

THE HON. RICARDO MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

and

HYPERION VOF, a Belgium corporation,

Defendant/Counterclaim Plaintiff,

v.

ITEC, LLC, a New York Limited Liability  
Company,

Counterclaim Defendant.

CAUSE NO. CV07-0631RSM

**NOTICE OF MOTION AND MOTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO TRANSFER**

**NOTE ON MOTION CALENDAR:  
NOVEMBER 30, 2007**

**ORAL ARGUMENT REQUESTED**

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: NOTICE IS HEREBY  
GIVEN THAT pursuant to Rule 12(b)(2), (3) and/or (6) of the Federal Rules of Civil Procedure,  
on November 30, 2007, in the courtroom of the Honorable Ricardo Martinez, located at 700  
Stewart Street, Seattle, Washington, additional Counterclaim-Defendant Itec, LLC, a New York  
Company, (“Itec”) will and hereby does move the Court for an order dismissing the claims

1 brought against it by Hyperion VOF, a Belgian entity, (“Hyperion”) for lack of jurisdiction over  
2 the person of Itec and for lack of proper venue in this forum; or for failure to state a claim upon  
3 which relief can be based; or, in the alternative, for an order pursuant to 28 U.S.C. § 1404 and/or  
4 1406 transferring this cause to the United States District Court for the Southern District of New  
5 York.<sup>1</sup>

6  
7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. PRELIMINARY STATEMENT**

9 In its June 26, 2007 motion to join Itec as an additional counterclaim defendant in this  
10 action -- a motion to which Itec had no chance to respond -- Hyperion provided the Court with  
11 a great deal of misinformation about Itec; Itec’s relationship to the parties herein; and its role in  
12 the events giving rise to the dispute between Hyperion and defendant Amiga, Inc. (“Amiga”).  
13 But when the record is set straight, it becomes immediately clear that Itec’s involvement in these  
14 matters was *de minimus* at best, and in any event was totally unrelated to this forum such that  
15 this Court has no jurisdiction over Itec’s person.

16 To set the record straight:

17 Pursuant to a simple, two-page written sales contract dated as of April 24, 2003, made  
18 and to be performed in Belgium and New York -- the “Itec/Hyperion Contract” -- in return for  
19 payment of \$25,000, the receipt of which Hyperion acknowledged, Hyperion agreed to transfer  
20 ownership of certain technology -- the OS 4.0 -- to Itec. Hyperion never did so, and it is now  
21 being sued by Itec in New York for breach of contract as a consequence.  
22

23 Hyperion is also being sued by Amiga here for a variety of claims, having their genesis in  
24 a separate 2001 Agreement among Hyperion, Eyetech Group, Ltd. (“Eyetech”), Amiga One  
25

26  
27 <sup>1</sup> Unless otherwise stated, defined terms used herein will have the meaning ascribed to them in the Declaration of  
John Grzymala (the “Grzymala Dec.”), filed herewith.

1 Partners, and a Washington state corporation formerly called Amiga, Inc. (which is not a party to  
2 this action; hereinafter “Amiga Washington”). Itec is not a party to that Agreement.

3       Whatever Hyperion’s disputes are with Amiga, and whatever connection they may have  
4 with the State of Washington, Hyperion seems to forget -- or more precisely, it seeks to obscure  
5 -- the fact that the very limited Hyperion/Itec relationship, which is founded solely and  
6 exclusively on the Itec/Hyperion Contract, has no connection with this forum. The  
7 Itec/Hyperion Contract was not made by or in Washington, nor is it to be performed here, neither  
8 does it contain a Washington choice of forum provision; and while it makes brief reference to the  
9 separate 2001 Agreement between Hyperion and Amiga that contains such a provision, it does  
10 not provide for Itec’s assumption of Amiga Washington’s rights or obligations thereunder, nor  
11 does it incorporate the terms of that Agreement -- much less the choice of forum provision --  
12 into the Itec/Hyperion Contract.  
13

14       It would undoubtedly be more convenient for Hyperion to force Itec to come to this  
15 forum, and tactically advantageous as well: it would permit Hyperion to delay adjudication of  
16 the claims that Amiga has brought against it. But Hyperion’s personal convenience is not the  
17 test for determining whether personal jurisdiction exists over Itec. That test involves an analysis  
18 of whether Itec -- not Hyperion, not Amiga, not Amiga Washington, but Itec -- has contacts  
19 with this forum out of which Hyperion’s claims against it arise. And under this test --  
20 notwithstanding some very artful, albeit very inaccurate, pleading by Hyperion -- its claims  
21 against Itec in this forum must be dismissed.  
22

23       Finally, if dismissal on jurisdictional grounds were not required, the Court should transfer  
24 this cause to the United States District Court for the Southern District of New York. In addition  
25 to a number of more traditional reasons for such a transfer -- including that New York is the one  
26 place where jurisdiction exists over both Itec and Amiga -- Hyperion’s joining Itec as an  
27

1 additional "Counterclaim Defendant" here smacks of bad faith and forum shopping. Hyperion  
2 has known all of the facts that it relies on for its claims against Itec since the time that Amiga's  
3 motion for a preliminary injunction was submitted in April 2007. Nonetheless, Hyperion did not  
4 seek to assert those claims here until after Itec had made it clear that unless Hyperion performed  
5 its contract with Itec and delivered the OS 4.0 to it in New York, Itec would sue Hyperion there.  
6 Only then, hoping to pretermite that suit, did Hyperion race to this Court to seek a declaratory  
7 judgment that its contract with Itec is invalid -- a disfavored tactic the allowance of which would  
8 "reward Pearl Harbor tactics at the expense of the Marquis of Queensbury rules." Briarwood  
9 Shoe Corp. v. Sears Roebuck & Co., 479 F.Supp. 563, 568 (S.D.N.Y. 1979). Moreover, many of  
10 Hyperion's assertions in its Amended Counterclaims are in direct contradiction of the documents  
11 upon which it purports to rely -- and worse yet, in direct contradiction to what Hyperion has  
12 represented to the court in New York, and what it represented to this Court in its opposition to  
13 Amiga's motion for injunctive relief.  
14

15  
16 For all of these reasons, and those set forth below, Itec's motion to dismiss or transfer  
17 should be granted in all respects.

## 18 **II. STATEMENT OF FACTS**

19 The facts relevant to this motion are actually quite simple and not subject to legitimate  
20 dispute, as they are largely documentary in nature:

21 Itec is a New York limited liability company, engaged primarily in venture financing. It  
22 does not do business in the State of Washington. It is not and never has been an affiliate of  
23 Amiga Washington, and while it has a substantial equity interest in Amiga, it is a minority  
24 interest only. Grzymala Dec. at ¶¶ 2-4.

25  
26 Itec's involvement with Hyperion was of limited object and duration. Specifically, in or  
27 about April 2003, Hyperion and Itec communicated concerning Amiga Washington. Itec knew

1 Amiga Washington, as it had lent money to it in connection with a then-contemplated acquisition  
2 of the company's assets that never came to fruition. Grzymala Dec. at ¶¶ 5-6.

3 At that time, Hyperion had a 2001 Agreement with Amiga Washington, et al., involving a  
4 variety of licensing, distribution and trademark rights; one facet of that Agreement involved the  
5 development of the OS 4.0. While Hyperion had ownership rights in technology related to the  
6 OS 4.0, Eyetech and Amiga One Partners had no ownership interest therein. Under the 2001  
7 Agreement, Amiga Washington had an option -- but not an obligation -- to buy the rights to  
8 the OS 4.0 any time within six months of its completion for \$25,000. As of April 2003, the OS  
9 4.0 was not yet completed, but Hyperion was in desperate financial straits and needed the  
10 \$25,000 immediately to stave off bankruptcy. Amiga Washington was not interested in  
11 exercising its option to buy the OS 4.0, but did not object to Hyperion's selling the OS 4.0 to  
12 Itec.  
13

14 Because a failure by Itec to buy the OS 4.0 could result in the product's going to a third  
15 party or having title thereto enmeshed in Belgian legal proceedings if Hyperion indeed went  
16 bankrupt, Itec concluded that it was advisable to buy the OS 4.0 while it considered whether or  
17 not to acquire Amiga Washington's assets. Accordingly, Itec entered into a separate, standalone  
18 purchase and sale agreement with Hyperion, memorialized in the Itec/Hyperion Contract.  
19 Grzymala Dec. at ¶¶ 7-9, Ex. 1.  
20

21 As is apparent from the face of that document, Amiga Washington was not a party to the  
22 Itec/Hyperion Contract; and Amiga Washington did not purport to assign, and Itec did not  
23 purport to assume, the detailed rights or obligations of Amiga Washington under the 2001  
24 Agreement. Indeed, Itec understood at the time that with the agreed upon sale to it of the OS 4.0,  
25 Amiga Washington and Hyperion had abandoned the 2001 Agreement. All Itec did was to buy a  
26 single product -- the OS 4.0. Grzymala Dec. at ¶¶ 9-10.  
27

1 In October, 2003, before the OS 4.0 was completed, Itec sold the OS 4.0 to a Delaware  
2 company then known as KMOS, (now “Amiga, Inc.”), which had determined that it was going to  
3 acquire the assets of Amiga Washington in a separate transaction between those two parties.  
4 Grzymala Dec. at ¶¶ 16-17. The Amended Counterclaims do not allege any other act by Itec  
5 here relevant after its sale of the OS 4.0 to KMOS in October 2003 until June 20, 2007, when  
6 Itec, reserving all rights, sent a letter notifying Hyperion that Itec had elected to exercise its  
7 rights under the Itec/Hyperion Contract, tendering an additional payment in the amount of  
8 \$25,000 to Hyperion, and demanding that Hyperion transfer the OS 4.0, and all rights relating  
9 thereto, to Itec no later than June 26, 2007. Grzymala Dec. at ¶ 21, Ex. 4.

11 It appears that in 2004, KMOS did acquire all of Amiga Washington’s remaining assets,  
12 and that in December 2006, Hyperion announced that the OS 4.0 was finally completed.  
13 However, Itec had no involvement in any of this. Grzymala Dec. at ¶ 18. Thereafter, Hyperion  
14 apparently refused to transfer the OS 4.0 to KMOS n/k/a Amiga, and Amiga thus brought suit  
15 against Hyperion in this Court. Grzymala Dec. at ¶ 19. In so doing, Amiga alleged that  
16 Hyperion “had stipulated to jurisdiction and to venue in this judicial district.” Complaint at ¶ 3.

18 As the Court is aware, in that lawsuit, there is a welter of claims and counterclaims back  
19 and forth between Amiga and Hyperion involving trademark rights and other matters, all of  
20 which have nothing to do with Itec, which sold OS 4.0 KMOS in 2003 and which asserts no  
21 rights or claims to any of the Amiga trademarks. Grzymala Dec. at ¶ 20. Nonetheless, Hyperion  
22 now seeks to pull Itec into this welter.

24 But as shown above, there is simply no basis for Hyperion to sue Itec here under the  
25 Itec/Hyperion Contract. The Contract has no connection with this forum, and there is no other  
26 basis for Hyperion to sue Itec here since Itec is not a party, directly or by assignment, to the 2001  
27 Agreement between Hyperion and Amiga Washington. Grzymala Dec. at ¶ 23.

1           What has complicated an otherwise straightforward case of no jurisdiction is that on its  
2 motion for a preliminary injunction in April 2007, Amiga, which was not a party to the  
3 Itec/Hyperion Contract, asserted that the Contract constituted an acknowledgement of an  
4 assignment by Amiga Washington of the 2001 Agreement to Itec. Grzymala Dec. at ¶ 24.  
5 Hyperion then argued that by reason of Article 7.12 of the 2001 Agreement any “assignment”  
6 was ineffective, and a good part of the preliminary injunction argument was focused on this  
7 issue. Order Denying Motion for Preliminary Injunction at pp. 6-7. Moreover, as more fully set  
8 forth below, Hyperion now tries to exploit this statement by Amiga to support its Counterclaims  
9 against Itec, arguing it means that Itec must be asserting that its rights to the OS 4.0 arise under  
10 the 2001 Agreement.  
11

12           The short of it is, Amiga, which operated under the time constraints of preparing a  
13 motion for a preliminary injunction, was simply mistaken. Itec does not claim to be an assignee  
14 of the 2001 Agreement, and it does not assert any rights to the OS 4.0 thereunder. Grzymala  
15 Dec. at ¶ 25. Nor has anyone ever pointed to anything that looks or reads like an assignment  
16 agreement between Amiga Washington and Itec -- probably because none exists. Rather, Itec  
17 had its own separate sales contract with Hyperion, and Hyperion alone, and that Contract is the  
18 basis of Itec’s claim that it was the owner of the OS 4.0 from April – October 2003. Grzymala  
19 Dec. at ¶ 9. Moreover, far from the 2001 Agreement’s being “incorporated” into the  
20 Itec/Hyperion Contract (as Hyperion has recently implied), the only reference to that Agreement  
21 is in the context of prescribing Hyperion’s delivery obligation. In other words, the Itec/Hyperion  
22 Contract provides only that Hyperion would deliver the OS 4.0 at the same time and manner as it  
23 would have had to deliver it to Amiga Washington, if Amiga Washington had exercised, rather  
24 than abandoned, its option to buy the OS 4.0.  
25  
26  
27

1 Hyperion's argument on the injunction motion that Itec was an assignee of the 2001  
2 Agreement, and that it did not acquire and could not sell the OS 4.0, came as a complete surprise  
3 to Itec. Grzymala Dec. at ¶ 27. Not only is the Itec/Hyperion Contract devoid of any prohibition  
4 regarding what Itec could do with the OS 4.0, but Hyperion had actually assisted Itec in  
5 arranging the sale of OS 4.0 to KMOS, *inter alia*, representing to KMOS in 2003 that there were  
6 no liens or encumbrances on the product except as might be specifically stated in the 2001  
7 Agreement (regarding third-party contractor rights). See Grzymala Dec. at ¶ 17, Ex. 3.  
8 However, with Hyperion taking the position that the transfer to KMOS was ineffective (while  
9 curiously enough retaining the \$25,000 payment it acknowledged that it had received from Itec  
10 in 2003), that would necessarily mean that title to the OS 4.0 reverted to Itec -- which was under  
11 a contractual obligation to transfer same to KMOS. Accordingly, on June 20, 2007, Itec wrote  
12 Hyperion warning that if it was not delivered to Itec in New York by June 26, 2007, Itec would  
13 have to take steps to protect its legal rights. Grzymala Dec. ¶21.

14  
15  
16 Hyperion's response was to file its motion in this Court on June 26, 2007 to join Itec as  
17 an additional Counterclaim Defendant on what is essentially a declaratory judgment claim that  
18 the Itec/Hyperion Contract should be declared void. Grzymala Dec. at ¶ 22. And Hyperion has  
19 since told the New York State Court in response to Itec's breach of contract action, commenced  
20 on July 6, 2007, that because Hyperion "filed first", the New York action should be stayed in  
21 favor of this action. Grzymala Dec. at ¶ 29.

### 22 Hyperion's Jurisdictional Allegations

23  
24 Hyperion's jurisdictional allegations are hinged on its erroneous argument that Itec is  
25 claiming rights under the 2001 Agreement rather than under the Itec/Hyperion Contract. Thus,  
26 Hyperion pleads in regard to how Itec can be subject to suit in this forum by stating that:  
27



1 Venue is proper in this district because Defendant Hyperion VOF  
2 stipulated to jurisdiction and venue in this district in [the 2001 Agreement]  
3 with Amiga, Inc., a Washington corporation . . . and Eyetech Group Ltd.  
4 Plaintiff Amiga Inc., a Delaware corporation . . . and Counterclaim-  
5 Defendant Itec, LLC . . . each asserts that it succeeded to the rights of  
6 Amiga Washington under that agreement.

7 Amended Counterclaims at ¶3.

8 But because Itec claims no such thing, Hyperion’s jurisdictional premise is simply wrong  
9 from the start.

10 Hyperion knows this. In fact, the substantive portions of pleadings here and elsewhere  
11 negate its jurisdictional averment. For example, in Paragraph 13 of its Amended Counterclaims,  
12 Hyperion abandons its contention that Itec is asserting that it “succeeded to the rights of Amiga  
13 Washington” under the 2001 Agreement and avers that the Itec/Hyperion Contract only  
14 “purported to relate to Amiga Washington’s rights under the [2001] Agreement.” Even this  
15 statement is incorrect -- once again, the Itec/Hyperion Contract does no such thing -- but even  
16 if the statement were correct, entering into a contract that “relates to,” but is not, a contract to be  
17 performed within this state is hardly a recognized predicate for *in personam* jurisdiction.

18 Similarly, Hyperion has asserted in the New York proceedings that the Itec/Hyperion  
19 Contract “expressly incorporates” the 2001 Agreement. Affidavit of Evert Carton in Support of  
20 Defendant Hyperion’s Motion to Dismiss or Stay [New York Action] at ¶ 19. But “document  
21 *ipsa loquitur*.” The Itec/Hyperion Contract says no such thing, and as Hyperion also knows, the  
22 distinction is not just semantic but legally critical—absent such express language, Hyperion  
23 cannot make Itec subject to the choice of forum provision in Hyperion’s 2001 Agreement with  
24 Amiga Washington to which Itec is not a signatory.

25 On its motion to join Itec, Hyperion also asserted:

26 Amiga Delaware has claimed the benefits and obligations of this  
27 Agreement §7.08 therein by virtue of its alleged status as a  
successor in interest to Amiga Washington. (Complaint, ¶4.) Since  
Amiga Delaware’s status as successor in interest depends on the

1 validity of the alleged transfer between Itec, LLC and it, Itec must  
2 also be bound by November 2001 Agreement's jurisdictional and  
3 forum provisions.

Hyperion's Motion to Join Itec, LLC as a Counterclaim Defendant at p. 4.

4 Once again, this simply is not correct. Amiga's rights under the 2001 Agreement arose  
5 by reason of its acquisition in December 2004 of all of Amiga Washington's assets—including its  
6 contracts—and not from the October 2003 limited transfer agreement between KMOS and Itec  
7 that dealt only with the OS 4.0. Grzymala Dec. at ¶ 18.

8 But perhaps most puzzling, Hyperion claims that the attempted assignment of Amiga  
9 Washington's rights to Itec via the Itec/Hyperion Contract was void and unenforceable.  
10 Amended Counterclaims at ¶¶14-22). However, if Hyperion prevails on that issue at trial, or at a  
11 pre-trial evidentiary hearing on the jurisdictional issue, Hyperion will have proven that there was  
12 no basis for its assertion that jurisdiction exists over Itec, and the Amended Counterclaims would  
13 have to be dismissed on that basis.

15 Pleading in the alternative only goes so far. At some point, Hyperion must either say that  
16 Itec in fact succeeded to the rights of Amiga Washington under the 2001 Agreement and for that  
17 reason is subject to jurisdiction here, or that Itec did not succeed to the rights of Amiga  
18 Washington under the 2001 Agreement, in which case it cannot be sued here based on the forum  
19 selection clause in that Agreement. While the latter formulation is in fact the correct one -- Itec  
20 will stipulate that it was not an assignee of the 2001 Agreement or any rights thereunder if it  
21 would resolve this issue -- Hyperion cannot continue have it both ways. It cannot ask this Court  
22 to charter a jurisdictional inquiry based on a claim of Itec's succeeding to Amiga Washington's  
23 rights and obligations under the 2001 Agreement unless Hyperion is prepared to say, if asked,  
24 that it takes the position that Itec in fact succeeded to Amiga Washington's rights and obligations  
25 thereunder. And Hyperion is understandably unwilling -- and unable -- to do so.

1 Thus, Hyperion has alleged no factual -- or even fanciful -- basis for jurisdiction over  
2 Itec here.

3 Finally, if Hyperion really believes that it cannot litigate this matter without both Itec and  
4 Amiga being present it is wrong, but its remedy is simple. Having been sued in New York State  
5 Court by Itec, all that Hyperion need do is to implead Amiga, which has an office and is subject  
6 to jurisdiction in New York. But the one thing that Hyperion should not be permitted to do is  
7 force Itec to travel 3,000 miles to litigate on Hyperion's claims for declaratory relief in a forum  
8 in which Itec is not present and in connection with claims that have nothing to do with  
9 Washington just because Amiga and Hyperion have gotten into a dispute here.  
10

### 11 **III. ARGUMENT**

12 The legal principles applicable on these facts are also simple and not subject to legitimate  
13 dispute.

#### 14 Standards on a Jurisdictional Motion

15 1. Plaintiff has the burden of pleading and, where challenged, proving jurisdiction.  
16 Scott v. Breeland, 792 F. 2d 925, 927 (9<sup>th</sup> Cir. 1986).  
17

18 2. As in any pleading context, plaintiff must meet its burden by alleging facts, not  
19 naked conclusions. Scott v. Breeland, 792 F. 2d at 929; Amba Marketing Systems, Inc. v. Jobar  
20 International, 551 F. 2d 784, 787 (9<sup>th</sup> Cir. 1977).  
21

22 3. Where a party characterizes a document on a Rule 12 motion, the court is not  
23 bound by that characterization. It will read the document itself and determine its legal meaning  
24 and, if clear, reject any contrary assertion by a party as to the intent or meaning of the document.  
25 Steckman v. Hart Brewing, 143 F.3d 1293, 1295-96 (9<sup>th</sup> Cir. 1998); Polar Int'l Brokerage Corp.  
26 v. Reeve, 108 F. Supp. 2d 225, 241 (S.D.N.Y. 2000) ("At the motion to dismiss stage, a court  
27 must accept as true the well-pleaded allegations of the Complaint. However, the court need not

1 adopt plaintiffs' subjective characterizations of documents properly before it.”)

2 4. Under the Washington long arm statute (Wash. Rev. Code § 4.28.185),  
3 jurisdiction over non-residents lies only where the defendant does an act in or affecting  
4 Washington enumerated in that section, and the cause of action arises from the doing of the  
5 enumerated act. Wash. Rev. Code § 4.28.185(1) & (3). The Washington long arm statute goes  
6 to the full limits of the Constitution and thus only a “due process” analysis is required as to  
7 whether jurisdiction exists. Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnanain Co., 284  
8 F. 3d 1114, 1126 (9<sup>th</sup> Cir. 2002); Childers v. Sagem Morpho, Inc. 2006 U.S. Dist. LEXIS 88425,  
9 \*7 (W.D. Wash. 2006) (Martinez, J.).

#### 11 Hyperion’s Jurisdictional Averments

12 5. Hyperion does not claim that Itec is “doing business” in the State of Washington  
13 such as to give rise to “general jurisdiction” over it, which would permit a plaintiff to sue it here  
14 on any claim, even one unrelated to its in-state activities. Perkins v. Benguet Mining Co., 342  
15 U.S. 437, 445 (1952); Tuazon v. R.J. Renolds Tobacco Co., 433 F. 3d 1163, 1169 (9<sup>th</sup> Cir. 2006).

17 6. Hyperion’s sole jurisdictional averment -- that Itec has claimed rights under the  
18 2001 Agreement and thus is subject to “specific” jurisdiction here -- is a mere conclusion. It is  
19 not supported by any facts as to when, where and how Itec has supposedly done so, and is thus  
20 insufficient on its face to support a claim of jurisdiction. Schwarzenegger v. Fred Martin Mtor  
21 Co., 374 F. 3d 797, 802 (9<sup>th</sup> Cir. 2004); Childers v. Sagem, 2006 U.S. Dist. LEXIS 88425 at \*9-  
22 10.

24 7. In any event, Itec’s declaration in support of the instant motion establishes that it  
25 never claimed rights under the 2001 Agreement, nor is it doing so now. The burden thus shifts to  
26 Hyperion to controvert that declaration with competent evidentiary material. Miracle v. N.Y.P.  
27 Holdings, Inc., 87 F. Supp. 2d 1060, 1063 (D. Hawaii 2000), citing Ziegler v. Indian River

1 County, 64 F. 3d 470, 473 (9<sup>th</sup> Cir. 1995).

2 8. Hyperion's argument that by its 2003 contract with Hyperion, Itec became an  
3 assignee of the 2001 Agreement between Amiga Washington and Hyperion, is both unsupported  
4 and unsupportable. The Itec/Hyperion Contract contains no words of assignment. It is not  
5 signed by Amiga Washington (the putative assignor), nor is there any separate agreement alleged  
6 to have been signed by Amiga Washington that would acknowledge or evidence such an  
7 assignment. The Itec/Hyperion Contract on its face is a standalone contract for the sale of the  
8 OS 4.0. Where a written contract is clear on its face, the construction and legal effect of the  
9 document is a question of law for the court. Wm. Dickson Co. v. Pierce County, 128 Wash.  
10 App. 488, 493, 116 P2d 409 (2005); Paradise Orchards Gen. Partners v. Fearing, 122 Wash.  
11 App. 507, 517, 94 P3d 372 (2004).

13 9. Moreover, Hyperion resisted Amiga's motion for a preliminary injunction by  
14 asserting that any attempted assignment of the 2001 Agreement to Itec would be void.  
15 Memorandum in Opposition to Motion for Preliminary Injunction at p. 17. In accepting  
16 Hyperion's argument and denying the motion, the Court stated:

18 Nowhere in the record is there a document demonstrating the initial  
19 transfer or assignment of rights from Amiga Washington to Itec . . . .

20 As set forth above, Section 7.12 of the [2001] Agreement provides that  
21 '[n]either party shall assign or subcontract the whole or any part of this  
22 agreement without the other party's written consent.' Hyperion contends  
23 that Amiga Delaware and its predecessor, Amiga Washington, did not  
24 comply with this requirement. Nowhere in the record is there a copy of  
25 written consent, signed by the parties to the 2001 Agreement to the  
26 transfer of rights under the agreement from Amiga Washington to Itec. . . .

27 Order Denying Preliminary Injunction at pp. 6-7.

10. Having sought and attained judicial relief based on the argument that any  
attempted assignment of the 2001 Agreement was legally ineffective, Hyperion is judicially  
estopped from arguing now that there was such an assignment. See Russel v. Rolfs, 893 F. 2d

1 1033, 1038-39 (9<sup>th</sup> Cir. 1990).

2 11. Nor can Hyperion argue the terms of the 2001 Agreement were “incorporated”  
3 into the Itec/Hyperion Contract. Whether a forum selection clause applies is a matter of ordinary  
4 contract law. Holland America Line, Inc. v. Wartsila North America, Inc., 485 F.3d 450, 458  
5 (9<sup>th</sup> Cir. 2007); Comerica Bank v. Whitehall Specialties, Inc., 352 F.Supp.2d 1077, 1081 (C.D.  
6 Cal., 2004). Under Washington choice of law principles, it is a New York law question as to  
7 whether the Itec/Hyperion Contract, which was partly made and was to be performed in New  
8 York, and which does not itself have any nexus to Washington, incorporated by reference in the  
9 2001 Agreement. Mulcahy v. Farmers Ins. Co., 152 Wn.2d 92, 100 (2004) (“The rights and  
10 duties of the parties with respect to an issue in contract are determined by the local law of the  
11 state which, with respect to that issue, has the most significant relationship to the transaction and  
12 the parties”) quoting Restatement (Second) of Conflict of Laws § 188 (1971).

13  
14 12. Under New York law, for one contractual document to be incorporated by  
15 reference into another, there must be a clear manifestation that the parties assented and intended  
16 to be bound by the terms of the incorporated instrument. PaineWebber, Inc. v. Bybyk, 81 F.3d  
17 1193, 1201 (2d Cir. 1995). Merely referencing the former document in the latter is insufficient  
18 as a matter of law to do this. Federated Mutual Insurance Co. v. Woodstock '99 LLC, 140  
19 F.Supp.2d 229, 228-29 (N.D.N.Y. 2001); CooperVision Inc. v. Intek Integration Technologies, 7  
20 Misc. 3d 592; 794 N.Y.S.2d 812 (Sup. Ct. Monroe Co. 2005). See generally, Golden v. Belden,  
21 754 F.2d 1059, (2d Cir. 1985) (“limited quotation does not constitute incorporation by  
22 reference”) (federal law).

23  
24 13. The Court need not reach the issue of whether there is any incorporation by  
25 reference here, however, because even assuming that there were, it would be a most limited one.  
26  
27 Where incorporated matter is referred to for a specific purpose only, it becomes a part of the

1 contract for that purpose only. Lodges 743 and 746 International Ass'n of Machinists v. United  
2 Aircraft Corp., 534 F.2d 422, 441 (2d Cir 1975); CooperVision, 7 Misc.3d 592, 794 N.Y.S.2d at  
3 819. Bachman Emmerich & Co. Inc. v. S.A. Wenger & Co. Inc., 204 A.D. 282, 197 N.Y.S. 879  
4 (1<sup>st</sup> Dep't 1923).

5 14. As relevant, the Itec/Hyperion Contract provides: "Hyperion shall transfer the OS  
6 4.0 to Itec in accordance with the 2001 Agreement." Grzymala Dec. ¶ 9, Ex. A. Thus, the 2001  
7 Agreement was, at most, incorporated only as to Hyperion, and only for purposes of governing  
8 the terms on which Hyperion transferred the OS 4.0 to Itec. The "incorporation" did not purport  
9 to apply to Itec, and it did not bind either Itec or Hyperion to the "legal" terms of the 2001  
10 Agreement -- the choice of forum or choice of law provisions -- as distinct from the  
11 commercial terms of that Agreement. U.S. Steel Corp. v. Turner Construction Corp., 560  
12 F.Supp. 871, 873-74 (S.D.N.Y. 1983). See also Bachman Emmerich, 204 A.D. 282, 197 N.Y.S.  
13 879; CooperVision, 7 Misc.3d 592, 794 N.Y.S.2d at 819.

14 15. This is a conclusion born of necessity. There are innumerable provisions in the  
15 2001 Agreement which, if engrafted into the Itec/Hyperion Contract, would lead to absurd and  
16 clearly undesired results. For example, how could Itec, which owned no rights in the Amiga  
17 trademark, purport to license the trademark rights that Amiga Washington was licensing to  
18 Amiga One Partners (a stranger to this transaction) under the 2001 Agreement? See Declaration  
19 of Evert Carton In Opposition to Amiga Delaware's Motion for Preliminary Injunction, Ex. 2.  
20 Or, if Paragraph 2.07 of the 2001 Agreement (providing that if Amiga Washington became  
21 insolvent Hyperion would receive a perpetual license on the OS 4.0) were read into the  
22 Itec/Hyperion Contract, would it mean the parties intended that although Itec had already paid  
23 the \$25,000 purchase price for the OS 4.0, if someday in the future it became insolvent, then  
24 Hyperion would receive such a license? Moreover, even Hyperion admits that the choice of  
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1 forum provision was included in the 2001 Agreement for the personal convenience of Amiga  
2 Washington. Hyperion's Memorandum of Law in Support of Motion to Dismiss or Stay [New  
3 York Action] at p.4. Why, then, would Itec, a New York company with no contact with  
4 Washington, consent to exclusive jurisdiction there in connection with its own separate contract  
5 with Hyperion? A contract should never be construed so as to produce an absurd result. Boag v.  
6 Farmers Ins. Co., 117 Wn. App. 116, 124 (2003), citing Morgan v. Prudential Ins. Co. of Am.,  
7 86 Wn.2d 432, 434-5 (1976).

9 16. This is also a conclusion born of sound policy considerations. Hyperion is  
10 invoking the incorporation by reference doctrine in an effort to deprive Itec of its Constitutional  
11 right not to be sued in a forum within which it has no connection. As such, "incorporation" in  
12 this context is a term of art and strictly construed. Where a plaintiff asserts that defendant has  
13 "incorporated" a forum selection or other dispute resolution provision contained in another  
14 contract to which defendant is not a party, plaintiff must point to specific and explicit language  
15 of incorporation. General Silk Importing Co. Inc. v. Gerseta Corp., 198 A.D.16, 189 N.Y.S. 391  
16 (1<sup>st</sup> Dep't 1921) (contract providing that sales were governed by rules adopted by Silk  
17 Association of America did not incorporate arbitration provisions of those rules because the  
18 reference to the rules did not include the arbitration provisions thereof; as such, that rules only  
19 governed parties' performance of contract, not resolution of disputes); CooperVision, 7 Misc.3d  
20 592, 794 N.Y.S.2d 812 (forum selection clause in software licensing agreement was not  
21 incorporated by reference into the implementation agreement governing services to be provided  
22 by licensor absent an express provision making it applicable to the implementation agreement,  
23 even though that document referred to the license agreement as part of the "entire agreement of  
24 the parties"); CG Trading Corp. v. Sun-Fast Textiles Inc., 24 Misc.2d 77, 201 N.Y.S.2d 883,  
25 885 (Sup. Ct. N.Y. Co. 1960) (mere reference to set of rules insufficient to incorporate  
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1 arbitration obligation). See generally, Grundstad v. Ritt, 106 F3d 201, 205 (7<sup>th</sup> Cir. 1997)  
 2 (guarantor of “all” the provisions of a written contract did not express intent to be bound by  
 3 arbitration clause in the underlying agreement because guarantee lacked express incorporation  
 4 language), 23 Carmody-Wait 2d, New York Practice With Forms § 141:15 (2004) (“Unless there  
 5 is additional evidence showing an intent to adopt an arbitration clause contained in another  
 6 contract, a general incorporation by reference of such other contract without specific mention of  
 7 the arbitration clause, is not sufficiently clear to obligate the parties to arbitrate.”) There is no  
 8 such language here, so, even if, *arguendo*, the 2001 Agreement governed the parties’  
 9 performance under the Itec/Hyperion Contract, it did not bind Itec to litigate disputes thereunder  
 10 in accordance with the choice of forum provision in the 2001 Agreement.

12           17. Absent an ability by Hyperion to rely on the forum selection clause in the 2001  
 13 Agreement, its assertion of jurisdiction over Itec in this forum on the claims set forth in the  
 14 Amended Counterclaims would, if allowed, violate the Due Process Clause of the United States  
 15 Constitution. Those claims all arise from the Itec/Hyperion Contract -- a contract between a  
 16 Belgian seller and a New York buyer made to be performed in Belgium and/or New York.  
 17 Because Hyperion is asserting only specific jurisdiction over Itec, Hyperion must show that its  
 18 claim arises from the in-state activities of Itec. RCWA 4.28.185 (1) & (3); Holland America,  
 19 485 F.3d at 460 (“Unlike general jurisdiction, specific jurisdiction is tethered to a relationship  
 20 between the forum and the claim”); Kransco Manufacturing Inc. v. Markwitz, 656 F.2d 1376 (9<sup>th</sup>  
 21 Cir. 1981) (dismissing on due process grounds where claim did not arise out of or result from  
 22 defendant’s forum related activities.) Hyperion cannot assert jurisdiction over Itec by  
 23 referencing Hyperion’s own in-state activities or those of Amiga. Burger King, Corp. V.  
 24 Rudzewicz, 471 U.S. 462, 474-475 (1985); Petrik v. Public Service Mutual Insurance Co., 879 F.  
 25 2d 682, 684 (9<sup>th</sup> Cir. 1989). Because the Itec/Hyperion Contract has no nexus to this state,  
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1 jurisdiction over Itec's person for claims arising out of that Contract is thus lacking. Holland  
2 America, 485 F. 3d at 460-1; Petrik, 879 F.2d at 684-85; FDIC v. British-American Insurance  
3 Co., 828 F. 2d 1439, 1443-4 (9<sup>th</sup> Cir. 1987).

4 18. To the extent that Hyperion tries to allege any other nexus between its claims  
5 against Itec and this forum, this effort also fails. Thus, Hyperion claims in "Cause Three" of the  
6 Amended Counterclaims that "the Itec/Hyperion contract, and the Itec/KMOS contract were  
7 merely part of an elaborate scheme to hinder, delay or defraud the creditors of Amiga  
8 Washington." Amended Counterclaim ¶24. But Cause Three is plainly not sufficiently pled.  
9 Rule 9(b) of the Federal Rules of Civil Procedure requires that all claims sounding in fraud must  
10 be pled with particularity. Here, however, Hyperion has made a naked, conclusory claim of  
11 fraud, which is entirely insufficient under Rule 9(b). Accordingly, this claim should be  
12 dismissed. Vess v. Ciba-Geigy Corp. USA, 317 F. 3d 1097, 1106 (9<sup>th</sup> Cir. 2003) (Rule 9(b)  
13 requires the plaintiff to specify the "who, what, when, where and how of the misconduct  
14 charged").  
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16 19. Moreover, attempting to assert jurisdiction over an out-of-state defendant by  
17 saying that it schemed or conspired with an in-state defendant is a highly disfavored practice. To  
18 be sustained, such allegations must be coupled with a strong factual showing, even on a motion  
19 to dismiss pursuant to R. 12(b)(2). Again, Hyperion's conclusory allegations do not approach,  
20 must less meet, this strict standard. Underwager v. Channel 9 Australia, 69 F. 3d 361, 364 (9<sup>th</sup>  
21 Cir. 1995) (holding that a bare allegation of conspiracy between defendants and a person with  
22 personal jurisdiction is not sufficient to establish personal jurisdiction).  
23

24 20. Hyperion's Cause Six, a Lanham Act claim directed at Itec, is legally deficient for  
25 the reasons set forth in Amiga's Motion for Judgment on the Pleadings, which arguments are  
26 expressly incorporated by reference herein. In addition, Hyperion alleges that "Itec's potential  
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1 future use of the Amiga trademarks violates Hyperion's explicit contractual rights under the  
2 [2001] Agreement." However, Itec is a venture capital company that has never used, and has no  
3 intention to use, any Amiga trademarks in commerce. If a claim could be stated by a naked  
4 assertion that an adverse party might, in the future, undertake to violate a plaintiff's rights, the  
5 whole concept of limiting federal jurisdiction to "real cases and controversies" would go out the  
6 window. United States v. Aukai, 2007 U.S. App. LEXIS 18995, \*14-16 n. 6 (9<sup>th</sup> Cir. 2007);  
7 Covedell v. Department of Social and Health Services, 834 F. 2d 758, 766 (9<sup>th</sup> Cir. 1987).  
8 Finally, given that Itec does no business in Washington, even if a Lanham Act claim were stated,  
9 the claim would have no nexus with this forum, and no predicate for personal jurisdiction over  
10 Itec here. Holland America, 485 F. 3d at 460-1; Kransco Manufacturing, 656 F. 2d 1376.

12 21. Accordingly, the Amended Counterclaims should be dismissed as to Itec.

13 Alternative Grounds for Transfer

14 22. Pursuant to 28 U.S.C. §§ 1404 and 1406, the Court has the power to transfer an  
15 action where it is brought in an inconvenient or improper forum.

17 23. Even assuming that jurisdiction and venue existed here in respect of Itec, it would  
18 be a proper exercise of the Court's discretion to: (a) sever the Counterclaims against Amiga and  
19 Itec from the principal suit; and (b) transfer same to the United States District Court for the  
20 Southern District of New York. 7 Charles A. Wright and Arthur R. Miller, Federal Practice &  
21 Procedure § 1689, p. 2 (1986) (2007 update) ("Even when venue is proper as to all defendants,  
22 the court may sever a claim against a party and transfer it to a more convenient forum.")

24 24. The fact that Amiga may be subject to a jurisdictional choice of forum provision  
25 is not a bar to transfer. See Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 31-32 (1988)  
26 (whether jurisdiction or venue exist are matters of law; the Court can disregard a forum selection  
27 clause where necessary to achieve other significant purposes); Red Bull Associates v. Best

1 Western International, Inc., 862 F. 2d 963, 966 (2<sup>nd</sup> Cir. 1988). In any event, Hyperion has  
2 asserted that the clause was included in the Agreement for the benefit of Amiga Washington,  
3 (see Hyperion’s Memorandum of Law in Support of Motion to Dismiss or Stay [New York  
4 Action] at p. 4) and not for the convenience of Hyperion, so Hyperion has no basis to raise it as a  
5 defense to a transfer.

6           25. Further, Hyperion’s claims against Itec are primarily for declaratory relief. When  
7 a court has to choose the forum in which a contract dispute should be resolved, the forum in  
8 which a party alleges a breach of contract and seeks damages will usually be preferred to the  
9 forum in which declaratory relief is sought, and that is true even if the party seeking declaratory  
10 relief has “won the race to the courthouse.” See 10B Charles A. Wright and Arthur R. Miller,  
11 Federal Practice & Procedure § 2758, p. 2 n. 9 (1986) (2007 update), citing First Nationwide  
12 Mortgage Corp. v. Fisi Madison, LLC, 219 F. Supp. 2d 669 (D. Md. 2002) (dismissing an action  
13 filed in Maryland district court seeking a declaration that a contract had been breached because  
14 Tennessee court, where a breach of contract claim was pending, was a more proper forum to  
15 resolve the dispute even though the Maryland action was filed first).

16           26. Moreover, Hyperion started that race only after it received Itec’s June 20, 2007  
17 letter which suggested that if Hyperion did not perform the Itec/Hyperion Contract, Itec would  
18 bring suit in New York. Winning a race to the courthouse in that circumstance reflects clear  
19 forum shopping and a court will not honor the “first filed” rule in such circumstances. Ven-Fuel,  
20 Inc. v. Department of Treasury, 673 F. 2d 1194, 1195 (11<sup>th</sup> Cir. 1982) (dismissing suit for  
21 declaratory judgment that was filed immediately after the plaintiff received a letter threatening  
22 that defendant would file a suit in a different forum); see also Briarwood Shoe Corp. v. Sears,  
23 Roebuck & Co., 479 F. Supp. 563, 568 (S.D.N.Y. 1979).

24           27. If the Counterclaims are so transferred, Itec understands that Amiga will withdraw  
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1 its affirmative claims for breach of contract in this Court and join them in the New York  
 2 litigation, such that any risk of double liability that Hyperion may assert will be obviated, and  
 3 neither this Court nor the New York court will have to deal with a jurisdictional or venue-type  
 4 motion. In such circumstances, transfer is preferred. See 15 Charles A. Wright and Arthur R.  
 5 Miller, Federal Practice & Procedure § 3842, p. 4 (1986) (2007 update), citing Kahhan v. City of  
 6 Fort Lauderdale, 566 F. Supp. 736, 740 (E.D. Pa. 1983) (“Substantial time, money and effort will  
 7 be required to determine these preliminary jurisdictional issues which are rendered unnecessary  
 8 if the action is transferred to the Southern District of Florida, which has *in personam* jurisdiction  
 9 over the defendant and is a forum where the action might have been brought. A transfer,  
 10 obviating a jurisdictional difficulty, has been found to serve the interests of justice within the  
 11 meaning of that language in § 1404(a).”) (internal quotations omitted).

#### 12 **IV. CONCLUSION**

13 For the foregoing reasons, Itec’s motion to dismiss or transfer should be granted.

14 DATED this 8th day of November, 2007.

15 /s/

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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