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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

vs.

HYPERION VOF, a Belgium corporation,

Defendant.

CAUSE NO.: CV-07-0631-RSM

**DECLARATION OF WILLIAM MCEWEN  
IN SUPPORT OF PLAINTIFF AMIGA,  
INC.'S REPLY TO HYPERION'S  
OPPOSITION TO AMIGA'S MOTION FOR  
PRELIMINARY INJUNCTION**

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

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

**COURT: HON. RICARDO MARTINEZ**

1 I, William McEwen, declare:

2 1. I am the acting President of Amiga, Inc ("Amiga"). I make this Declaration in  
3 support of Amiga's Reply to Hyperion's Opposition to Amiga's Motion for Preliminary  
4 Injunction.

5 2. I have personal knowledge of the matters set forth in this Declaration. If called as  
6 a witness, I could and would competently testify to these matters.

7 3. For the various reasons set forth in both my first declaration in support of  
8 Amiga's Motion for a Preliminary Injunction and the first declaration of Barrie Jon Moss in  
9 support of Amiga's Motion for a Preliminary Injunction, Amiga decided to out-source the project  
10 of updating and "porting" its operating system to a newer and faster version supported on more  
11 open-ended hardware.

12 4. Soon after it became clear that Haage & Partners would not be performing the  
13 development work on OS 4, Amiga was approached by Hyperion VOF ("Hyperion"), a Belgium  
14 software development company. Hyperion represented to Amiga that it would be the best, and  
15 perhaps the only, candidate for the OS 4 job because it had previously done subcontracting work  
16 with Haage & Partners and therefore had access to OS 3.5 and 3.9 which it could use in the  
17 development of OS 4.0.

18 5. On or about November 3, 2001 Amiga Washington entered into the "(OEM)  
19 License and Software Development Agreement," (the "Agreement") with Hyperion, for the  
20 development of the OS 4.0 software, and Eyeteck Ltd, for the development of the Amiga One  
21 computer hardware ("Eyeteck"). The Agreement also granted certain licenses for Hyperion to  
22 market OS 4.0 and to use Amiga's trademarks in the development, promotion and sales of  
23 products in narrowly defined markets and platforms. I was involved with the negotiations of this  
24 Agreement.

25 6. Amiga agrees that Exhibit 2 of Evert Carton's Declaration is a true and correct  
26 copy of the Agreement. Amiga submitted to the court what it had in its files and what it believed  
27 to be the entire Agreement. Along the same lines, the 2004 "Artic Agreement" attached as  
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1 Exhibit G to my first declaration in support of Amiga's motion for a Preliminary Injunction is  
2 also the only copy I had of the Agreement in my Amiga files. However, it is my belief that the  
3 Arctic Agreement I submitted to the court is the same agreement actually signed by the parties.  
4 Although it is my understanding from Hyperion's Opposition papers that the Arctic Agreement  
5 attached to my declaration different from the agreement signed by the parties, Hyperion does not  
6 submit this allegedly different agreement.

7 7. I have read Hyperion's Opposition to Amiga's motion for a preliminary  
8 injunction. It is my understanding that Hyperion now claims, for the first time, to have an  
9 exclusive, worldwide, perpetual license to use the Amiga trademarks and to distribute OS 4.0 ,  
10 without limitation or condition, claiming that Amiga Washington allegedly became insolvent  
11 sometime before certain assets were sold and assigned to ITEC, LLC.. This is not true. Prior to  
12 the assignment of rights to Itec in 2003, Amiga Washington was active and fully operating.  
13 Amiga Washington never filed for bankruptcy nor was legally insolvent before this transfer.  
14 Indeed, in 2002 Amiga Washington was releasing products and had signed a lucrative OEM deal  
15 with Microsoft whereby Microsoft shipped Amiga products under Microsoft's name. I  
16 understand from my review of Amiga's Opposition that Hyperion contends that Amiga was  
17 legally insolvent some time in 2002, based upon my deposition testimony in an unrelated action.  
18 In that same deposition, however, in 2002, I testified that Amiga Washington was not filing for  
19 bankruptcy, that Amiga Washington still had employees, and that it was expecting future  
20 revenues. [Kinsel Dec. Ex. A, pp. 11-12.]

21 8. Admittedly, Amiga Washington was experiencing financial difficulties during  
22 2002. However, Hyperion was well aware of these financial problems at the time and at the time  
23 of our contact in November 2001. In 2003, Amiga Washington was involved in a law suit over  
24 the Amiga Digital Environment ("DE"). Amiga's then financial distress became well known to  
25 those involved in the lawsuit, including Evert Carton, the managing partner of Hyperion. Mr.  
26 Carton served as a declarant in support of Amiga in this case in March 2004. A true and correct  
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1 copy of Mr. Carton's Declaration In Support of Amiga's Response to Motion to Modify the  
2 Order Granting Specific Performance is attached hereto as Exhibit A.

3 9. Not only was Hyperion aware of Amiga's financial problems in 2003, but  
4 Hyperion's delay in completing OS 4.0 for release in either 2002 or 2003 also greatly contributed  
5 to such problems. When Amiga entered into the Agreement with Hyperion, Amiga could not  
6 have anticipated that Hyperion would not only fail to complete and deliver the OS 4.0 within a  
7 few months as contemplated by the contract, but would still refuse to deliver OS 4.0 more than  
8 five years after it was due. Indeed, in anticipation of having access to OS 4.0 *in 2002*, Amiga  
9 made announcements that it would launch OS 4.0 and had numerous plans for revenues tied to  
10 OS 4.0. Of course, Amiga never realized any revenues for OS 4.0 in 2003 or beyond because  
11 Hyperion never transferred the code and title to Amiga OS 4.0 to Amiga.. These unrealized  
12 revenues were partly to blame for Amiga's financial difficulties.

13 10. Although Hyperion was well aware of Amiga's financial difficulties Hyperion  
14 never raised any concerns or objections. Indeed, since 2001, I communicated with Hyperion  
15 frequently concerning performance of the Agreement, breach of the Agreement and informal  
16 attempts to resolve this dispute. Hyperion never stated that it believed Amiga Washington was  
17 insolvent, and until the opposition papers in this case, it never once asserted that it has an  
18 exclusive, worldwide license to market Amiga OS under the Amiga trademark.

19 11. After reviewing Hyperion's Opposition papers, it is my understanding that  
20 Hyperion also claims to have an exclusive, perpetual, worldwide license to use the Amiga marks  
21 and to distribute OS 4.0 because Amiga failed to obtain consent to assign its rights under the  
22 Agreement. In my first declaration in support of Amiga's Motion for a Preliminary Injunction, I  
23 noted that Amiga had undergone various changes of ownership since it entered into the  
24 Agreement with Hyperion. As Hyperion now claims that the Amiga One partners did not  
25 consent to the assignment of the Agreement under these changes, it is worth outlining each  
26 transaction and describing how the Amiga One Partners have acknowledged their consent to  
27 each of the assignments of the Agreement.

1           12.     In April 2003, Amiga Washington assigned its rights under the Agreement to Itec.  
2 Hyperion and Amiga consented to this assignment in writing. [Carton Dec., Ex. 16.] While my  
3 review of Hyperion's Opposition papers leads me to believe that Hyperion alleges Eyetech did  
4 not consent to the April 2003 assignment, my dealings with Alan Redhouse of Eyetech suggest  
5 otherwise. Mr. Redhouse, on behalf of Eyetech, continued his course of dealings with Amiga  
6 after Amiga became Itec. Hyperion's claim that Amiga Washington never consented to its own  
7 transfer is absurd. Until its Opposition papers, Hyperion never raised an objection to the  
8 assignment of the Agreement to Itec in 2003.

9           13.     In October 2003, Itec then assigned its rights to the Object Code, Source Code  
10 and Intellectual Property to OS 4 under the Agreement to KMOS, Inc. A true and correct copy  
11 of the "October 2003 Stock Purchase and Sale Agreement of Assignment of Intellectual Property  
12 Rights" is attached hereto as Exhibit B. This assignment was acknowledged by Amiga  
13 Washington on behalf of its CEO in a letter dated October 10, 2003. It is my understanding that  
14 Hyperion now claims it did not consent to the assignment of the Agreement under this October  
15 2003 Stock Purchase Agreement. However, Hyperion continued its course of dealings with Itec  
16 after Itec became KMOS. I located the following evidence demonstrating Hyperion's dealings  
17 with Itec as KMOS:

- 18           • In February 2004, Ben Hermans, a then managing partner of Hyperion, wrote an email to  
19 Pentti Kouri, the chief investor in Itec, seeking permission to re-negotiate the Agreement  
20 with KMOS. A true and correct copy of this email exchange between Ben Hermans and  
21 Pentti Kouri dated February 15, 2004 is attached hereto as Exhibit C.
- 22           • In March 2004, Hyperion issued a press release in which Mr. Carton stated "We welcome  
23 the acquisition of the AmigaOS intellectual property by KMOS which we found to be a  
24 professional and reliable partner. Together with KMOS, Hyperion will explore new  
25 business opportunities for AmigaOS 4. I would like to reassure all our customers that the  
26 acquisition by KMOS will not have any adverse impact whatsoever on the release of the  
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1 consumer version of AmigaOS 4.0 later this year.” A true and correct copy of this March  
2 2004 press release is attached hereto as Exhibit D.

- 3 • In April 2004, Hyperion issued a press release in which Hyperion acknowledges its  
4 consent to the assignment by stating: “Amiga OS 4.0 © 2004 Hyperion Entertainment,  
5 developed under licensed from KMOS, Inc.” [Carton Dec., Ex. 8.]
- 6 • Finally, on the face of the disk for OS 4.0 developer pre-release, Hyperion again states,  
7 “Amiga OS 4.0 © 2004 Hyperion Entertainment, developed under licensed from KMOS,  
8 Inc.” A true and correct copy of face of the developer pre-release disk for OS 4.0 is  
9 attached hereto as Exhibit E.

10 14. It is also my understanding that Hyperion argues that Eyeteach never consented to  
11 the October 2003 assignment of rights to KMOS. However, just as it did when Amiga Delaware  
12 assigned the Agreement to Itec, Eyeteach continued its course of dealings with Amiga/Itec after  
13 the Agreement was assigned to KMOS. Indeed, in March 2004, Mr. Redhouse of Eyeteach  
14 participated in communications with both Mr. Hermans of Hyperion and Garry Hare, the then-  
15 CEO of KMOS concerning legal issues that arose when KMOS was still Itec. Attached hereto as  
16 Exhibit F is a true and correct copy of the March 28, 2004 email communication between Mr.  
17 Hare, Mr. Redhouse and Mr. Hermans. Although both Hyperion and Eyeteach were aware of  
18 Itec’s transfer to KMOS, neither entity raised any objection to a transfer of the Agreement.

19 15. It is also my understanding that Hyperion claims that neither it nor Eyeteach  
20 consented to an assignment of the Agreement when KMOS became Amiga, Inc, a Delaware  
21 corporation, in 2005. However, there was no assignment of the Agreement under this 2005  
22 transaction. Rather, on January 25, 2005, KMOS merely changed its name to Amiga, Inc., a  
23 Delaware corporation (“Amiga Delaware”). KMOS and Amiga Delaware are the same entity.  
24 Attached hereto as Exhibit G is a Certified Copy of the Original Change of Name from KMOS,  
25 Inc. to Amiga, Inc.

26 16. In my first Declaration in support of Amiga’s Motion for a Preliminary  
27 Injunction, I noted that under Section 3.01 of the Agreement, Amiga has the right to purchase the  
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1 Object Code, Source Code and Intellectual Property of OS 4.0 for a payment of \$25,000. After  
2 reviewing Hyperion's Opposition papers, it is my understanding that Hyperion asserts that  
3 Amiga did not tender full payment for OS 4.0. This is simply not true. In March 2003, Amiga  
4 tendered \$25,000 to Hyperion. \$2,500 of this payment was wired from my personal bank to  
5 Hyperion. Attached hereto as Exhibit H is a true and correct copy of the receipt for a wiring  
6 transaction from my bank to Hyperion in the amount of \$2,500 dated March 18, 2003. Hyperion  
7 does not dispute that it received the remaining \$22,500. Included as Exhibit J to my first  
8 declaration in support of Amiga's motion for preliminary injunction is a true and correct copy of  
9 an invoice sent from Hyperion to Itec confirming that it received \$22,500 "pursuant to article  
10 3.01 of the November 3, 2001 agreement between Amiga, Eyetech and Hyperion." Attached  
11 hereto as Exhibit I is a true and correct copy of a March 27, 2004 e-mail from Mr. Hermans of  
12 Hyperion to Mr. Hare and Mr. Kouri asking where Hyperion should send the invoice for the  
13 \$22,500 that it received from Itec the year before.

14 17. The two payments described above to Hyperion in 2003, totaling \$25,000, were  
15 made at Hyperion's request, so that Hyperion could stave off bankruptcy. Mr. Hermans  
16 represented to Amiga that Hyperion was involved in a lawsuit in Belgium, and he was concerned  
17 that if Hyperion became insolvent, the opposing party could place a lien on, or levy against,  
18 Hyperion's assets, including the source code to OS 4.0. To prevent this from happening, Amiga  
19 paid the \$25,000, and Hyperion acknowledged that the payment was in compliance with the  
20 provision in the Agreement allowing Amiga to purchase the code and title to OS 4.0.

21 18. At the time we entered into the Agreement, I understood that a "lump" payment  
22 of the \$25,000 all at the same time was not required under Section 3.01 of the Agreement.  
23 Rather, even if Amiga paid a single Dollar, during the required time period, it exercised its  
24 "election" and activated this buy-back clause. Amiga then eventually, and in a timely,  
25 reasonable manner, would have to pay the entire amount when the source code for the completed  
26 product ready for general release was available. At the time of contracting, I also understood  
27 that, although payments would be first applied to outstanding invoices, Amiga's obligation to  
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1 turn over the source code and intellectual property rights to Amiga were not affected. The clause  
2 does not state that Amiga must pay Hyperion a net amount of \$25,000, after outstanding  
3 payments were to be made, and I do not believe that was the parties' intention at the time of  
4 contracting. Rather, I understood this clause should be read to mean that once Amiga pays  
5 Hyperion \$25,000, it has satisfied its payment obligations for OS 4.0 under the Agreement. How  
6 Hyperion then applies the monies is irrelevant.

7 19. Hyperion now claims for the first time in its Opposition papers that Amiga's  
8 option to acquire the code and title to Amiga OS 4.0 expired on June 28, 2005 (because  
9 Hyperion also now claims for the first time that Amiga OS 4.0 was completed for release on  
10 December 27, 2004). Yet, in the Fall of 2006, in response to Amiga's demand that Hyperion  
11 release the source code to Amiga OS 4.0 to Amiga, Hyperion demanded additional money.  
12 Hyperion alleged that in 2003, Amiga had not tendered the full \$25,000 required to invoke its  
13 right to buy back the source code, title and intellectual property in OS 4.0. Although Amiga  
14 maintained that it did make the full payment in March 2003, as evidenced above, because Amiga  
15 needed the source code to OS 4.0 and desired to resolve the dispute informally, Amiga met  
16 Hyperion's demands. Specifically, Amiga tendered an additional \$7,200 on September 19, 2006  
17 and \$8,500 on November 21, 2006 beyond the \$25,000 that Amiga had already paid. Finally,  
18 Hyperion admitted that Amiga had made full payment for OS 4.0. In a letter dated January 10,  
19 2007, Hyperion's counsel admitted to me that by making these payments, Amiga's right to  
20 purchase the source code to OS 4.0 "contained in article 2.6 was activated." However, Hyperion  
21 continues to refuse to transfer the code and title OS 4.0 to Amiga but has retained all the monies  
22 Amiga paid to exercise its option under the Agreement.

23 20. As stated above, it is my understanding that Hyperion claims OS 4.0 was  
24 complete by December 2004. Amiga strongly disputes that OS 4.0 was completed by December  
25 2004. In fact, to the best of my knowledge, OS 4.0, is still not complete. Admissions made as  
26 recently as a month ago by the Frieden brothers, two of the key developers of OS 4.0, prove that  
27 Amiga OS 4.0 is not complete for release. Further, on November 29, 2006, I had a  
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1 conversation with the Frieden brothers on Skype, a peer-to-peer Internet telephony network. In  
2 that conversation, Messers. Frieden told me that OS 4.0 was not complete but that they were very  
3 close to finishing it and hoped to have OS 4.0 ready to be shipped by Christmas 2006. Attached  
4 hereto as Exhibit J is a true and correct copy of a print out of the Skype conversation that I had  
5 with Messers. Frieden. Moreover, on April 15, 2007, Hans-Joerg Frieden made an appearance in  
6 an online forum to answer questions. During this question and answer session, Hans-Joerg  
7 Frieden admitted that OS 4.0 was not yet complete:

8  
9 Q: When do we get OS4 for classic Amigans?

10 A: Classic version will be done as soon as we have the Amiga One version out of  
11 the door, which should be "RSN [real soon now]." Right now, we're working on  
12 the final ISO [an image put on the disk that is needed in order to ship the product],  
13 the one that is supposed to be packaged up in a nice big box (which, incidentally,  
is already designed ) in the form of a real, physical CD (with manual IIRC  
[documentation]). The classic version still has a few edges that need to be ironed  
out... but shouldn't be that much longer anymore.

14 A print out of the April 15, 2007 question and answer session is attached hereto as Exhibit K.

15 21. After reviewing the declaration of Mr. Carton, it is my understanding that  
16 Hyperion's contract with Olaf Barthel to gain access to Mr. Barthel's re-worked OS 3.1 requires  
17 Hyperion to make payments to Mr. Barthel within sixty (60) days of the release of OS 4.0.  
18 Based on a May 20, 2006 e-mail exchange between Mr. Barthel and myself, it is my  
19 understanding that Hyperion had not yet paid Mr. Barthel for his work. A copy of this May 20,  
20 2006 e-mail exchange is attached hereto as Exhibit L.

21 22. Hyperion did not notify me, or to the best of my knowledge, anyone at Amiga that  
22 it claimed OS 4.0 was complete in December 2004.

23 23. Section 2.01 of the Agreement grants Hyperion a license to use the Amiga  
24 trademarks only in conjunction with marketing and distribution efforts of OS 4.0 to (1) PowerPC  
25 hardware developed for the Amiga platform or (2) the Amiga One personal computer. It is my  
26 understanding after reviewing Hyperion's Opposition papers that Hyperion denies that it has  
27 exceeded, or will exceed, the scope of the license to use Amiga's trademarks. The evidence  
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1 establishes quite the contrary. As late as November 2006, Hyperion was using Amiga's marks to  
2 market OS 4.0 for everything from kiosks, set top boxes and cellular phones to servers and un-  
3 named OEM devices, none of which is the AmigaOne or hardware approved for the Amiga  
4 platform. In response to a November 21, 2006 letter from Amiga demanding that Hyperion  
5 cease its use of the Amiga marks in marketing efforts that exceed the scope of the license,  
6 Hyperion promised to remove such marketing references from its website. However, I viewed  
7 the Hyperion website today, and it still uses the Amiga marks in connection with the same  
8 products and more. Moreover, Hyperion's recent agreement with ACube demonstrates use of  
9 the Amiga Marks and logo for products other than the target hardware and falsely implies that  
10 Amiga has sponsored or endorsed the products marketed with reference to Amiga's trademarks.  
11 The agreement between Hyperion and ACube (Exhibit G to my first declaration in support of  
12 Amiga's motion for a Preliminary Injunction) purports to grant ACube distribution rights to OS  
13 4.0 to "a *range* of PPC hardware platforms including Amiga One (MicroA1, SE/XE) and Classic  
14 Amiga." I recently saw an advertisement for OS 4.0, using the Amiga marks and the Amiga  
15 logo, on ACube's website. Attached hereto as Exhibit M is a true and correct copy of a print-  
16 out of an advertisement for OS 4.0 found on ACube's website. Amiga has never licensed nor  
17 authorized ACube to sell OS 4.0 or use Amiga's trademarks.

18         24. Neither Hyperion nor ACube approached Amiga for consent to assign its license  
19 to ACube to market and distribute OS 4.0 or to use the Amiga trademarks and logo in any  
20 marketing efforts involving Amiga OS 3.9, and, to the best of my knowledge, no one at Amiga  
21 granted such consent. Yet, Hyperion and ACube were well aware that they needed to obtain  
22 additional consent to use the Amiga trademarks under their purported distribution agreement.  
23 Indeed, on April 17, 2007, *after ACube and Hyperion announced their distribution agreement*, I  
24 received an email from Nicola Moroccuti of ACube seeking to license the Amiga name for the  
25 very same product for which it is currently advertising OS 4.0. The April 17, 2007 email I  
26 received from Mr. Moroccuti is attached hereto as Exhibit N. Yet, both entities continue,  
27 without license or authorization, to use the marks.

1           25. Before Hyperion and ACube entered in this strategic partnership for distribution  
2 of OS 4.0, Mr. Moroccuti of ACube approached me in late 2006 with an offer to enter into the  
3 very same distribution agreement that Hyperion has now secured. Attached hereto as Exhibit O  
4 is a true and correct copy of a chain of emails between Mr. Moroccuti and I attempting to  
5 negotiate a distribution agreement. However, because Hyperion has refused to release the source  
6 code to Amiga OS 4.0 to Amiga despite Amiga's full payment, Amiga was not able to follow  
7 through on a distribution agreement with ACube. Hyperion then negotiated a distribution  
8 agreement with ACube, usurping a business opportunity belonging to Amiga. Moreover,  
9 Hyperion's retention of the source code to OS 4.0 prevents Amiga's ability to enter into  
10 agreements for distribution of OS 4.0.

11           26. After reviewing Hyperion's Opposition papers, it is my understanding that  
12 Hyperion challenges Amiga's ability to obtain a preliminary injunction because Amiga failed to  
13 name Eyetech, the third party to the Agreement along with Amiga and Hyperion, as a Defendant  
14 in this lawsuit. However, Eyetech is for all intents and purposes defunct. In March 2006, Alan  
15 Redhouse, the then president of Eyetech, made an announcement that it was leaving the Amiga  
16 business. A true and correct copy of this announcement is attached hereto as Exhibit P. Eyetech  
17 then sold its remaining inventory of Amiga One hardware to Leaman Computing in September  
18 2006.

19           27. I further understand that Hyperion alleges it cannot turn over the source code to  
20 Amiga because of intellectual property rights of third parties. However, this contention is  
21 contradicted by several pieces of evidence. First, in a September 25, 2005 email I received from  
22 Evert Carton, which is attached hereto as Exhibit Q, Mr. Carton states that the only reason  
23 Hyperion did not obtain all intellectual property rights from third party contractors is a financial  
24 reason, i.e., Hyperion had not fully paid the third party contractors for such rights. Yet, in a  
25 contradictory e-mail from Mr. Carton, he told me that Hyperion had paid all but \$40,000 for the  
26 source code to OS 4.0, implying that Hyperion indeed had access to the source code to OS .4.0.  
27 Second, Hyperion's agreement with ACube establishes Hyperion can indeed release the source  
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1 code to OS 4.0. I recently had a conversation on Skype with Mr. Moroccuti of ACube in which  
2 Mr. Moroccuti told me that ACube “ported” OS 4.0 to the Apple MiniMac Computer. To “port,”  
3 or move an operating system to a new product, such as a Macintosh computer, changes to the  
4 source code need to occur, and such changes can only be accomplished with access to the  
5 AmigaOS 4 source code. A true and correct copy of this conversation is attached hereto as  
6 Exhibit R.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED 5/25/2007



William McEwen

McEWEN DECLARATION

Case No. CV07-0631-RSM

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