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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.

CASE NO.: CV07-0631-RSM

**REPLY MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF AMIGA'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

**(Fed. R. Civ. Pro. 65)**

**NOTE ON MOTION CALENDAR:  
MAY 25, 2007**

**HEARING: MAY 31, 2007  
TIME: 10:00 A.M.**

**COURT: HON. RICARDO MARTINEZ**

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## I. INTRODUCTION

1  
2 In its Opposition papers, Hyperion concedes – as it must – that it has both (1) infringed,  
3 and continues to willfully infringe, Amiga’s registered trademarks by using them to market  
4 Amiga OS 4.0 outside the scope and term of its terminated license, and (2) materially breached its  
5 contractual obligations by, among other things, refusing to release the code and rights to Amiga  
6 OS 4.0 to Amiga upon Amiga’s exercise of its option to acquire that property and by continuing  
7 to market OS 4.0 outside the scope and term of its terminated marketing and distribution license.  
8 With no meritorious defense to Amiga’s claims, Hyperion offers freshly – but only half – baked  
9 excuses for why Hyperion’s infringement and breach should somehow be ignored or excused. In  
10 its haste, however, to find a defense – *any* defense – to Amiga’s claims, Hyperion advances  
11 arguments that are not only internally inconsistent but also mischaracterize the facts and misstate  
12 the law. Indeed, even a sampling of Hyperion’s new, attorney-contrived excuses reveals that  
13 Hyperion’s attempt to avoid an interim injunction by re-writing the history of the parties’  
14 substantial pre-dispute conduct should be summarily rejected.

15 For example, because Hyperion has used Amiga’s trademarks beyond both the scope and  
16 term of its license, Hyperion now must argue – for the very first time – that it obtained an  
17 exclusive, worldwide license to use Amiga’s trademark in *any manner* Hyperion desires, *for as*  
18 *long* as Hyperion desires. Hyperion boldly stakes its new, sweeping license claim on two  
19 meritless grounds. First, Hyperion claims that it obtained an exclusive, unlimited and perpetual  
20 trademark license from Amiga more than *three years ago* when Amiga allegedly became bankrupt  
21 or legally insolvent – despite the facts that Hyperion offers no competent evidence of either and  
22 that the course of the parties’ pre-litigation conduct proves otherwise. [Declaration of William  
23 McEwen In Support of Amiga’s Reply (“McEwen Reply Dec.”) ¶ 8.] Second, Hyperion claims,  
24 also for the first time, that almost *two years ago* it obtained an exclusive, unlimited and perpetual  
25 trademark license from Amiga because Amiga “halted development” of its Classic OS.  
26 Hyperion’s audacious forfeiture argument is founded on a shameless attempt to backdate the  
27 completion date for Amiga OS 4.0 and ignores the fact that Hyperion’s refusal to release the code  
28

1 and rights to Amiga OS 4.0 to Amiga prevented Amiga from undertaking any further  
2 development of the Classic Amiga OS for the Target Hardware. [Declaration of Barrie Jon Moss  
3 In Support of Amiga's Reply ("Moss Reply Dec.") ¶ 12.]

4 But that's not all. Hyperion next argues that both its trademark infringement and  
5 contractual breach are somehow excused because Hyperion allegedly never consented to the  
6 transfer of the Agreement to Plaintiff Amiga's predecessor, KMOS, Inc. In support of this half-  
7 baked excuse, Hyperion submits the sworn declaration of Mr. Evert Carton, its Managing Partner,  
8 which curiously ignores the fact that *Hyperion itself* promoted Amiga OS 4.0 as "developed under  
9 license from KMOS, Inc." [Carton Dec., Ex 8, p. 82.] More egregiously, Mr. Carton's sworn  
10 declaration also ignores his own pre-dispute admissions offered in a press release that applauded  
11 the assignment to KMOS and warranted that the assignment would "not have any adverse impact  
12 whatsoever" in connection with Hyperion's obligations to release of the consumer version of  
13 Amiga OS 4.0 [McEwen Reply Dec., Ex. D.]

14 Next, Hyperion claims that its contractual breach of failing to release the code and title to  
15 Amiga OS 4.0 to Amiga should somehow be excused because (a) OS 4.0 was "complete" in  
16 December 2004 and (b) Amiga did not timely exercise its option to acquire the code and title to  
17 Amiga OS 4.0. Once again, in Hyperion's haste to revise history, it mischaracterizes the  
18 Agreement and ignores the following dispositive facts. First, Hyperion solicited – and received –  
19 the \$25,000 option payment under Section 3.01 from Amiga to stave off Hyperion's pending  
20 insolvency in 2003. [McEwen Reply Dec. Ex. H; Declaration of William McEwen in Support of  
21 Amiga's Motion for Preliminary Injunction ("McEwen Dec.") Ex. J.] Second, Amiga  
22 redundantly exercised its option again when it paid additional monies – once again at Hyperion's  
23 behest – in 2006, because Hyperion simply did not complete Amiga OS 4.0 in December 2004.  
24 [McEwen Reply Dec. ¶ 19.]

25 To determine whether the "Developer's Pre-release" of Amiga OS 4.0 in December 2004  
26 constitutes completion for purposes of Section 3.01 of the Agreement, the Court need not look  
27 beyond the "evidence" submitted by Hyperion and the parties' pre-dispute conduct. Indeed,  
28

1 although Hyperion trumpets a review by the “highly acclaimed independent tech website ‘Ars  
2 Technica,’” [Carton Dec., par. 38], Hyperion omits the key statements in the review concerning  
3 whether the December 2004 “Amiga OS 4.0 Developer’s Prerelease (Update 1)” was actually  
4 complete: “This is a *beta* OS with many issues still to be worked out....Clearly, OS 4 as it stands  
5 today is *not ready for general public consumption.*” [Carton Dec., Ex. 10 at 102-03 (emphasis  
6 added.)]

7 Further, Hyperion’s dubious claim that it completed the Amiga OS 4.0 is undercut by its  
8 pre-litigation conduct. For example, in the Fall of 2006 – more than a year after Hyperion now  
9 claims Amiga’s option expired – Hyperion demanded that Amiga make additional payments to  
10 invoke its option under Section 3.01. [McEwen Reply Dec. ¶ 19.] Amiga again made the  
11 payments to avoid a dispute, yet Hyperion has not only refused to release the code and title to  
12 Amiga OS 4.0, it has kept the entire ransom. [*Id.*] In sum, Amiga overpaid for the right to  
13 exercise its option before Hyperion finalized (assuming – charitably – that Hyperion’s non-  
14 commercial release of Amiga OS 4.0 in December 2006 is “complete”) the source code to Amiga  
15 OS 4.0. Hyperion’s refusal to release Amiga’s property warrants granting the requested equitable  
16 relief.

17 Hyperion’s remaining “defenses” to Amiga’s motion for a preliminary injunction – that  
18 Amiga allegedly failed to join an indispensable party and that the Court lacks the power to fashion  
19 appropriate equitable relief – are specious both factually and legally. Eyetech Ltd is neither an  
20 indispensable party to this litigation nor would its rights be impacted by requested interim  
21 injunction. And, on the facts presented, the Court is empowered to issue and appropriately tailor  
22 both prohibitory and mandatory injunctions. Accordingly, Amiga is likely to prevail on its claims  
23 for trademark infringement, breach of contract and specific performance.

24 Finally, Hyperion’s recent announcement concerning its “strategic partnership” with  
25 Acube to develop, market and distribute OS 4.0 outside the scope and term of its now terminated  
26 license – using both Amiga’s trademarks and source code to OS 4.0 that Hyperion hijacked and  
27 continues to hold hostage – confirms that the irreparable harm to Amiga is more than just  
28

1 presumed; its is actual and immediate. Amiga respectfully submits, therefore, that its motion for  
2 preliminary injunction should be granted.<sup>1</sup>

## 3 II. LEGAL ANALYSIS

### 4 A. The Court Should Enjoin Hyperion's Further Infringement Of Amiga's Trademarks.

#### 5 1. Hyperion Fails To Refute That Amiga Is Likely To Succeed On The Merits Of 6 Its Trademark Infringement Claim

7 It is well-established law in the 9th Circuit that use of a trademark outside the scope of a  
8 license constitutes infringement, and that such infringement warrants preliminary injunctive relief.  
9 *El Pollo Loco v. Hashim*, 316 F. 3d 1032, 1038 (9th Cir. 2003) (granting a preliminary injunction  
10 because a licensee's right to use a trademark is limited by the terms of the license); *see also, Pasia,*  
11 *Inc. v. N & G Auto*, 928 F. Supp, 1009, 1012 (C.D.Cal. 1996) (same). Hyperion does not refute  
12 the law.

13 It is undisputed that Hyperion has used, and continues to use, Amiga's trademarks outside  
14 the scope of the license granted to it under the Agreement, thereby infringing Amiga's trademarks  
15 and warranting preliminary injunctive relief. Section 2.01 of the Agreement only grants Hyperion  
16 a limited license to use the Amiga marks in conjunction with the marketing of Amiga OS 4.0 for  
17 the AmigaOne and other Target Hardware (PPC based hardware developed for and marked for the  
18 Amiga platform) (*i.e.*, Amiga-approved hardware). [Carton Dec., Ex. 2, p. 41] The AmigaOne is  
19 a desktop, personal computer. [McEwen Reply Dec. ¶ 23.] As late as November 2006, Hyperion  
20 was using Amiga's marks to market OS 4.0 for everything from kiosks, set top boxes and cellular  
21 phones to servers and un-named OEM devices, none of which is the AmigaOne or hardware  
22 approved for the Amiga platform. [*Id.*] In response to a November 21, 2006 letter from Amiga  
23 demanding that Hyperion cease its use of the Amiga marks in marketing efforts that grossly  
24 exceed the scope of the license, Hyperion promised to remove such marketing references from its  
25 website. [*Id.*] However, at the time Amiga filed its moving papers, and as of today, Hyperion

26 <sup>1</sup> As set forth in Section F below, Amiga also moves to strike, pursuant to the Federal Rules of Evidence, certain,  
27 objectionable portions of the Declarations submitted by Hyperion in support of its Opposition brief.

1 was, and still is, using the Amiga trademarks and logos in connection with the same products, and  
2 more, that far exceed the scope of the license. [*Id.*; McEwen Dec., Ex. H.]

3 Moreover, as evidenced by Hyperion's newly formed strategic partnership with ACube,  
4 Hyperion, now along with Acube, continues to use Amiga's marks in a manner that improperly,  
5 confusingly – and erroneously – suggests that Amiga endorses or sponsors ACube's distribution of  
6 OS 4.0. [McEwen Reply Dec. ¶ 23.] Confusion as to sponsorship constitutes trademark  
7 infringement. *See National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*,  
8 532 F. Supp. 651, 661-662 (W.D. Wash. 1982) (holding that defendant's unauthorized use of  
9 plaintiff's trademarks in connection with the sale of replicated professional football jerseys created  
10 confusion as to sponsorship and constituted infringement).<sup>2</sup>

11 Hyperion's Opposition does nothing to refute the competent evidence of infringement  
12 actions. Rather, Hyperion half-heartedly argues, without any legal analysis or evidentiary support,  
13 that there is no risk of confusion over the trademarks because it was "public knowledge" that  
14 Hyperion was the software developer for OS 4.0. [Opposition, p. 21.] Hyperion's conclusory  
15 statement ignores settled law and reality. Under controlling law, marketing efforts using Amiga's  
16 trademarks outside the scope of the license is likely to cause confusion among customers, *El Pollo*  
17 *Loco*, 316 F. 3d at 1038, and the presence of Amiga's marks on ACube's marketing creates  
18 confusion as to sponsorship. *NFL Properties*, 532 F. Supp. at 661-62. Accordingly, Amiga has  
19 established that it is likely to succeed on the merits of its trademark infringement claim.

20 **2. Irreparable Harm Is Presumed Where, As Here, Plaintiff Has Established A**  
21 **Likelihood Of Success On The Merits**

22 Under controlling Ninth Circuit precedent, once a plaintiff in a trademark case establishes  
23 that a likelihood of success on the merits exists, it is presumed that the plaintiff will suffer  
24 irreparable harm. *Pasia*, 928 F. Supp, at 1012; *see also GoTo.Com, Inc. v. Walt Disney Company*,

25 <sup>2</sup> Indeed, although Acube is aware that a license from Amiga is required to use Amiga's marks, as demonstrated by  
26 Acube's requests to Amiga for a trademark license [McEwen Reply Dec., Ex. N] Hyperion and Acube nonetheless  
27 proceeded with an infringing advertising campaign that displays Amiga name, Amiga's registered trademark symbol  
28 and Amiga's logo, thereby falsely suggesting that Amiga endorsed or sponsored their efforts. *NFL Properties*, 532  
F. Supp. at 661-62.



1 202 F. 3d 1199, 1205 (9th Cir. 2000) (finding that a presumption of irreparable harm is proper  
2 once the plaintiff establishes that it is likely to succeed on its trademark claim). As demonstrated  
3 above, Amiga's unequivocal – and undisputed – evidence of Hyperion's use of Amiga's marks  
4 outside the scope and term of the terminated license and in a manner that erroneously suggests  
5 endorsement or sponsorship by Amiga, infringes Amiga's marks. Because Amiga is likely to  
6 prevail on the merits, Amiga is, therefore, entitled to a presumption of irreparable harm.

7 Here, the potential irreparable harm, absent an injunction is more than presumptive; it is  
8 actual. Under the Agreement, Amiga reserved for itself all markets and platforms outside the  
9 Target Hardware. Hyperion's announced plans with Acube, however, demonstrates its intent to  
10 market and distribute Amiga OS 4.0 outside its pre-termination license scope in one or more  
11 platforms reserved for Amiga. [McEwen Reply Dec. ¶ 23.] Thus, Hyperion's attempt to usurp  
12 and obtain a "first mover" position in one or more markets and platforms reserved for Amiga  
13 constitutes actual irreparable harm as well. *See Tom Doherty Associates, Inc. v. Saban*  
14 *Entertainment, Inc.*, 60 F. 3d 27, 37-38 (2nd Cir. 1995) (finding irreparable harm where defendant  
15 wrongfully deprived plaintiff of a unique product and contract right that would have allowed  
16 plaintiff to expand its business).

17 **B. Amiga is Entitled to a Mandatory Injunction in Aid of Obtaining the Code to OS 4.0**

18 **1. Amiga Owns OS 4.0 And Hyperion Has An Executory Obligation To Transfer**  
19 **To Amiga The Source Code, Title and Intellectual Property Rights In OS 4.0**

20 Amiga seeks a preliminary injunction requiring Hyperion to abide by the terms of the  
21 Agreement governing Amiga's right to acquire the code and title to Amiga OS 4.0. With no  
22 meritorious defense to its hijacking of the code and title to OS 4.0 Hyperion resorts to  
23 mischaracterizing the Agreement and mis-stating the facts.

24 Amiga has completed the only two steps that are required to invoke its right to buy back the  
25 source code, title, interest and intellectual property in OS 4.0 under Section 3.01 of the Agreement:  
26 (1) Amiga tendered full payment of the \$25,000; and (2) Amiga's payment was timely, as it  
27 occurred within six months after the completion date of OS 4.0.  
28

1 Indeed, the evidence overwhelmingly establishes that in March 2003, Amiga tendered  
2 \$25,000 to Hyperion.<sup>3</sup> Hyperion does not dispute that it received \$22,500 of this amount, and  
3 Amiga has demonstrated that the remaining \$2,500 was wired from the personal bank account of  
4 Amiga's President to Hyperion. [McEwen Reply Dec., Ex H.] As detailed in the Supplemental  
5 McEwen Declaration, a subsequent invoice and e-mail correspondence from Hyperion to Itec, who  
6 had since acquired Amiga, confirm that Amiga made full payment to acquire OS 4.0 in March  
7 2003. [See McEwen Reply Dec., ¶ 16 & Ex. I; McEwen Dec. Ex. J.]

8 After coming to Amiga in 2003, "hat in hand," seeking Amiga's \$25,000 payment under  
9 the Agreement to avoid its own potential insolvency, Hyperion gladly accepted Amiga's money  
10 and characterized it as payment in full under Section 3.01 of the Agreement. Three years later,  
11 however, in 2006, when Amiga demanded delivery of what it had already paid for – the source  
12 code to Amiga OS 4.0 – Hyperion had the temerity to claim that Amiga's payment in 2003 did *not*  
13 satisfy the \$25,000 buy-out amount in Section 3.01. Based on a superficially clever – but  
14 nonetheless erroneous – interpretation of Section 3.01, Hyperion claimed that it had the right to  
15 "set off" other invoices owed by Amiga from the amount paid by Amiga. Hyperion's reading of  
16 Section 3.01 was, and remains, wrong, however, because Section 3.01 merely provides that any  
17 monies paid by Amiga under Section 3.01 must be applied by Hyperion to reduce any of Amiga's  
18 partnership debts before Hyperion can apply the payment for its own use. By its plain language,  
19 Section 3.01 does *not* give Hyperion a right of "off set." [McEwen Reply Dec., ¶ 18.]

20 Amiga also satisfied the second requirement to acquire the code and title to OS 4.0: that  
21 payment be tendered no more than six months after completion of the OS 4.0. While Amiga  
22 vigorously disputes that OS 4.0 has even been completed,<sup>4</sup> even if one were to take Hyperion's

23 <sup>3</sup> Payment in 2003 was made at Hyperion's request, so that Hyperion could stave off bankruptcy. Coming to  
24 Hyperion's aid, Amiga tendered the \$25,000, and Hyperion acknowledged that the payment was in compliance with  
25 the provision in the Agreement allowing Amiga to purchase the code and title to OS 4.0. [McEwen Reply Dec. ¶  
17.]

26 <sup>4</sup> Under the Agreement, "completion" of OS 4.0 occurred when it was suitable for release to the general public.  
27 [Moss Reply Dec. ¶ 10.] Yet all Hyperion has released to this date are developer pre-release versions of OS 4.0 and  
28 subsequent updates of such pre-releases. [*Id.*] Moreover, Hans-Joerg and Thomas Frieden, two of the key  
developers of OS 4.0 have made statements as recently as one month ago that OS 4.0 was not complete. [McEwen

1 assertion that OS 4.0 was complete in December 2004, Amiga's payment of \$25,000 for the code  
2 in March 2003 was timely, as it occurred prior to the alleged completion of OS 4.0.

3 **2. Hyperion's Refusal to Turn Over OS 4.0 Is Causing, And Will Continue To**  
4 **Cause, Irreparable Harm To Amiga**

5 Hyperion makes no effort to refute the fact that without the OS 4.0, Amiga is suffering and  
6 will continue to suffer irreparable harm. Indeed Hyperion's refusal to turn over OS 4.0 resulted in  
7 a lost business opportunity for Amiga. Before Hyperion and ACube entered in its newly formed  
8 strategic partnership for distribution of OS 4.0, Nicola Moroccuti of ACube approached Amiga in  
9 late 2006 with an offer to enter into the very same distribution agreement that Hyperion has now  
10 secured. [McEwen Reply Dec., Ex. O.] However, because Hyperion has refused to release the  
11 source code to Amiga OS 4.0 to Amiga despite Amiga's full payment, Amiga was not able to  
12 follow through on a distribution agreement with ACube. Hyperion then negotiated a distribution  
13 agreement with ACube, usurping a business opportunity belonging to Amiga. Moreover,  
14 Hyperion's retention of the source code to OS 4.0 prevents Amiga's ability to enter into  
15 agreements for distribution of OS 4.0. [*Id.* ¶ 25.]

16 Rather than attempting to refuting this clear irreparable harm suffered by Amiga without  
17 OS 4.0, Hyperion turns to a newly concocted and borderline frivolous argument that Amiga  
18 cannot suffer irreparable harm because it is insolvent. This contention completely misconstrues  
19 the facts. Before its assignment of rights to Itec in 2003, Amiga Washington was active and fully  
20 operating.<sup>5</sup> Amiga Washington never filed for bankruptcy nor was legally insolvent before this

21 \_\_\_\_\_  
22 Reply Dec. ¶ 20, Exs J-K.] Finally, and most tellingly, the evidence Hyperion itself presents in attempt to support  
23 its position that OS 4.0 was complete in December 2004 in fact negates such a position. Indeed, the January 17,  
24 2005 "Ars Technica" review of Amiga OS 4.0 twice characterizes OS 4.0 as in "beta" form. [Carton Dec., Exh. 10,  
25 p. 102]. A source code in beta form is simply not a complete code. [Moss Reply Dec. ¶ 10] More importantly, the  
26 "Ars Technica" review states "OS 4 as it stands today is not ready for general public consumption. There are many  
27 rough edges with this version of the OS, stability is still and issue, and the web browsing situation clearly needs to  
28 be improved." [Carton Dec., Exh. 10, p. 102.]

<sup>5</sup> Admittedly, Amiga Washington was experiencing financial difficulties during 2002. However, Hyperion was well  
aware of these financial problems at the time and at the time of our contact in November 2001. In 2003, Amiga  
Washington was involved in a law suit over the Amiga Digital Environment ("DE"). Amiga's then financial distress  
became well known to those involved in the lawsuit, including Evert Carton, the managing partner of Hyperion. Mr.  
Carton served as a declarant in support of Amiga in this case in March 2004. [McEwen Reply Dec. ¶ 8, Ex. A.]

1 transfer. Indeed, in 2002 Amiga Washington was releasing products and had signed a lucrative  
2 OEM deal with Microsoft whereby Microsoft shipped Amiga products under Microsoft's name.  
3 [McEwen Reply Dec. ¶ 7.]

#### 4 **C. Amiga Has Standing to Bring This Lawsuit**

5 Recognizing Amiga's high likelihood of success on the merits and strong showing of  
6 irreparable harm, Hyperion desperately argues that Amiga has no standing to bring its claims.  
7 Specifically, Hyperion contends that Amiga has no rights under which to sue because (1) it was  
8 insolvent in 2003 and (2) Hyperion and Eyetech did not consent to an assignment of the  
9 Agreement each time Amiga changed ownership. Each of these arguments is without merit.

10 First, Hyperion's allegation that Amiga was insolvent is simply false, and is not supported  
11 by any competent evidence. To the contrary, Amiga has demonstrated that it neither filed for  
12 bankruptcy nor was insolvent prior to the transfer in 2003, but was instead fully operating and  
13 releasing products. [McEwen Reply Dec., ¶¶ 7-10.] Moreover, although Amiga experienced  
14 financial difficulties in 2003, Hyperion was aware of Amiga's financial troubles at the time, did  
15 not object, and should be estopped from doing so now. [*Id.* ¶¶ 9-10.]

16 Second, both Hyperion and Eyetech either expressly or impliedly consented to each  
17 assignment of the Agreement through Amiga's three changes of ownership. First, with regard to  
18 Amiga's April 2003 assignment to Itec, Hyperion expressly consented to the assignment and  
19 Eyetech impliedly consented by continuing the same course of dealings after Amiga became Itec.  
20 [*Id.*, ¶ 12 & Ex. 16.] Second, regarding Itec's October 2003 assignment to KMOS, Inc, both  
21 Hyperion and Eyetech implicitly consented by continuing their course of dealings after Itec  
22 became KMOS. [*Id.* ¶¶ 13-14 & Exs. C-F; Carton Dec., Ex. 8.] By not raising objections to the  
23 assignment of Itec to KMOS at the time, despite clear knowledge of the change in ownership, both  
24 Hyperion and Eyetech should be estopped from objecting now. Finally, as to the third alleged  
25 change of ownership, KMOS merely changed its name to Amiga, Inc. on January 25, 2005 – there  
26 was simply no assignment requiring *any* consent by Hyperion or Eyetech. [McEwen Reply Dec. ¶

1 15, Ex. G.] In sum, Hyperion's argument that Amiga lacks standing to bring its claims lacks any  
2 legal or factual support, and it should be rejected by the Court.

3 **D. The Court Is Empowered To Issue The Requested Injunctive Relief**

4 First, in a last-ditch effort to avoid an injunction, Hyperion resorts to questioning the  
5 Court's authority to issue the requested relief. Hyperion claims that the requested relief is  
6 improper because Eyetech is a "necessary party" to this lawsuit. Under Rule 19(a)(1), a party  
7 may be "necessary" if the absence of the party would preclude the district court from fashioning  
8 complete relief among those already parties. Fed. R. Civ. Proc. 19(a)(1); *Disabled Rights Action*  
9 *Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 878 (9<sup>th</sup> Cir. 2004). Here, however, the  
10 absence of Eyetech would in no way prevent the Court from fashioning complete relief between  
11 Amiga and Hyperion. Under the Agreement, Eyetech was responsible for hardware development,  
12 not the OS 4.0 software at the core of this dispute. [See McEwen Reply Dec., ¶ 5.] Moreover,  
13 Eyetech has abandoned the Amiga business entirely (including selling all its remaining inventory  
14 of Amiga One inventory), and is for all intents and purposes defunct.<sup>6</sup> [*Id.*, ¶ 26.] Because  
15 Eyetech does not possess the OS 4.0 software that Amiga seeks by way of injunction, and because  
16 it has not engaged in the wrongful conduct that Amiga seeks to enjoin, the requested relief would  
17 have *no* impact on any of Eyetech's rights. Because it is simply not affected by the requested  
18 preliminary injunctive relief, Eyetech's absence would not affect the Court's ability to afford  
19 complete relief and Eyetech thus cannot be considered a "necessary" party under Rule 19(a)(1).

20 Likewise, Eyetech cannot be considered "necessary" under Rule 19(a)(2). That Rule,  
21 cited by Hyperion, focuses on whether the absent party's participation is necessary to protect its  
22 legally cognizable interests or to protect other parties from a substantial risk of incurring multiple  
23 or inconsistent obligations because of those interests. Fed. R. Civ. Proc. 19(a)(2); *Disabled Rights*  
24 *Action Committee*, 375 F.3d at 880. Importantly, although parties to a contract may be considered  
25 necessary where their interests may be affected by an action to *set aside* a contract, they are not

26 <sup>6</sup> Indeed, Eyetech never even exercised its rights under the Agreement, in part because it was unable to use the OS  
27 4.0 software with *any* hardware, given that Hyperion refused to release that software.

1 “necessary” parties merely by virtue of their status as contracting parties where, as here, the  
2 contract would not be invalidated, but would instead remain legally binding, if the lawsuit were  
3 successful. *See, e.g., Disabled Rights Action Committee*, 375 F.3d at 881-82 (rejecting contention  
4 that university was necessary party merely because it was contracting party to licensing  
5 agreement, where agreement would remain legally binding even if plaintiff prevailed in lawsuit  
6 against other party to agreement). Here, an adjudication of *Hyperion’s* rights under the  
7 Agreement – including a ruling that the Agreement were properly terminated as to Hyperion –  
8 would *not* impact Eyetech, as the Agreement expressly provides that it shall “remain in force with  
9 respect to the parties other than the party found in material breach . . . .” [Declaration of Barrie  
10 Jon Moss in Support of Amiga’s Motion for Preliminary Injunction, Ex. A (“License  
11 Agreement”), § 6.03.] As such, Eyetech also does not qualify as a “necessary” party under Rule  
12 19(a)(2).

13 Second, Hyperion contends that the requested injunctive relief should not issue because it  
14 would impact third party rights in the OS 4.0 software. Specifically, Hyperion suggests that the  
15 Frieden brothers and perhaps other unnamed entities retain rights to the OS 4.0 software and its  
16 underlying code because Hyperion has not paid in full for the software. However, Hyperion has  
17 admitted in correspondence that it has paid all but \$40,000 for the source code for OS 4.0. [See  
18 McEwen Reply Decl., ¶ 27.] Given the Court’s wide discretion in fashioning injunctive relief, it  
19 could simply order Hyperion to pay the remaining \$40,000 to alleged third party developers as  
20 part of any order requiring Hyperion to deliver the software to Amiga.

21 Finally, any suggestion by Hyperion that it neither possesses nor has access to the OS 4.0  
22 source code is directly contradicted by its conduct with ACube. Specifically, ACube recently  
23 admitted that it “ported” OS 4.0 to the Apple MiniMac Computer, which it could have done only  
24 if it had access to the OS 4.0 source code. [*Id.*] If Hyperion can release the OS 4.0 source code to  
25 ACube, it can undoubtedly release the code to Amiga as well.

#### 26 **E. Hyperion’s Requested Bond Is Excessive And Improper**

27 Federal Rule of Civil Procedure 65(c) grants district courts wide discretion in setting the  
28

1 amount of a security bond. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999).  
 2 Notably, the district court can weigh the evidence in determining the amount of the bond. *See id.*,  
 3 198 F.3d at 733-734 (district court did not abuse discretion in setting bond amount at \$100,000;  
 4 court discredited declaration submitted in support of party's request for increased bond amount  
 5 where party could have easily rescinded contract and thereby avoided risk of purported \$2 million  
 6 tax liability). Here, Hyperion's conclusory assertion that it is entitled to a \$1.5 million bond bears  
 7 no relation to the factual realities of this case. It is undisputed that Hyperion already valued the  
 8 sale of OS 4.0 to Amiga at \$25,000. That is the appropriate amount for a bond as to the  
 9 mandatory injunction. As to the balance of the injunction, although Hyperion has put on no  
 10 competent evidence relating to alleged damages, Amiga suggests that a bond be reasonably  
 11 limited to \$75,000 - \$100,000, to account for any alleged disruption to Hyperion's business  
 12 should the injunction be deemed improvidently granted.

13 **F. Objections To Hyperion's Purported Evidence And Motion To Strike Same**

14 Amiga objects to the following purported evidence submitted by Hyperion on the grounds  
 15 that they lack foundation, include improper opinions by lay witnesses, constitute inadmissible  
 16 hearsay, and are irrelevant and misleading (Fed. R. Evid. 401-403, 602, 701, 802, 1002).

- 17 1. Declaration of Evert Carton: ¶¶ 7-18, 20-30, 33, 38-47, 49-52, 54-59, 63-64, 65-67;
- 18 2. Second Declaration of Evret Carton: ¶¶ 3-5;
- 19 3. Declaration of Hans- Joerg Frieden: ¶¶ 4-9;
- 20 4. Second Declaration of Hans-Joerg Frieden: ¶¶ 6, 12, 17, 21-23;
- 21 5. Declaration of Thomas Frieden: ¶¶ 2-7.

22 Amiga respectfully requests the Court to strike the same.

23  
 24 DATED this the 25th day of May, 2007.

25 REED SMITH LLP

26 By: /s/ Morgan W. Tovey  
 Morgan W. Tovey (Admitted Pro Hac Vice)  
 27 Lawrence R. Cock, WSBA No. 20326 (CABLE, LANGENBACH,  
 KINERK & BAUER LLP)