

1 stratagem and, accordingly, strictly construes the allegations of the complaint in responding
2 thereto.

3 1. This paragraph contains matters of merely an introductory nature which
4 require no response.

5 2. Hyperion admits that the Court has jurisdiction over the parties to this matter.
6 Hyperion denies that the Court has jurisdiction over all of the entities that Amiga Delaware
7 is attempting to reach through this suit, e.g., subcontractors of Hyperion. Furthermore,
8 depending on the disposition of the various claims in this matter, the Court may or may not
9 have supplemental, ancillary or pendent jurisdiction.

10 3. Hyperion admits that venue is proper pursuant to the contract between Amiga
11 Washington, Hyperion and Eyetech dated November 3, 2001 (hereinafter the "Agreement").
12 Hyperion denies that a substantial part of the events giving rise to the alleged claims in this
13 action occurred in Washington.

14 4. Denied.

15 5. Hyperion admits that it is a foreign general partnership organized under the laws
16 of Belgium with its principal place of business in Leuven, Belgium. Hyperion's status as a
17 partnership is disclosed in its signature block on the Agreement. Hyperion denies the remainder
18 of this paragraph.

19 6. Hyperion denies that Amiga Delaware is the company it claims to be in this
20 paragraph.

21 7. Hyperion denies that Amiga Delaware is the company it claims to be in this
22 paragraph. Because the generalized statements about Amiga OS are not relevant to the current
23 dispute, and because Amiga Delaware and its staff are not in a position to have personal
24 knowledge of the matters contained herein, Hyperion declines to admit or deny the same.

25 8. Denied.

26 9. Denied.

1 10. Hyperion admits that it is a software development company, that it specializes in,
2 among other things, 3D graphics and the conversion of entertainment software. With respect to
3 the last sentence of this paragraph, Hyperion denies that Amiga Delaware entered into the
4 Agreement.

5 11. Denied.

6 12. Hyperion admits that Amiga Washington, Hyperion and Eyeteck entered into the
7 Agreement on or about November 3, 2001. Hyperion denies that Exhibit A to the complaint is a
8 true, accurate and complete copy of the Agreement. Hyperion specifically denied that Amiga
9 Delaware had any plans in 2001, or that Hyperion made any representations to a nonexistent
10 corporation.

11 13. Denied. The Agreement speaks for itself.

12 14. Denied. The Agreement speaks for itself.

13 15. Denied. The Agreement speaks for itself.

14 16. Denied. The Agreement speaks for itself.

15 17. Denied. The Agreement speaks for itself.

16 18. Denied. The Agreement speaks for itself.

17 19. Denied. The Agreement speaks for itself.

18 20. Hyperion admits that Exhibit B is a true and accurate copy of a document dated
19 November 21, 2006. Hyperion denies the remainder of this paragraph, including Amiga
20 Delaware's assertion that it had any right to terminate Hyperion's rights under the Agreement.

21 21. Denied.

22 22. Denied. Exhibit C, assuming that it is a true and accurate of the document it
23 purports to be, proves that Amiga Delaware did not do the acts it claims to have done in this
24 paragraph.

1 23. Denied. Exhibit D, assuming that it is a true and accurate of the document it
2 purports to be, proves that Amiga Delaware did not do the acts it claims to have done in this
3 paragraph.

4 24. Denied. Hyperion further notes that Exhibit D transitions directly to Exhibit F,
5 with no Exhibit E identified.

6 25. Hyperion denies paragraph 25 for lack of knowledge. Hyperion furthermore
7 specifically alleges that Amiga Delaware has failed to prove its title to the Amiga trademarks in
8 any form and, thus, that it has failed to prove that it had or has any rights to file trademark
9 applications with the Patent and Trademark Office.

10 26. Denied.

11 27. Denied for lack of personal knowledge.

12 28. Denied.

13 29. With respect to the first sentence of this paragraph, Hyperion denies both that it
14 has used any trademarks beyond the scope of its rights under the Agreement, and that Hyperion
15 was required to obtain any consent for its actions from Amiga Delaware. With respect to the
16 second sentence, Hyperion states that Amiga Washington did enter into the Agreement that
17 transferred the rights specified in that Agreement to Hyperion. The reference to “goods” in this
18 second sentence is ambiguous. To the extent that it refers to the hardware developed and
19 produced by Eyetech, and to the extent (if any) that Amiga Delaware was entitled to do so,
20 Hyperion denies that Amiga Delaware failed to sponsor, endorse or approve the relevant goods.
21 To the extent that this second sentence refers to software, code, OS 4 or OS 4.0 as “goods,”
22 Hyperion denies that it failed to have any required sponsorship, endorsement or approval for the
23 same. Hyperion denies the third sentence of this paragraph, as well as all other allegations
24 contained within this paragraph not specifically addressed above.

25 30. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
26 set forth herein.

- 1 31. Denied.
- 2 32. Denied.
- 3 33. Denied.
- 4 34. Denied.
- 5 35. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
6 set forth herein.
- 7 36. Denied.
- 8 37. Admitted.
- 9 38. Hyperion admits that Amiga Delaware seeks a judicial declaration regarding
10 Amiga Delaware's erroneous allegations.
- 11 39. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
12 set forth herein.
- 13 40. Denied.
- 14 41. Denied.
- 15 42. Denied.
- 16 43. Denied.
- 17 44. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
18 set forth herein.
- 19 45. Denied.
- 20 46. Denied.
- 21 47. Denied.
- 22 48. Denied.
- 23 49. Denied.
- 24 50. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
25 set forth herein.
- 26 51. Denied.

1 52. Denied.

2 53. Denied.

3 54. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
4 set forth herein.

5 55. Denied.

6 56. Denied.

7 57. Denied.

8 58. Denied.

9 59. Denied.

10 60. Denied.

11 61. Denied.

12 62. Denied.

13 63. Denied.

14 64. Denied.

15 65. Denied for lack of knowledge.

16 66. Hyperion realleges each and every answer to the foregoing paragraphs as if fully
17 set forth herein.

18 67. Denied.

19 68. Denied.

20 69. Denied.

21 Wherefore, the entirety of Amiga Delaware's Prayer for Relief should be denied and
22 dismissed with prejudice.

23 **AFFIRMATIVE DEFENSES**

24 For its affirmative defenses to Amiga Delaware's complaint, Hyperion alleges the
25 following Affirmative Defenses:

1 1. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
2 interest to Amiga Washington; then Amiga Delaware and/or its predecessors-in-interest failed
3 to comply with the obligations of the Agreement to pay Hyperion \$25,000, and to release a
4 substantially new version of the Classic Amiga OS for the Target Hardware, by June 27, 2005.
5 (See, for instance, Sections 2.06, 2.08, and 3.01 of the Agreement.) Amiga Delaware therefore
6 is not entitled to the relief it seeks in this suit.

7 2. Hyperion and Eyetech have an exclusive, perpetual, world-wide and royalty free
8 right and license to develop, use, modify and market the Software and OS 4 under the “Amiga
9 OS” trademark pursuant to Section 2.07 of the Agreement.

10 3. Hyperion and Eyetech have an exclusive, perpetual, worldwide right and license
11 to develop, use, modify and market the Software and OS 4 under the “Amiga OS” trademark
12 pursuant to Section 2.08 of the Agreement.

13 4. Hyperion possesses all ownership and title in the enhancements of and additions
14 to the Software pursuant to the terms of Section 3.01 of the Agreement.

15 5. Amiga Delaware has no rights under the Agreement because the requirements of
16 Section 7.12 of the Agreement were not met.

17 6. Amiga Delaware has no rights pursuant to the self-executing terms of Section
18 2.07 the Agreement because Amiga Washington was insolvent before the purported transfer of
19 rights to Itec LLC.

20 7. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
21 interest to Amiga Washington, then Amiga Delaware and/or its predecessors-in-interest
22 breached their warranties and obligations under the Agreement. See, e.g., Sections 4.01, 4.02
23 and 4.06.

24 8. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
25 interest to Amiga Washington, then Amiga Delaware is estopped from denying that it and/or its
26

1 predecessors-in-interest agreed with Eyetech to modifications in the PPC hardware developed
2 and/or provided for “Amiga One” under the Agreement.

3 9. Amiga Delaware lacks the capacity and right to sue under the Agreement, and
4 under the other causes of action asserted in its complaint.

5 10. To the extent not subject to the claims of its subcontractors, Hyperion claims title
6 to the Software, code and intellectual property sought by Amiga Delaware in this lawsuit.

7 11. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
8 interest to Amiga Washington, then Amiga Delaware and/or its predecessors-in-interest failed to
9 provide consideration for that which they seek in this suit.

10 12. Amiga Delaware has failed to name a necessary party to this action, to wit,
11 Eyetech Group Ltd. See FRCP 19.

12 13. Amiga Delaware has failed to state a claim upon which relief can be granted.

13 14. The laws of Belgium and the European Union apply to certain aspects of this
14 case, e.g., the obligations of Hyperion to, and the rights of, defendant’s subcontractors to the
15 Software, Code and intellectual property at issue.

16 15. Amiga Delaware failed to issue sufficient process in order to obtain jurisdiction
17 over Hyperion and the subject matter of this suit.

18 16. Amiga Delaware has failed to serve process upon this Defendant in the manner
19 and form required by the applicable law.

20 17. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
21 interest to Amiga Washington, then Amiga Delaware’s claims are barred by laches.

22 18. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
23 interest to Amiga Washington, then Amiga Delaware and/or its predecessors-in-interest failed to
24 perform conditions precedent to these claims. See, e.g., Sections 2.06, 2.07, 2.08, 3.01, 3.02,
25 4.01, 4.02, 4.06, and 7.12.

1 19. If the Court ultimately finds that Amiga Delaware is the legitimate successor-in-
2 interest to Amiga Washington, then Amiga Delaware ratified actions about which it now
3 complains.

4 20. The transactions on which Amiga Delaware's lawsuit is based was beyond the
5 express or implied powers of Amiga Washington because Amiga Washington was insolvent at
6 the time it purportedly transferred, for inadequate consideration, its interests under the
7 Agreement, its interests in its trademarks, and it interests in other assets.

8 21. Amiga Delaware's claims are barred by its unclean hands.

9 22. Amiga Delaware's claims are barred because it obtained the rights its now claims
10 to own through a series of fraudulent conveyances conducted with the assets of Amiga
11 Washington and the aid of other entities that are not parties to this suit.

12 23. Amiga Delaware has failed to prove its right and title to any of the Amiga
13 trademarks.

14 24. Amiga Delaware has failed to prove that it is merely a renamed KMOS, or that it
15 acquired the rights and title of KMOS in some other legal and proper manner.

16 25. Amiga Delaware has failed to prove that KMOS acquired the rights and title of
17 Itec LLC in a legal and proper manner.

18 26. Amiga Delaware has failed to prove that Itec LLC acquired the rights and title of
19 Amiga Washington in a legal and proper manner.

20 **COUNTERCLAIMS**

21 COMES NOW Hyperion VOF, and for its counterclaims against Amiga Delaware,
22 alleges as follows:

23 **JURISDICTION**

24 1. This Court has jurisdiction over this action under 28 U.S.C. §1332(a)(2), 28
25 U.S.C. §1331 (federal question jurisdiction); 28 U.S.C. §1338(a)(any act of Congress relating to
26 patents, copyrights and trademarks); 28 U.S.C. §1367 (ancillary jurisdiction), and the doctrines

1 of ancillary and pendent jurisdiction. The amount in controversy exceeds a sum or value of
2 \$75,000, exclusive of interest and costs.

3 **VENUE**

4 2. Venue is proper in this District because defendant Hyperion VOF stipulated to
5 jurisdiction and venue in this District in an (OEM) License and Software Development
6 Agreement dated November 3, 2001 (the "Agreement") with Amiga, Inc., a Washington
7 Corporation ("Amiga Washington"), and Eyetech Group Ltd. ("Eyetech"), and because plaintiff
8 Amiga, Inc., a Delaware corporation ("Amiga Delaware") is asserting that it succeeded to the
9 rights of Amiga Washington under that Agreement.

10 **PARTIES**

11 3. Plaintiff Amiga Delaware purports to be a Delaware corporation.

12 4. Hyperion VOF, d/b/a Hyperion Entertainment VOF ("Hyperion"), is a foreign
13 general partnership organized under the laws of Belgium with its principal place of Business in
14 Leuven, Belgium.

15 **FACTS**

16 5. Hyperion is a party to the Agreement.

17 6. Amiga Delaware did not exist on November 3, 2001.

18 7. Amiga Washington was insolvent no later than the end of July 2002 up through
19 and including April 24, 2003.

20 8. Upon Amiga Washington's insolvency, the self-executing provision in §2.07 of
21 the Agreement transferred to Hyperion and Eyetech "an exclusive, perpetual, world-wide and
22 royalty free right and license to develop (at their sole expense), use, modify and market the
23 Software and OS 4 under the 'Amiga OS' trademark."

24 9. Amiga Washington remained insolvent from April 24, 2003 through the date of
25 its administrative dissolution by the State of Washington on September 30, 2004.

1 10. Amiga Washington, its representatives, Itec LLC, and its representatives, failed
2 to inform Hyperion on or before April 24, 2003, that Amiga Washington was insolvent.

3 11. Hyperion did not know, on or before April 24, 2003, that Amiga Washington
4 was insolvent.

5 12. On April 24, 2003, Hyperion and Itec LLC (“Itec”) entered into an agreement
6 that purported to relate to Amiga Washington’s rights under the Agreement. This contract is
7 hereinafter referred to as the “Itec Contract.”

8 13. Amiga Washington did not give is prior written consent to the Itec Contract.

9 14. Eyetech did not give its prior written consent to the Itec Contract.

10 15. On information and belief, a common core of major investors, shareholders,
11 officers and directors were directly involved in the affairs of Amiga Washington and Itec on and
12 prior to April 24, 2003. This common core of individuals included Mr. William McEwen, Mr.
13 Barrie Jon Moss and Mr. Pentti Kouri. Itec, and this common core of major investors,
14 shareholders, officers and directors were therefore “insiders” of Amiga Washington within the
15 meaning of RCW 19.40.011.

16 16. At the time of the Itec Contract, Itec and the other insiders of Amiga Washington
17 knew that Amiga Washington was insolvent.

18 17. On information and belief, on, before and after April 24, 2003, Itec failed to give
19 Amiga Washington a reasonably equivalent value for Amiga Washington’s contractual rights
20 that were purportedly transferred in the Itec Contract.

21 18. On information and belief, Itec and the other insiders of Amiga Washington
22 acted in bad faith when Itec entered into the Itec Contract.

23 19. At the time of the Itec Contract, Hyperion was a creditor of Amiga Washington
24 because, for instance, Amiga Washington had breached its warranties in Article IV of the
25 Agreement, to the substantial damage of Hyperion.

1 20. On information and belief, the purported transfer to Itec in the Itec Contract of
2 Amiga Washington's rights under the Agreement, if any such rights existed following Amiga
3 Washington's insolvency, was made by Itec and its insiders with the actual intent to hinder,
4 delay or defraud creditors of Amiga Washington.

5 21. Because of §2.07 of the Agreement, and because of the failure of Itec to obtain
6 prior written consent as required by §7.12 of the Agreement, the Itec Contract is invalid, void
7 and otherwise unenforceable.

8 22. Attached as Exhibit B to the Declaration of William McEwen In Support of
9 Plaintiff Amiga [Delaware's] Reply to Hyperion's Opposition to Amiga's Motion for
10 Preliminary Injunction is what Mr. McEwen purports to be a true and accurate copy of a Stock
11 Purchase and Sale Agreement and Agreement of Assignment of Intellectual Property Rights"
12 dated October 7, 2003. This agreement is hereinafter referred to as the "Itec/KMOS Contract."

13 23. By the explicit admissions of the Itec/KMOS Contract, the insiders of Itec were
14 the insiders of KMOS. By necessary implication, then, the insiders of KMOS were and are
15 insiders of Amiga Washington, which prevents KMOS, now purportedly known as Amiga
16 Delaware, from being a good faith purchaser of the assets of Amiga Washington under the
17 terms of RCW 19.40.081. On information and belief, the Itec Contract, and the Itec/KMOS
18 Contract were merely part of an elaborate scheme to hinder, delay or defraud the creditors of
19 Amiga Washington.

20 24. KMOS failed to obtain the prior written consent of Hyperion and Eyetech to the
21 Itec/KMOS Contract as required by §7.12 of the Agreement. The Itec/KMOS Contract is
22 therefore invalid, void and otherwise unenforceable.

23 25. Attached as Exhibit G to the Declaration of William McEwen In Support of
24 Plaintiff Amiga [Delaware's] Reply to Hyperion's Opposition to Amiga's Motion for
25 Preliminary Injunction is what purports to be a cover page of a certified copy of the original
26 Agreement on Acquisition and Assignment of Trademarks between Assignor Amiga, Inc.

1 [Amiga Washington] and the Assignee, KMOS, Inc. (Hereinafter the “Amiga
2 Washington/KMOS Contract”.) This Exhibit G purports to claim that the Amiga
3 Washington/KMOS Contract was signed on August 30, 2004, or just one month before Amiga
4 Washington was administratively dissolved by the State of Washington. However, the
5 certification itself was not signed until September 5, 2006, or more than two years later.

6 26. On information and belief, based on the physical appearance of Exhibit G to Mr.
7 McEwen’s Reply Declaration, the Amiga Washington/KMOS Contract was not signed before
8 Amiga Washington was administratively dissolved, making said contract invalid, void and
9 otherwise unenforceable. This, in turn, makes KMOS’ assertion of its rights to the “Amiga”
10 trademarks invalid, at least as those asserted rights conflict with the rights held by Hyperion
11 pursuant to the Agreement.

12 27. The insiders of KMOS are the insiders of Amiga Washington. KMOS and its
13 insiders knew that Amiga Washington was insolvent on August 30, 2004, assuming that that
14 was in fact when the Amiga Washington/KMOS Contract was signed. KMOS, therefore, acted
15 in bad faith when it entered into that contract with the actual intent to hinder, delay and defraud
16 creditors of Amiga Washington, including Hyperion. Furthermore, on information and belief,
17 KMOS failed to provide reasonably equivalent value for the “intellectual properties,” including
18 the “Amiga” trademarks, that are allegedly covered by the Amiga Washington/KMOS Contract.

19 28. Hyperion completed AmigaOS 4.0 as required by Annex I of the Agreement no
20 later than December 27, 2004. To the extent that Amiga Delaware had or has any rights under
21 the Agreement, Hyperion gave timely notice of this completion in a joint press release issued
22 with KMOS in 2004, and separately via email.

23 29. By June 27, 2005, neither Amiga Washington nor any of its purported
24 successors-in-interest had paid to Hyperion the \$25,000 required by §§3.01 and 2.06 of the
25 Agreement.

1 30. By June 27, 2005, neither Amiga Washington nor any of its purported
2 successors-in-interest had issued a substantially new version of the Classic Amiga OS for the
3 Target Hardware.

4 31. Amiga Delaware alleges that it is KMOS, Inc., and that KMOS merely changed
5 its name to Amiga Delaware. Based on the failure of Amiga Delaware to produce
6 documentation supporting this allegation in its reply in support of its motion for preliminary
7 injunction, Hyperion alleges that the facts support the conclusion that there was yet another
8 corporate entity change between KMOS, Inc. and Amiga Delaware.

9 32. If there was another entity change between KMOS, Inc. and Amiga Delaware,
10 then Hyperion alleges that the insiders of Amiga Delaware were the insiders of KMOS, Inc.,
11 Itec LLC and Amiga Washington, that Amiga Delaware failed to obtain the prior written
12 consent required by §7.12 of the Agreement, and that that transfer was yet another link in the
13 effort to hinder, delay and defraud the creditors of Amiga Washington.

14 33. Even if one assumes that Amiga Washington was not insolvent and that all
15 required parties gave their written consent to the transfer of Amiga Washington's rights in the
16 Itec Contract and all subsequent contracts, Hyperion has at no time, and will not in the future in
17 its dealings with ACube Systems Srl, violate the provisions of its license under the Agreement.
18 Amiga Delaware therefore has no valid basis upon which to terminate the licensing agreement.

19 34. Hyperion specifically alleges that it went well beyond its contractual obligations
20 under the Agreement—at substantial expense to itself—and unquestionably met its obligations
21 to exercise “best efforts,” both with respect to releasing AmigaOS 4.0 as promptly as possible,
22 and with respect to obtaining the widest possible rights from third party developers.

23 35. Because Amiga Delaware and its purported predecessors in interest failed to pay
24 \$25,000 to Hyperion by the required date, Amiga Delaware and its purported predecessors in
25 interest failed to timely exercise the “buy-in option” in §3.01. Hyperion, therefore, has no
26

1 obligation to provide to Amiga Delaware the Object Code, Source Code and intellectual
2 property of OS 4.0 pursuant to and within the limits set out in §2.06 of the Agreement.

3 36. Amiga Delaware had neither the legal right nor the factual basis upon which to
4 terminate the Agreement.

5 CAUSES OF ACTION

6 CAUSE NO. 1: DECLARATORY JUDGMENT UNDER RCW CH. 7.24

7 Hyperion realleges paragraphs 1 through 36 as if restated in full herein.

8 37. Pursuant to RCW Ch. 7.24 *et seq.*, Hyperion seeks a declaratory judgment under
9 the November 3, 2001 Agreement that:

10 (a) Under the self-executing provisions of §2.07 of the Agreement, the Amiga
11 One Partners received an exclusive, perpetual, world-wide and royalty free right and license to
12 develop (at their sole expense), use, modify and market the Software and OS 4 under the Amiga
13 OS trademark upon Amiga Washington's insolvency, and that Amiga Washington was
14 insolvent prior to and on April 24, 2003;

15 (b) Amiga Delaware and its predecessors did not comply with the requirement of
16 §7.12 of the Agreement that the Amiga One Partners and Amiga Washington each provide prior
17 written consent before the purported assignment of Amiga Washington's rights under the
18 Agreement could occur in the Itec Contract. Amiga Delaware therefore has no rights under the
19 contract upon which it is suing;

20 (c) Amiga Delaware and its predecessors did not comply with the requirement of
21 §7.12 of the Agreement that subsequent transfers of rights under the Agreement also be
22 completed only after obtaining the prior written consent of the parties thereto. Amiga Delaware
23 therefore has no rights under the contract upon which it is suing;

24 (d) Even if one assumes that Amiga Washington was not insolvent and that all
25 required parties gave their written consent to the transfer of Amiga Washington's rights, neither
26 Amiga Washington nor any of its purported successors paid the \$25,000 within the six-month

1 time period required by §3.01 to “buy in” to OS 4. Thus, Amiga Delaware has not acquired the
2 Object Code, Source Code and intellectual property of OS 4.0 pursuant to and within the limits
3 set out in §2.06 of said Agreement. Instead, Hyperion possesses all ownership and title in the
4 enhancements of and additions to the Software effected by Hyperion and its subcontractors
5 pursuant to the terms of the Agreement;

6 (e) Even if one assumes that Amiga Washington was not insolvent and that all
7 required parties gave their written consent to the transfer of Amiga Washington’s rights, the
8 self-executing provisions of §2.08 of the agreement transferred an exclusive, perpetual,
9 worldwide right and license to develop, use, modify and market the Software and OS 4 under
10 the Amiga OS trademark at their sole expense because Amiga Washington and its purported
11 successors failed to release a substantially new version of the Classic Amiga OS for the Target
12 Hardware within six months of Hyperion’s completion of OS 4.0;

13 (f) Even if one assumes that Amiga Washington was not insolvent and that all
14 required parties gave their written consent to the transfer of Amiga Washington’s rights, (i)
15 Hyperion exercised its “best efforts” as required of it under the Agreement, and (ii), Hyperion
16 has at no time, and will not in the future in its dealings with ACube Systems Srl, violate the
17 provisions of its license under the November 3, 2001 Agreement. Amiga Delaware therefore
18 has no valid basis upon which to terminate the licensing agreement; and

19 (g) Hyperion is entitled to whatever other declaratory relief is required to fully
20 adjudicate the rights of the parties to the Agreement pursuant to RCW 7.24.010, .020, .030,
21 .050, .080, and .090.

22 38. In addition to a declaratory judgment in its favor, Hyperion is entitled to an
23 award from Amiga Delaware of its attorney’s fees and expenses under §7.07 of the Agreement
24 and its costs under RCW 7.24.100.

1 **CAUSE NO. 2: FRAUDULENT CONVEYANCE OF THE AMIGA**
2 **WASHINGTON/KMOS CONTRACT**

3 Hyperion realleges paragraphs 1 through 38 as if restated in full herein.

4 39. Hyperion is a creditor of Amiga Washington because, among other things,
5 Amiga Washington breached its Warranties and Indemnification obligations in Article IV of the
6 Agreement.

7 40. For example, Amiga Washington breached its warranty that it was the owner of
8 all intellectual property rights in the Software, defined to include but not be limited to OS 3.1,
9 3.5 and 3.9, when it in fact did not own said rights and could not deliver the code. (Agreement,
10 §4.01.) On information and belief, Amiga Washington and its insiders knew it could not
11 comply with these warranty obligations at the time the Agreement was entered into. This
12 breach caused Hyperion substantial damage because Hyperion was then forced to enter into
13 dozens of contracts with the actual owners of that Software and acquire the liabilities attendant
14 thereto.

15 41. Amiga Washington then further breached its duties of indemnification under
16 §4.02 of the Agreement because it failed to hold Hyperion harmless from those damages, costs
17 and expenses.

18 42. As another example, Hyperion's rights under §2.01 of the Agreement included
19 the right to retain all revenues from the distribution of OS 4.0. In 2001 and 2002 Amiga
20 Washington breached Hyperion's rights by engaging in illicit discount voucher schemes aimed
21 at future end-consumers of OS 4.0. Specifically, Amiga Washington issued \$100 "Amiga Party
22 Pack" and \$50 "I am Amiga" vouchers designed to induce consumers to pay Amiga
23 Washington \$100 or \$50 in anticipation of the release of OS 4.0. Amiga Washington
24 represented that in exchange for these vouchers it would either grant a discount or provide free
25 copies of software, e.g. OS 4.0, that it did not own. By Amiga Washington's own admissions, it
26 raised at least \$90,000 from consumers in this manner. Hyperion never endorsed these

1 schemes, was never paid any of the money, and has been damaged both in its reputation and
2 monetarily as it was confronted with demands from these consumers for benefits that Hyperion
3 was not in a position to provide.

4 43. Hyperion assumed the status of a creditor of Amiga Washington prior to April
5 24, 2003.

6 44. The Amiga Washington/KMOS Contract, purportedly signed on August 30,
7 2004, violates RCW 19.40.041(a) and RCW 19.40.051(a).

8 45. Amiga Delaware, either as the renamed KMOS or as a subsequent transferee
9 who failed to take in good faith and failed to provide reasonably equivalent value, is liable to
10 Hyperion for this fraudulent transfer pursuant to RCW 19.40.071 and .081.

11 46. Pursuant to RCW 19.40.071 and .081, Hyperion is entitled to a judgment voiding
12 the transfer that took place in the Amiga Washington/KMOS Contract and to a judgment
13 awarding Hyperion full right and title to the intellectual property rights covered by the Amiga
14 Washington/KMOS Contract in partial satisfaction of Amiga Washington's liabilities to
15 Hyperion.

16 47. Pursuant to RCW 19.40.071 and .081, Hyperion is further entitled to an
17 injunction prohibiting Amiga Delaware from using the name "Amiga" in its corporate name, in
18 corporate sponsorships of public facilities, and from using the Amiga trademarks in any of its
19 commercial or noncommercial activities.

20 48. Finally, Hyperion is entitled to any other relief required by the circumstances of
21 this case to provide it full relief pursuant to RCW 19.40.071(a)(3)(iii).

22 **CAUSE NO. 3: FRAUDULENT CONVEYANCE OF THE ITEC/KMOS CONTRACT**

23 Hyperion realleges paragraphs 1 through 48 as if restated in full herein.

24 49. The Itec/KMOS Contract was purportedly entered into on October 7, 2003.

25 50. At the alleged time of that contract, Hyperion was a creditor of Amiga
26 Washington.

1 51. The Itec/KMOS Contract violates RCW 19.40.041(a) and RCW 19.40.051(a) in
2 as much as it was part of a larger scheme to hinder, delay or defraud the creditors of Amiga
3 Washington.

4 52. Amiga Delaware, either as the renamed KMOS or as a subsequent transferee
5 who failed to take in good faith and failed to provide reasonably equivalent value, is liable to
6 Hyperion for this fraudulent transfer pursuant to RCW 19.40.081.

7 53. Pursuant to RCW 19.40.071 and .081, Hyperion is entitled to a judgment voiding
8 the transfer that took place in the Itec/KMOS Contract. To the extent that Hyperion has not
9 already received the same in response to its cause of action for declaratory judgment, Hyperion
10 is further entitled to a judgment awarding Hyperion full right and title to the intellectual
11 property rights covered by the Itec/KMOS Contract in partial satisfaction of Amiga
12 Washington's liabilities to Hyperion.

13 54. Finally, Hyperion is entitled to any other relief required by the circumstances of
14 this case to provide it full relief pursuant to RCW 19.40.071(a)(3)(iii).

15 **4. CAUSE NO. 4: BREACH OF CONTRACT**

16 Hyperion realleges paragraphs 1 through 54 as if restated in full herein.

17 55. If Amiga Delaware is in fact a valid successor in interest to Amiga Washington
18 under the Agreement, then Amiga Delaware assumed all of contractual obligations and
19 liabilities of Amiga Washington with respect to the same.

20 56. As alleged previously, Amiga Washington breached its warranties and
21 indemnification obligations of Article IV of the Agreement by failing both to deliver OS 3.1,
22 3.5 and 3.9 source code free of encumbrances and, with respect to OS 3.5 and 3.9, the outright
23 failure to produce that code in any form. These breaches caused substantial damages to
24 Hyperion in an amount to be proven at trial. Amiga Delaware is liable for those damages if in
25 fact it is the legitimate successor in interest to Amiga Washington.

1 57. As alleged previously, Amiga Washington breached Hyperion's rights under
2 §2.01 of the Agreement by engaging in the "I am Amiga Club" and "Party Pack" voucher
3 schemes. These breaches caused substantial damages to Hyperion in an amount to be proven at
4 trial. Amiga Delaware is liable for those damages if in fact it is the legitimate successor in
5 interest to Amiga Washington.

6 58. Discovery is ongoing and additional breaches of contract by may be discovered.

7 59. Hyperion accordingly demands judgment against Amiga Delaware in an amount
8 to be determined at trial, plus attorney's fees and expenses, if plaintiff is in fact determined to
9 be a valid successor in interest to Amiga Washington.

10 **CAUSE NO. 5: VIOLATION OF RCW CH. 19.86 ET AL.**

11 Hyperion realleges paragraphs 1 through 59 as if restated in full herein.

12 60. Amiga Delaware has misrepresented to third parties that it owns the Object
13 Code, the Source Code and all intellectual property of the Operating System known as OS 4 in
14 the context of negotiating, or attempting to negotiate contracts with said parties relating to the
15 development, marketing, distribution and/or sale of OS 4. One such example of this is a
16 Subscription Agreement between KMOS and a Singapore company named TAPUL S.A. dated
17 May 10, 2004. In making these misrepresentations, Amiga Delaware made a representation of
18 existing fact, the factual misrepresentation was material, it was false, Amiga Delaware knew it
19 was false, and Amiga Delaware intended that third parties act on those false representations.

20 61. In making the foregoing misrepresentations, Amiga Delaware was engaging in
21 an unfair or deceptive act or practice that occurred in trade or commerce. Those
22 misrepresentations have had a public interest impact because certain of those third parties have
23 accepted as true Amiga Delaware's misrepresentations, and their subsequent actions have had a
24 negative impact on Hyperion's ability to develop, market and sell its intellectual property.
25 Furthermore, certain of Hyperion's independent contractors have viewed Amiga Delaware's
26 actions as an infringement on their rights, and those third parties have instituted, or threatened

1 to institute, legal proceedings against Hyperion. Because of the same, Amiga Delaware's
2 actions have caused injury to Hyperion's business or property. RCW 19.86.020.

3 62. In light of the foregoing violations, RCW 19.86.090 entitles Hyperion (a) to
4 injunctive relief requiring Amiga Delaware to cease and desist its wrongful acts, (b) to recover
5 actual damages, trebled to no more than \$10,000 per violation, and (c), to recover costs of suit,
6 including a reasonable attorney's fee.

7 **CAUSE NO. 6: LANHAM ACT—TRADE MARK INFRINGEMENT AND DILUTION**

8 Hyperion realleges paragraphs 1 through 62 as if restated in full herein.

9 63. As previously alleged, Amiga Delaware acquired its alleged rights to the Amiga
10 trademarks through a fraudulent conveyance. As such, those alleged rights are invalid and
11 unenforceable.

12 64. Amiga Delaware's past and present use of the Amiga trademarks violates
13 Hyperion's explicit contractual rights under the Agreement.

14 65. As between Amiga Delaware and Hyperion, Hyperion also has the right of first
15 use with respect to the Amiga trademarks because Hyperion in fact was the first to use those
16 marks in conjunction with the expenditure of time and the resources needed to develop the
17 Amiga OS 4.0 Software and to promote the same within the scope of its rights under the
18 Agreement.

19 66. Amiga Delaware's use of the Amiga marks is and has been done with actual and
20 constructive knowledge of, and with deliberate, willful and utter disregard of Hyperion's rights
21 in the same. Furthermore, Amiga Delaware uses those marks in a way that is not only
22 confusingly similar, but identical, to Hyperion's use of its trademark rights. Amiga Delaware's
23 use of those marks is likely to cause confusion, deception and mistake among the consuming
24 public as to the source or affiliation of Hyperion's goods, namely Amiga OS 4.0.

1 67. Amiga Delaware has used and seeks to use the Amiga marks to falsely proclaim
2 that it is the source of the Amiga OS 4.0 Software, to the damage of Hyperion's valuable
3 goodwill as the source of the same.

4 68. Amiga Delaware's actions have had the effect of diluting and weakening the
5 unique and distinctive significance of Hyperion's rights in the Amiga trademarks as acquired
6 through the Agreement and through first use.

7 69. By reason of the foregoing, Amiga Delaware has violated §32(1) and §43(c) of
8 the Lanham Act, 15 U.S.C. §1114(1) & 1125(c).

9 70. Because of the above acts, Hyperion asks the Court to enjoin Amiga Delaware
10 from continuing these wrongful acts and to award it monetary damages in an amount to be
11 proven at trial.

12 **CLAIM NO. 7: LANHAM ACT—FALSE DESIGNATION OF ORIGIN**

13 Hyperion realleges paragraphs 1 through 70 as if restated in full herein.

14 71. Amiga Delaware's use of the trademark AmigaOS 4.0 to promote and sell
15 Software and products to which it has no contractual right is a false designation of origin.

16 72. On information and belief, Hyperion alleges that Amiga Delaware's actions have
17 been knowing, deliberate, willful and in utter disregard of Hyperion's rights.

18 73. The above acts by Amiga Delaware constitute a false designation of origin. By
19 reason of the foregoing, Amiga Delaware has violated §43(a) of the Lanham Act, 15 U.S.C.
20 §1125(a), and will continue to do so unless the above acts, among others, are enjoined by the
21 Court.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, having fully answered the allegations contained in Amiga Delaware's
24 Complaint, Hyperion prays that said Complaint be dismissed and that all costs incurred herein
25 by Hyperion, plus a reasonable attorney's fee, be taxed against Amiga Delaware. Hyperion
26 further requests the following relief:

1 1. For declaratory judgment that:

2 (a) Under the self-executing provisions of §2.07 of the Agreement, the Amiga
3 One Partners received an exclusive, perpetual, world-wide and royalty free right and license to
4 develop (at their sole expense), use, modify and market the Software and OS 4 under the Amiga
5 OS trademark upon Amiga Washington's insolvency, and that Amiga Washington was
6 insolvent prior to and on April 24, 2003;

7 (b) Amiga Delaware and its predecessors did not comply with the requirement of
8 §7.12 of the Agreement that the Amiga One Partners and Amiga Washington each provide prior
9 written consent before the purported assignment of Amiga Washington's rights under the
10 Agreement could occur in the Itec Contract. Amiga Delaware therefore has no rights under the
11 contract upon which it is suing;

12 (c) Amiga Delaware and its predecessors did not comply with the requirement of
13 §7.12 of the Agreement that subsequent transfers of rights under the Agreement also be
14 completed only after obtaining the prior written consent of the parties thereto. Amiga Delaware
15 therefore has no rights under the contract upon which it is suing;

16 (d) Even if one assumes that Amiga Washington was not insolvent and that all
17 required parties gave their written consent to the transfer of Amiga Washington's rights, neither
18 Amiga Washington nor any of its purported successors paid the \$25,000 within the six-month
19 time period required by §3.01 to "buy in" to OS 4. Thus, Amiga Delaware has not acquired the
20 Object Code, Source Code and intellectual property of OS 4.0 pursuant to and within the limits
21 set out in §2.06 of said Agreement. Instead, Hyperion possesses all ownership and title in the
22 enhancements of and additions to the Software effected by Hyperion and its subcontractors
23 pursuant to the terms of the Agreement;

24 (e) Even if one assumes that Amiga Washington was not insolvent and that all
25 required parties gave their written consent to the transfer of Amiga Washington's rights, the
26 self-executing provisions of §2.08 of the agreement transferred an exclusive, perpetual,

1 worldwide right and license to develop, use, modify and market the Software and OS 4 under
2 the Amiga OS trademark at their sole expense because Amiga Washington and its purported
3 successors failed to release a substantially new version of the Classic Amiga OS for the Target
4 Hardware within six months of the completion of OS 4.0 by Hyperion;

5 (f) Even if one assumes that Amiga Washington was not insolvent and that all
6 required parties gave their written consent to the transfer of Amiga Washington's rights, (i)
7 Hyperion exercised its "best efforts" as required of it under the Agreement, and (ii), Hyperion
8 has at no time, and will not in the future in its dealings with ACube Systems Srl, violate the
9 provisions of its license under the November 3, 2001 Agreement. Amiga Delaware therefore
10 has no valid basis upon which to terminate the licensing agreement; and

11 (g) Hyperion is entitled to whatever other declaratory relief is required to fully
12 adjudicate the rights of the parties to the Agreement pursuant to RCW 7.24.010, .020, .030,
13 .050, .080, and .090.

14 2. For a declaration that the Amiga Washington/KMOS Contract is void as a
15 fraudulent conveyance, and for a judgment awarding title to Hyperion of all rights of any kind
16 covered by said Contract;

17 3. For a declaration that the Itec/KMOS Contract is void as a fraudulent
18 conveyance and, to the extent that said rights have not already been awarded to Hyperion under
19 paragraph 1 above, a judgment awarding all rights of any kind covered by said Contract, to the
20 extent that they are not owned by third parties (e.g., Eyetech);

21 4. For an award of damages against Amiga Delaware for the breaches of the
22 Agreement committed by Amiga Washington, if Amiga Delaware is actually a valid successor
23 in interest to that Agreement;

24 5. For treble damages, injunctive relief, fees and costs as a result of Amiga
25 Delaware's violation of RCW 19.86 *et seq.*

26 6. For injunctive relief and damages under the Lanham Act;

