beginning the formal objection process.					

*** Summary by Working Lawyer ***