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HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

v.

HYPERION VOF, a Belgium corporation,

Defendant.

No. 07-0631-RSM

**HYPERION'S MEMORANDUM IN
OPPOSITION TO ITEC'S MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
TO TRANSFER**

Note on Motion Calendar: Friday, 11/30/07

HYPERION VOF, a Belgian General
Partnership,

Counterclaim Plaintiff,

v.

ITEC, LLC, a New York Limited Liability
Company,

Counterclaim Defendant.

I. INTRODUCTION

COMES NOW defendant Hyperion VOF and files this memorandum in opposition to Itec, LLC's motion to dismiss or transfer. As the court will recall, it granted Hyperion's motion to add Itec to this suit. (Dkt #65.) The genesis of that motion was Amiga Delaware's claim that it now owns Amiga Washington's rights under the 3 November 2001 Agreement (the

1 “Agreement”) that was signed by Amiga Washington, Hyperion and Eyetech Group, Ltd. A
2 representative of Amiga Washington and Amiga Delaware testified that Amiga Delaware
3 received those rights from Itec via an assignment, and that Itec likewise obtained them via an
4 assignment from Amiga Washington. (McEwen Reply Dec., Dkt. 35, ¶¶12 & 13.) With the
5 recent failure of Amiga Delaware’s motion for a preliminary injunction, Itec launched a parallel
6 lawsuit in New York state court hoping to obtain that which Amiga Delaware has been unable
7 to do here, namely, the issuance of an order directing Hyperion to produce OS 4.0.¹ The basic
8 point of Hyperion’s motion to join Itec in this litigation was simple: All of the parties’
9 competing claims should be resolved in one forum, both for purposes of avoiding potential
10 inconsistencies in results and to avoid wasting the resources of both the judiciary and parties.
11

12 Having been added to this suit, Itec now asks the Court either to dismiss it from this
13 suit, or to have the claims against it transferred to the United States District Court for the
14 Southern District of New York, wherein a third lawsuit would potentially be commenced to
15 join this litigation and the one filed in New York’s state court.² Because personal jurisdiction
16 exists over Itec on four separate grounds,³ and only one is needed to provide this Court with
17 personal jurisdiction over all claims, Itec’s motion should be denied. Rosenberg v. Seattle Art
18 Museum, 42 F.Supp.2d 1029, 1037-8 (USDC, WD WA 1999)(where jurisdiction lies over one
19 claim, it is appropriate to assume jurisdiction over the other claims under principles analogous
20 to the doctrine of pendent jurisdiction, if the interests of justice and the efficient use of the
21 parties’ and Court’s resources are served).
22

23 _____
24 ¹ Hyperion’s motion to join was filed before Itec commenced its litigation in New York.
25 ² Hyperion’s motion to dismiss or stay that New York state action is currently pending.
26 ³ The first three grounds are found at RCW 4.28.185(1)(a), (b) and (c), and constitute the
transaction of business, the commission of a tortious act, and the ownership of personal
property within Washington. The fourth grounds is original jurisdiction under the Lanham Act.

II. FACTS

A. AMIGA DELAWARE’S REPRESENTATIONS REGARDING ITEC’S CONTACTS WITH WASHINGTON

Because a claimant may no rely on the bare allegations of its claims, if those allegations are controverted, it is appropriate to point to evidence submitted by an adverse party, and by witnesses who represent or have represented both parties and non-parties to the litigation. We begin with Amiga Delaware’s complaint, which reads as follows at paragraph 3:

Venue is proper in this District pursuant to 28 U.S.C. Sections 1391(b) and 1400(a) because a substantial part of the events giving rise to the alleged claims in this action occurred in this judicial district and, by contract, the parties stipulated to jurisdiction and to venue in this judicial district.

(Complaint, Dkt. #1, emphasis added.) In paragraph 4 of that Complaint, Amiga Delaware alleges that it “is the successor in interest to all rights, title and interest in the contracts referenced herein between Amiga, Inc. formerly a Washington corporation (“Amiga Washington”) and Hyperion VOF.” Id.

Mr. William McEwen was the President and CEO of Amiga Washington, and he is the Acting President of Amiga Delaware. Mr. McEwen affirmatively stated that he had personal knowledge of, and was competent to testify regarding, all matters stated in his declarations.

(McEwen Dec, Dkt. 4, ¶¶1,2 & 6; McEwen Reply Dec., Dkt. 35, ¶¶1-2.) In his reply declaration (Dkt # 35), Mr. McEwen makes the position of his current and former companies absolutely clear:

12. In April 2003, Amiga Washington assigned its rights under the [November 3, 2001] Agreement to Itec. . . .

13. In October 2003, Itec then assigned its rights to the Object Code, Source Code and Intellectual Property to OS 4 under the [November 3, 2001] Agreement to KMOS, Inc.

1 (McEwen Reply Dec., Dkt 35.) Furthermore, during oral argument on Amiga Delaware’s
2 motion for preliminary injunction, counsel for Amiga Delaware confirmed his client’s position
3 that these assignments took place. (Transcript, Dkt 37, p. 35, ll. 5 to 9 (Mr. Baker).)⁴ The
4 logic of the situation is unavoidable: Because Amiga Delaware stipulated to jurisdiction and
5 venue in this District, it is both Amiga Delaware’s and Mr. McEwen’s position that Itec
6 necessarily did the same thing. (Complaint, Dkt 1, ¶3.) That this was also Itec’s position is
7 seen in the language of the 24 April 2003 contract between it and Hyperion:

8
9 Hyperion confirms that for the receipt of 25,000.00 USD, Hyperion shall
10 transfer the ownership of the Object Code, Source Code and intellectual
11 property of OS 4.0 to Itec in accordance with the provisions of the
November 1 [sic], 2001 agreement between Amiga, Hyperion and
Eyetech and to the extent it can do so under existing agreements with
third party developers whose work shall be integrated in OS 4.0.

12 (Carton Dec., Dkt. 43, Ex. A, p. 5, underlined emphasis.)

13 It is certainly true that Hyperion has denied the effectiveness of these alleged
14 assignments from Amiga Washington to Itec to Amiga Delaware. This does not change the
15 fact, however, that evidence was submitted to support the position that such assignments took
16 place. Further, to address the possibility that the Court or trier of fact might determine that the
17 alleged assignments were partially or wholly effective, Hyperion has alleged facts and causes
18 of action to address the same. (*See, e.g.*, Hyperion’s Counterclaims against Itec at Dkt 66,
19 ¶¶31-33, 36-39, Cause #1, ¶40(d), (e) & (f), Cause #4, ¶¶58-63).
20

21 Additional evidence of Itec’s attempt to assume Amiga Washington’s place in the 3
22 November 2001 Agreement, and thus be bound by its Washington choice of law and forum
23 provisions, is found in a declaration filed by Mr. Garry Hare in an action pending before Judge
24 Lasnik. Again, Mr. Garry Hare was the President and CEO of KMOS/Amiga Delaware, of
25

26 ⁴ The reporter erroneously spelled “Eyetech” instead of “Itec” in this portion of the transcript.

1 which Mr. Grzymala is an officer and director (Declaration of Evert Carton, ¶12, Ex. H, p. 31,
2 hereinafter "Carton Dec."), and it was Mr. Hare who controlled how Amiga
3 Washington/Amino spent money that supposedly was owned by Amino, not KMOS. (Carton
4 Dec., ¶10, Ex. E, p. 27, ¶2.c.) As Mr. Hare stated in his declaration dated March 12, 2004:
5 "On April 24, 2003, Itec . . . acquired all rights and ownership to Amiga [Washington's]
6 Operating System ("Amiga OS"). Itec's acquisition included Amiga OS source code,
7 including, but not limited to, the Classic Amiga OS, OS 3.1, OS 3.5, OS 3.9, OS 4.0 (not yet
8 commercially available) and all subsequent versions of this source code and associated
9 trademarks." (Hare Dec, attached to Carton Dec. as Ex. I, pp. 39-41, at ¶2.) Thus, it is clear
10 that Mr. Grzymala's fellow officer believed that Itec had acquired Amiga Washington's rights
11 under the November 3, 2001 Agreement. (Grzymala Dec., Ex. 1, pp. 12-13; Carton Dec., ¶14.)

12
13 Next, Mr. Hare testifies that in an October 10, 2003 agreement between Itec and
14 KMOS, KMOS "acquired all of Itec's interest in Amiga's Amiga OS family of products," and
15 that as a part of that agreement "KMOS specifically agreed to honor the terms of [the]
16 November 3, 2001 [Agreement]." (Carton Dec., Ex. I, p. 41, ¶¶4-5.) In other words, and
17 contrary to Grzymala's contention at ¶6 of his declaration, Itec must have considered itself a
18 party to the 3 November 2001 Agreement, as KMOS subsequently believed that it was bound
19 by all of the requirements of that Agreement through its acquisition of the same from Itec.
20 (Carton Dec., ¶15.)

21
22 **B. SUBSTANTIAL EVIDENCE EXISTS OF ITEC'S CONTINUING CONTACTS
WITH THE STATE OF WASHINGTON**

23 In any case where personal jurisdiction over a non-resident is based upon specific
24 jurisdiction, it is important to assess the contacts between the non-resident and the forum. This
25 case is slightly different than the standard dispute of that sort, however, because of Itec's
26

1 participation, as an alleged assignee, of the 3 November 2001 Agreement, which contains a
2 mandatory forum selection clause. Regardless, even without the provisions of the 3 November
3 2001 Agreement, Itec has engaged in significant activities within this state that gave rise to the
4 current dispute, thereby making the assertion of personal jurisdiction over it appropriate.

5 For instance, Mr. Grzymala contends that Itec has done no business in Washington and
6 that it has no other connection with Washington State. (Grzymala Dec., ¶¶3, 23.) In fact, a
7 May 22, 2003 “Loan Facility Agreement” between Itec and Amiga Washington was recently
8 produced in this litigation that proves Mr. Grzymala’s contention to be false. A true and
9 accurate copy of that Loan Facility Agreement, as produced by Amiga Delaware, is attached as
10 Ex. A to Mr. Carton’s declaration at pp. 12-16. In that contract Itec and Amiga Washington
11 state that Itec had already loaned \$75,750 to Amiga Washington (located at that company’s
12 office in Ravensdale, Washington), and that Itec would loan additional funds up to a total of US
13 \$175,000. (Carton Dec., Ex. A, p. 12.) In §20 of that contract, Itec and Amiga Washington
14 agreed that the contract was “to be construed in accordance with the laws of the State of
15 Washington, without regard to that state’s choice of law rules,” and that venue would lie in
16 King County, Washington, in the event of any disputes between them under the contract. (Id.,
17 Ex. A, p. 15.) Then, §8 of that contract purports to grant Itec a security interest in Amiga
18 Washington’s assets, some if not all of which would necessarily be located in the State of
19 Washington. (Id., Ex. A, p. 13.) A true and accurate copy of the Security Agreement, again
20 recently produced by Amiga Delaware, is attached as Ex. B to Mr. Carton’s declaration at pp.
21 17 to 20. The Security Agreement is dated July 3, 2003, and at §11 it too contains a choice of
22 law and venue provision similar to the Loan Facility Agreement in that it specifies Washington.
23 Finally, attached as Ex. C to Mr. Carton’s declaration is a true and accurate copy of a letter
24 (once more recently produced by Amiga Delaware) dated May 12, 2004 from Pentti Kouri,
25
26

1 Managing Member of Itec, to William McEwen, then President of Amiga Washington,
2 reflecting the fact that \$267,159 was due and owing under the Loan Facility Agreement,
3 including \$50,000 “loaned” on the very date of the letter, and that Itec was going to “foreclose”
4 if that entire \$267,159 was not repaid within 10 days, or by May 22, 2004. (Carton Dec., ¶7,
5 pp. 21-23.)

6 The Loan Facility Agreement, the Security Agreement, and the May 12, 2004 letter are
7 three pieces of evidence that support the conclusion that Washington State is the epicenter of
8 the relationships and transactions between Amiga Washington, Itec and Amiga Delaware, and
9 that one of the main aims of that relationship was to fraudulently convey the assets of Amiga
10 Washington away from Amiga Washington’s creditors, including Hyperion. For instance, less
11 than one month after signing the April 24, 2003 Contract with Hyperion, Itec entered into the
12 above-described Loan Facility Agreement with Amiga Washington to cover both past and
13 future loans. That Loan Facility Agreement (Carton Dec., Ex. A) is signed by Pentti Kouri on
14 behalf of Itec, and he is the same person who signed the April 24, 2003 Contract on behalf of
15 Itec. (See Grzymala Dec., Ex. 1, pp. 12-13.) Note further that, based on Carton Dec., Ex. C, p.
16 23 (last entry), the final \$50,000 “loan” to Amiga Washington went straight into the pocket of a
17 corporate insider, Mr. McEwen, rather than being used for the benefit of that company’s third-
18 party creditors. (Carton Dec., ¶8; Hermans Dec., ¶9.)

19
20
21 Mr. Kouri also signed the "Stock Purchase and Sale Agreement and Agreement of
22 Assignment of Intellectual Property Rights" dated October 7, 2003 (Carton Dec., Ex. D, pp. 24-
23 26) by which Itec purports to assign to KMOS/Amiga Delaware the rights to OS 4.0 (the
24 "Itec/KMOS Sale Agreement"). The assignment language appears at *Id.*, Ex. D, p. 25, second
25 paragraph from the bottom and, obviously, in the contract’s title. It is particularly noteworthy
26 that Mr. Kouri signed the Itec/KMOS Sale Agreement on behalf of all three signatories: Itec,

1 Amiga Delaware and Monrepos, LLC, the shareholder of Amiga Delaware. (*Id.*, Ex. D, p. 25,
 2 first “Whereas” paragraph re Monrepos’ status.) The suspect nature of this transaction is
 3 highlighted by the fact that at the end of the transaction Itec ended up owning 6,999,000 of
 4 KMOS’ 7,000,000 outstanding shares. (*Id.*, Ex. D., p.25.)

5 By comparison, when reading Mr. Grzymala’s declaration, one would think that he had
 6 nothing to do with KMOS/Amiga Delaware. (*See, e.g.*, Grzymala Dec. at ¶18.) The
 7 documents Hyperion has obtained again disproves Mr. Grzymala’s contention. For instance,
 8 KMOS/Amiga Delaware was involved in some litigation in the United States District Court for
 9 the Southern District of New York, and Hyperion obtained copies of some of the documents
 10 filed in conjunction with that suit. One of the documents so filed is a copy of the December 10,
 11 2004 corporate minutes for KMOS/Amiga Delaware, a true and accurate copy of which is
 12 attached to Carton Dec. as Ex. E, p. 27. In those minutes Mr. John Grzymala is identified as
 13 the corporate Secretary for KMOS, Mr. Kouri is identified as the Chairman, and Mr. Garry
 14 Hare is identified as the President and CEO. Amiga Delaware is, again, the plaintiff in this
 15 litigation, and thus Mr. Grzymala willingly launched his company into litigation “3,000 miles
 16 away” in Washington State—something which he now complains is totally unreasonable for his
 17 companies to have to do. (*See* Grzymala Dec., ¶28; Carton Dec., ¶10.)⁵

18
 19 Mr. Grzymala also clearly wants to distance Itec (the stated owner of 6,999,000 of
 20 KMOS’ 7,000,000 outstanding shares) and KMOS/Amiga Delaware from Amiga Washington.
 21 (*See again* Grzymala Dec., ¶28.) Yet, those same corporate minutes (Carton Dec., Ex. E, p. 27
 22

23
 24 ⁵ One has to wonder why it is so burdensome for Itec to litigate this matter in Washington when
 25 Itec and Amiga Delaware are represented by the same counsel and will necessarily need to use
 26 common witnesses. (Declaration of Ben Hermans in Opposition to Itec’s Motion to Dismiss or
 Transfer, ¶12, Ex. 3, p. 21, hereinafter “Hermans Dec.”)

1 at ¶2.c) reflect the fact that KMOS was paying a company called “Amino Development
 2 Corporation” \$240,000, and that KMOS’ CEO (Garry Hare) had to approve of how Amino
 3 spent that money. How, one may wonder, is this relevant? Because “Amino Development
 4 Corporation” is actually the renamed Amiga Washington, as is demonstrated by corporate
 5 registration forms obtained from the Washington Secretary of State. (*Compare* the Uniform
 6 Business Identifier numbers on Carton Exs. F and G, which are the same, to the changing
 7 names of that corporation.) (Carton Dec., ¶11, pp. 28-29.)

8
 9 The ongoing relationship between Mr. Grzymala, Itec, Mr. Kouri, Amiga Delaware and
 10 Amiga Washington/Amino is reflected in Ex. H, pp. 30-31 to Mr. Carton’s declaration, which
 11 is a “Form D” filed by Amiga *Delaware* with the SEC in January 2006. As is reflected on Ex.
 12 H, p. 31 of that SEC filing, Mr. *John Grzymala* is an Executive Officer and Director of Amiga
 13 Delaware, Mr. *Pentti Kouri* is a Promoter, Beneficial Owner, Executive Officer and Director of
 14 Amiga Delaware, *Itec, LLC* is a Beneficial Owner of Amiga Delaware, and *Amino* of
 15 Ravensdale, Washington (i.e., Amiga Washington⁶) is also a Beneficial Owner of Amiga
 16 Delaware. Under these circumstances, and considering the Loan Facility Agreement (Carton
 17 Dec., Ex. A, pp. 12-16) and the Security Agreement (Carton Dec., Ex. B, pp. 17-20) Itec
 18 entered into with Amiga Washington, it is difficult to understand how Mr. Grzymala can in
 19 good faith maintain that Itec has no business connection with Washington State with respect to
 20 the causes of action at issue in this lawsuit. (Carton Dec., ¶12.)

21
 22 When viewed as a whole, the various contractual maneuvers and machinations by
 23 which Itec stripped the assets and rights from Amiga Washington and then moved them to
 24 another entity it controlled, namely Amiga Delaware, were all closely related to the events in
 25

26 ⁶ See Carton Dec., Exs. F & G, pp. 28-29.

1 Washington State that gave rise to this lawsuit. For instance, Itec's Loan Facility and Security
2 Agreements with Amiga Washington/Amino (i.e., Carton Dec., Exs. A & B, pp. 12-20) contain
3 Washington choice of law and forum selection clauses. Furthermore, by stripping those assets
4 away from Amiga Washington and moving them to a different state, Itec caused damage to
5 Hyperion in Washington State. (Carton Dec., ¶13.)

6 In addition to the above problems with Mr. Grzymala's testimony and legal contentions,
7 Mr. Garry Hare directly contradicts Mr. Grzymala's assertion (at ¶20 of Grzymala's
8 declaration) that Itec "asserts no rights or claims to any of the Amiga-related trademarks." Mr.
9 Hare does so by stating that "Itec's acquisition included Amiga OS source code including . . .
10 associated trademarks." (Carton Dec., ¶16, Ex. I, pp. 39-41 at ¶2.)

11
12 **C. THE ITEC CONTRACT DID NOT REQUIRE PERFORMANCE IN NEW YORK**

13 Itec expends substantial effort trying to convince the Court that the April 24, 2003
14 Contract between Hyperion and Itec was a stand-alone agreement that required Hyperion to
15 deliver goods or provide some other performance in the State of New York. This assertion is
16 not correct (Hermans Dec., ¶11), and in any event is not determinative of whether this Court
17 has personal jurisdiction over Itec.

18 Contrary to Mr. Grzymala's assertion at ¶5 of his declaration, the April 24, 2003
19 Contract did not require the "performance" of anything in New York. Rather, it only provides
20 for the "transfer [of] the ownership of " OS 4.0. (Grzymala Dec., Ex. 1, p. 12.) The transfer of
21 the ownership of OS 4.0 would have been self-executing, without the performance by Hyperion
22 of any task in New York, if the November 3, 2001 and April 24, 2003 contracts had been
23 performed by Amiga Washington, Itec and/or Amiga Delaware. In fact, as this Court found in
24 its June 11, 2007 order, at most \$24,750 was paid to Hyperion by an aggregate of entities, and
25 Hyperion disputes a variety of issues related to the same, including whether some of that
26

1 money needs to be applied to other outstanding invoices instead of the \$25,000 “buy-in”
2 amount, and whether the payments that were made were timely made. (*See* Dkt. #40, pp. 8-9.)
3 Thus, Hyperion’s obligation to make the limited “transfer of ownership” of OS 4.0 never
4 became due. (Carton Dec., ¶18.)

5 Even if some type of "delivery" was contemplated by the April 24, 2003 agreement, that
6 delivery would have most logically and securely been accomplished by Itec downloading OS
7 4.0 from computer servers located in Europe. To explain, the Amiga OS 4.0 source code is
8 located on a Concurrent Versions System (CVS) server in Germany. A CVS server is a server
9 running software which automates the storing, retrieval, logging, identification, and merging of
10 revisions of software source code and object code in order to avoid incompatible changes being
11 made by multiple developers at the same time. A “delivery” of software code would typically
12 take the form of a “check out” of the source code from the CVS server located in Germany
13 from anywhere in the world. Thus, Hyperion would never have had reason to deliver anything
14 to New York. (Carton Dec., ¶19.)

15
16 In addition, Itec’s position is logically inconsistent, since Itec asserts that it is merely a
17 venture financing firm. (*See* Carton Dec., Ex. A, p. 12, fifth "Whereas" clause; Grzymala Dec.,
18 ¶3.) Thus, if Itec is to be believed, it never intended to actually utilize OS 4.0. Rather, Itec
19 merely would have acted as a conduit to transfer “title” to OS 4.0 from Amiga Washington to
20 KMOS/Amiga Delaware, if it had in fact performed all of the obligations required under the
21 November 3, 2001 Agreement. (For example, the \$25,000 was not paid. *See* Dkt. #40, at pp.
22 8-9.) In short, contrary to Itec’s assertions, the April 24, 2003 Contract did not require
23 performance in New York, even if Itec had fully performed all of its obligations under that
24 contract. (Carton Dec., ¶20; Hermans Dec., ¶10.)
25
26

1 The plain language of the April 24, 2003 Contract indicates the parties' intent to
 2 incorporate all of the November 3, 2001 Agreement by stating that the transfer shall be "in
 3 accordance with the provisions of the November [3], 2001 [Agreement]." (Grzymala Dec., Ex.
 4 1, p. 12.) This mutual understanding is reflected in Ex. J, p. 42, to Mr. Carton's declaration,
 5 which is an (erroneous-in-amount) record of payment from Hyperion to Itec stating that a
 6 payment was made "pursuant to article 3.01 of the November 3, 2001 agreement between
 7 Amiga, Eyetech and Hyperion." Itec never objected to this reference to the November 3, 2001
 8 Agreement because Itec agreed with that understanding until it's nearly-100% owned company
 9 (Amiga Delaware) launched the Washington litigation and ran into difficulty in this Court.
 10 Here, it is clear from the Grzymala Dec, ¶¶6-8, that Itec was fully familiar with the November
 11 3, 2001 Agreement at the time it agreed to incorporate its language in the April 24, 2003
 12 Contract. (Hermans Dec., ¶¶3-11.) Itec should not be allowed now to avoid the forum
 13 selection clause of the November 3, 2001 Agreement. (Carton Dec., ¶21.)

15 Mr. Grzymala has no facts upon which to base his assertion in ¶9 of his declaration that
 16 the November 3, 2001 Agreement was "abandoned." Indeed, he offers no factual support for
 17 that claim outside of his legal assertion in that regard. (Carton Dec., ¶22; Hermans Dec., ¶¶5-
 18 6.)

19 Hyperion did not "race" to the courthouse in Washington State in order to deprive Itec
 20 of a New York forum. Rather, it was Itec, Mr. Grzymala, Pentti Kouri and even Amiga
 21 Washington ("Amino"), acting through Amiga Delaware, who launched the Washington
 22 litigation. Then, after this litigation took a "wrong turn" before this Court, this same group
 23 sought to open up a two-front war against Hyperion through Itec's filing of an action in New
 24 York. In short, it is Itec who seeks to have a second bite at the apple in New York, even though
 25 it was apparent from this Court's June 11, 2007 ruling denying the motion for a preliminary
 26

1 injunction that Itec was intimately involved in the facts underlying this litigation. (Carton Dec.,
2 ¶23.)

3 Contrary to Mr. Grzymala's contentions at ¶¶33-35 of his declaration, Itec's desire to
4 forum shop and pursue two parallel pieces of litigation is obviously intended to create the risk
5 of inconsistent outcomes, for Itec hopes to achieve in New York what Amiga Delaware appears
6 unlikely to achieve in Washington, namely the transfer of OS 4.0 to Amiga Delaware. (Carton
7 Dec., ¶24.)

8 **D. HYPERION DOES NOT DISPUTE THIS COURT'S JURISDICTION**

9 Finally, Itec wrongly asserts that Hyperion is disputing personal jurisdiction over it by
10 this Court. In fact, when this Court specifically asked Hyperion's counsel about this during the
11 hearing on the motion for a preliminary injunction, Mr. Kinsel acknowledged that personal
12 jurisdiction and venue exists over the parties in Seattle, Washington. (*See* Dkt. # 37, at p. 29.)
13 Mr. Kinsel did state that Hyperion had asserted an affirmative defense with respect to the
14 adequacy of service of process, but it is Hyperion's belief that it has waived that defense when
15 it voluntarily filed suit against Itec in this forum. In case there is any doubt on that score, Mr.
16 Evert Carton has waived on behalf of Hyperion that affirmative defense against Amiga
17 Delaware and submits Hyperion to the jurisdiction of the United States District Court, Western
18 District of Washington. (Carton Dec., ¶25.)

19
20 **III. ARGUMENT**

21 **A. STANDARD OF REVIEW ON MOTIONS TO DISMISS FOR LACK OF**
22 **PERSONAL JURISDICTION**

23 Counterclaim defendant Itec cites to a recent decision of this Court regarding the
24 standards to be applied in deciding whether specific jurisdiction exists over a party:

25 Defendant SDS has moved to dismiss for lack of personal jurisdiction
26 pursuant to Fed. R. Civ. P. 12(b)(2). In response to a motion to dismiss for lack
of personal jurisdiction, the plaintiff bears the burden of demonstrating that

1 jurisdiction over a defendant is appropriate. Dole Food Co. v. Watts, 303 F.3d
 2 1104, 1108 (9th Cir. 2002). Where, as here, the motion to dismiss is based on
 3 written materials rather than an evidentiary hearing, the plaintiff need only make
 4 a prima facie showing of jurisdictional facts to avoid dismissal. Id. While the
 5 plaintiff may not simply rely on the bare allegations of its Complaint,
 uncontroverted allegations in the Complaint are taken as true. Schwarzenegger
v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). Conflicts between
 the facts contained in the parties' affidavits must be resolved in the plaintiff's
 favor. Id.; Dole, 303 F.3d at 1108.

6 In this case, the question of whether personal jurisdiction exists over
 7 SDS is governed by Washington's long-arm statute, RCW 4.28.185, or Fed. R.
 Civ. P. 4(k)(2), both of which are coextensive with the outer limits of federal
 8 due process. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir.
 1994); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d
 9 1114, 1126 (9th Cir. 2002). Thus, the Court need only determine whether
 jurisdiction in this District comports with due process.

10 Due process requires that a non-resident defendant have certain
 11 minimum contacts with the forum state so that the exercise of jurisdiction does
 not offend traditional notions of fair play and substantial justice. International
Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Personal jurisdiction can be
 12 specific or general. Helicopteros Naionales de Colombia v. Hall, 466 U.S. 408,
 414 n. 8-9 (1984). Specific jurisdiction arises where a cause of action results
 13 from a defendant's contacts with the forum state. Id., at 414 n. 8.

14 Childers, d/b/a Artemis Solutions Group v. Sagem Morpho, Inc., et al., 2006 WL 3523626, at
 15 pp. 2-3 (W.D.Wash., 12/6/2006), attached as Ex. 1 to the Declaration of Lance Gotthoffer.

16 In addressing a claimant's assertion, as here, that specific (rather than general)
 17 jurisdiction exists, this Court further explained that;

18 The Ninth Circuit applies a three-prong test to determine if specific
 19 jurisdiction exists: (1) the non-resident defendant must purposefully direct his
 20 activities or consummate some transaction with the forum or resident thereof, or
 perform some act by which he purposefully avails himself of the privilege of
 21 conducting activities in the forum, thereby invoking the benefits and protections
 of its laws; (2) the claim must be one which arises out of or relates to the
 22 defendant's forum-related activities; and (3) the exercise of jurisdiction must
 comport with fair play and substantial justice, i.e. it must be reasonable.
Schwarzenegger, 374 F.3d at 802 (citing Calder v. Jones, 465 U.S. 783 (1984));
Pebble Beach Co. v. Caddy, 433 F.3d 1151, 1155 (9th Cir.2006).

23 The burden is on the plaintiff to satisfy the first two prongs.
 24 Schwarzenegger, 374 F.3d at 802. If the plaintiff meets this burden, then the
 25 burden shifts to the defendant to "present a compelling case that the exercise of
 jurisdiction would not be reasonable." Id.

26 Id., at pp. 3-4. As Judge Lasnik has explained:

1 The three-prong jurisdictional analysis used in the Ninth Circuit does not
2 allow for challenges to the underlying merits when determining the Court's
3 jurisdiction. Once purposeful availment and but for causation is shown,
4 jurisdiction will lie unless fairness dictates otherwise.

5 Rosenberg v. Seattle Art Museum, 42 F.Supp.2d at 1037. To complicate matters somewhat, the
6 Ninth Circuit applies:

7 different purposeful availment tests to contract and tort cases. Consistent with
8 the Supreme Court's holding in Burger King [Corp. v. Rudzewicz], 471 U.S. 462,
9 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)], merely contracting with a resident of
10 the forum state is insufficient to confer specific jurisdiction over a nonresident.
11 In tort cases, however, jurisdiction may attach if an out-of-forum defendant
12 merely engages in conduct aimed at, and having effect in, the situs state.

13 Id., 42 F.Supp.2d at 1033.

14 **B. PERSONAL JURISDICTION EXISTS OVER ITEC IN THIS DISTRICT**

15 **1. Hyperion's Claims Against Itec Arise from That Company's Forum-
16 Related Business Activities**

17 Hyperion's First Cause of Action, for Declaratory Judgment, and Fourth Cause of
18 Action for Breach of Contract, are asserted against Itec. (Hyperion's claims against Itec are at
19 Dkt 66.) Those claims rest upon the Ninth Circuit's application of Washington's long-arm
20 jurisdiction statute at RCW 4.28.185(1)(a), which relates to a non-resident's "transaction of any
21 business within this state." As explained by the Washington Court of Appeals, "[a] purposeful
22 act, not a presently enforceable contract, is all that is required." Byron Nelson Co. v. Orchard
23 Management Corp., 95 Wash.App. 462, 466, 975 P.2d 555 (Div. III, 1999).

24 In an effort to simplify the jurisdictional dispute between the parties, Hyperion submits
25 a summary of its and Itec's competing positions. For its part, Hyperion submits that the 24
26 April 2003 Contract (the "2003 Contract") between it and Itec was supposed to be part of the
documentation needed to allow Itec to assume Amiga Washington's position in the 3
November 2001 Agreement (the "2001 Agreement"), if all of the requirements of that 2001
Agreement, including those related to the assignment, were met. For that reason all of the
provisions of the 2001 Agreement are necessary to determine the various rights and obligations

1 of Itec and Hyperion, even if the ultimate determination is that Itec has no rights. Byron
 2 Nelson, 95 Wash.App. at 466 (a purposeful act is all that is required). (See the 2001
 3 Agreement and the 2003 Contract at Hermans Dec., Exs. 1 & 2, pp. 6-20; see also Hermans
 4 Dec., ¶¶3-8, 10-11; Carton Dec., ¶¶14-15, 21.) Importantly, Mr. William McEwen, Mr. Garry
 5 Hare; Amiga Delaware itself, and counsel for Amiga Delaware asserted consistently that
 6 Amiga Washington *had* assigned its rights under the 2001 Agreement to Itec, who then
 7 assigned them to Amiga Delaware. (McEwen Dec, Dkt. 4, ¶¶1, 2 & 6; McEwen Reply Dec.,
 8 Dkt. 35, ¶¶1-2, 12 & 13; Carton Dec., ¶¶14-15, Ex. I (Hare’s declaration); Complaint, Dkt 1,
 9 ¶3; Transcript, Dkt 37, p. 35, ll. 5 to 9 (Mr. Baker).) This necessarily makes Itec subject to
 10 jurisdiction and venue in Washington because Itec, at a minimum, attempted to inject itself as a
 11 party into a contract containing a clause that specified Washington as the mandatory forum.

12 By contrast, Itec presents the lone Declaration of John Grzymala, who asserts that the
 13 2003 Contract is a “stand alone” document, and that that 2003 Contract “forms the sole and
 14 exclusive basis for Itec’s claims in this lawsuit.” (Grzymala Dec., ¶¶9 and 10.) While Itec has
 15 yet to actually assert any claims in this litigation, Hyperion presumes that Mr. Grzymala means
 16 that Itec’s *anticipated* claims rest solely on the 2003 Contract. Besides pointing out that *this*
 17 *motion to dismiss* is not about Itec’s claims, but rather the underlying facts supporting personal
 18 jurisdiction for Hyperion’s claims, it is important to point out that Mr. Grzymala is quickly
 19 forced to back off of his claim that the 2003 Contract is a stand-alone agreement. Indeed, he is
 20 forced to acknowledge the obvious, namely that the 2003 Contract does refer to the 2001
 21 Agreement. (Id., ¶13.) To limit the damage of that admission, Mr. Grzymala tries to assert that
 22 the reference to the 2001 Agreement is only “in the context of prescribing Hyperion’s delivery
 23 obligation,” but he offers no support within the language of the 2003 Contract for that supposed
 24 limitation. (Id., ¶26, emphasis in original.) As for the testimony and admissions of Mr.
 25 McEwen, Amiga Delaware, Garry Hare, and their counsel Mr. Baker, Mr. Grzymala is left
 26 simply to plead that they all made a mistake. (Id., ¶¶24-25.)

1 In assessing these competing claims, it is useful to examine some of the relevant
2 contractual language. The 2003 Contract states in relevant part:

3 Hyperion confirms that for the receipt of 25,000.00 USD, Hyperion shall
4 transfer the ownership of the Object Code, Source Code and intellectual
5 property of OS 4.0 to Itec in accordance with the provisions of the November 1
6 [sic], 2001 agreement between Amiga, Hyperion and Eyetech and to the extent it
7 can do so under existing agreements with third party developers whose work
8 shall be integrated in OS 4.0.

9 (Hermans Dec., Ex. 2, p. 19.) The 2001 Agreement says in relevant part:

10 **7.06 Governing Law.** This Agreement shall be governed by and interpreted in
11 accordance with the internal laws of Washington State, USA without regard to
12 conflicts of laws principles. The obligations set forth in this Agreement are
13 intended to supplement and not to supersede the protections afforded Amiga
14 under the Uniform Trade Secrets Act or similar law or laws as may be in effect
15 from time to time within the State of Washington.

16 **7.08 Forum.** The exclusive jurisdiction and venue of any lawsuit between the
17 parties arising under this Agreement or out of transactions contemplated hereby
18 or out of transactions contemplated hereby shall be the Superior Court of
19 Washington for King County or the United States District Court for the Western
20 District of Washington at Seattle and each of the parties hereto submits itself to
21 the exclusive jurisdiction and venue of such court for the purposes of such
22 lawsuit.

23 (Hermans Dec., Ex. 1, p. 11.)

24 Hyperion submits that whether this Court looks at the dispute from Hyperion's stand
25 point or from Itec's, the result is the same under the Ninth Circuit's three part jurisdictional
26 analysis. Under the first prong, whether successfully or not, Itec purposefully conducted
activities by which it sought to avail itself of the rights of Amiga Washington under the 2001
Agreement, which Agreement must be interpreted pursuant to the laws of this state, and which
interpretation must be accomplished either in King County Superior Court or in this United
States District Court. Next, under the second prong of the analysis—and intentionally putting
this in the language adopted by Mr. Grzymala—Hyperion's claims against Itec arise directly
from Itec's claim that Hyperion is obligated to "deliver the OS4.0 at the same time and manner
as it would have had to deliver it to Amiga Washington" under the indisputably *Washington*
2001 Agreement. (Grzymala Dec., ¶26.) In other words, even under Itec's limited approach,

1 the claims arise directly from Itec’s efforts to insert itself into the middle of the 2001
2 Agreement, with the interpretation of those “delivery obligations” requiring the parties to
3 invoke the benefits and protections of Washington’s laws.⁷ This, then, takes us to the third
4 prong of the analysis, which requires Itec to prove that the exercise of personal jurisdiction
5 would be unreasonable. Schwarzenegger, 374 F.3d at 802. Under the circumstances of this
6 case, that is an impossible burden for Itec to meet. Indeed, Itec has not even tried to address the
7 seven “reasonableness” factors set out at Dole Food, 303 F.3d at 1114.

8 Itec denies that personal jurisdiction exists over it because Hyperion alleges that the
9 assignment of Amiga Washington’s rights under the 2001 Agreement was incomplete or
10 otherwise invalid. Hyperion first notes that challenges to the merits of a party’s case may not
11 be considered when determining specific jurisdiction. Here, Hyperion has clearly alleged
12 alternative causes of action that are predicated on the possibility that the Court will find that the
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25 ⁷ For this reason if no other, it is obvious that Itec’s effort to use New York law to interpret a
26 Washington contract is erroneous.

1 assignment was valid and complete, and that is sufficient for jurisdictional purposes. (*See, e.g.*,
2 Dkt 66, ¶40(d), (e) & (f).) Rosenberg, 42 F.Supp.2d at 1037. More to the point, however,
3 parties are generally not allowed to allege facts, or to concede the presence of personal
4 jurisdiction, and then to retract those agreed facts/jurisdiction when the case goes against them.
5 Griffith v. Department of Motor Vehicles, 23 Wash.App. 722, 731-2, 598 P.2d 1377
6 (1979)(Naturopathic physician prohibited from withdrawing allegations in the complaint
7 admitting jurisdiction after losing his suit). In this case, Mr. Grzymala’s fellow officers and
8 directors have alleged and/or testified that an assignment of the 2001 Agreement to Itec took
9 place. (McEwen Dec, Dkt. 4, ¶¶1, 2 & 6; McEwen Reply Dec., Dkt. 35, ¶¶1-2, 12 & 13;
10 Carton Dec., ¶¶14-15, pp. 39-41, Ex. I (Hare’s declaration); Complaint, Dkt 1, ¶3; Transcript,
11 Dkt 37, p. 35, ll. 5 to 9 (Mr. Baker).) While it is true that “Itec” strictly speaking did not make
12 that concession in this litigation, the cited evidence was submitted by individuals or entities
13 who arguably are Itec’s agents, or who are otherwise in a position to establish that Itec
14 previously conceded that position in different settings. To put it a little differently, Itec has
15 failed to meet its burden to allow Mr. Grzymala to blithely “withdraw” the evidence of Itec’s
16 prior admissions provided by these other individuals and entities.

17 And, looked at in yet another way, the Declaratory Judgments Act, at RCW 7.24.020,
18 reads in relevant part as follows:

19 A person interested under a . . . written contract or other writings
20 constituting a contract, or whose rights, status or other legal relations are
21 affected by a . . . contract, may have determined any question of construction or
22 validity arising under the . . . contract . . . and obtain a declaration of rights,
23 status or other legal relations thereunder.

22 The Declaratory Judgment Act, in short, grants this Court authority to determine what rights
23 Itec has under the 2001 Agreement and the 2003 Contract, even if the ultimate conclusion is
24 that Itec has no such rights. Byron Nelson Co., 95 Wash.App. at 466 (“[a] purposeful act, not a
25 presently enforceable contract, is all that is required”); Yuan v. Chow, et al., 96 Wash.App.
26 909, 982 P.2d 647 (Div. II, 1999)(plaintiff liable for fees to defendant who plaintiff

1 unsuccessfully argued was liable under the contract based upon an agency theory). In sum,
2 even if Itec's efforts to conduct business in Washington were ultimately unsuccessful, it took
3 purposeful acts sufficient for personal jurisdiction under RCW 4.28.185(1)(a).

4 **2. Itec Participated in a Scheme to Fraudulently Transfer Washington Assets**
5 **Away from Creditors of Amiga Washington**

6 In its Counterclaims, culminating in the Third Cause of Action, Hyperion alleges that
7 Itec took part in a substantial, extended conspiracy to commit fraudulent conveyances, with
8 results that had unquestionable, damaging impacts on Hyperion's rights in Washington. (See
9 Hyperion's Counterclaims, Dkt 66, at ¶¶ 8-13, 16-25, 30, 35, 42-57.) Subsequent
10 developments in this case have only strengthened the evidence supporting the claim that Itec
11 engaged in the fraudulent conveyance of Amiga Washington's assets, first from Amiga
12 Washington to Itec, and then from Itec to KMOS/Amiga Delaware, and that those acts
13 damaged both Hyperion and other creditors here in Washington, where Amiga Washington's
14 assets were located. (Carton Dec., ¶¶ 7-13, 17, Exs. A to H; Hermans Dec., ¶¶ 8-9.)

15 Personal jurisdiction for this fraudulent conveyance claim actually rests on the
16 contractual, tortious, and "ownership of property" provisions of RCW 4.28.185(1)(a), (b) & (c).
17 The interconnectedness of those three sections of Washington's long-arm statute is readily seen
18 in three pieces of evidence found at Exhibits A to C to Mr. Carton's declaration, which
19 constitute the 2003 Loan Facility Agreement between Amiga Washington and Itec, the 2003
20 Security Agreement between Amiga Washington and Itec, and the 2004 final "payment and
21 demand letter" between Itec and Amiga Washington, represented respectively by Pentti Kouri
22 and William McEwen. These documents, taken in the context of Mr. McEwen's sworn
23 deposition testimony admitting to Amiga Washington's prior insolvency in 2002,⁸ and of the
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26 ⁸ See, e.g., Declaration of William A. Kinsel, Dkt 25, Ex. A, p. 11, at dep. p. 12; p. 12, dep. 16-
p. 13, dep. p. 17.

1 prior judgments entered against Amiga Washington in 2002,⁹ establish a pattern whereby
 2 Amiga Washington was apparently left penniless, and Itec then paid who and what it decided to
 3 pay on behalf of Amiga Washington. Mr. Kouri's letter of May 12, 2004 is particularly
 4 instructive in this regard, as it provides "cover" for a \$50,000 payment to Mr. McEwen on May
 5 12 (see the last entry on Carton Dec., Ex. C, p. 23, reflecting the payment to Mr. McEwen, who
 6 is an insider as defined by RCW 19.40.011(7)(ii)(B)), with a simultaneous threat of
 7 "foreclosure" on all of Amiga Washington's assets within another 10 days (or by May 22,
 8 2004), if Amiga Washington did not repay \$267,159. Considering that there could have been
 9 no good faith belief in Amiga Washington's ability to repay those sums in 10 days, these
 10 payments were obvious fraudulent transfers within the definition of RCW 19.40.041 and RCW
 11 19.40.051.¹⁰ To make things worse, Itec then somehow executed on its "security interest,"
 12 even though it had never perfected that interest and thus had no basis to foreclose on those
 13 assets. See Declaration of William A. Kinsel In Opposition to Motion to Dismiss or Transfer,
 14 at Exs. A and B (showing the failure of Itec to perfect its security interest); RCW
 15 62A.9A.310(a)("a financing statement must be filed to perfect all security interests. . . .")

16 When applying the contractual analysis under RCW 4.28.185(1)(a) to these
 17 transactions, one immediately sees that Ex. A, p. 15, ¶20, and Ex. B, p. 19, ¶11, to Mr. Carton's
 18 declaration contain choice of law and forum clauses that designate Washington, thereby easily
 19 satisfying the first prong of the due process test. The second prong is also readily satisfied
 20 because, but for the fraudulent conveyances Itec consummated in Washington under these
 21 contracts, the claim would not have arisen. This, then, leaves Itec with the burden of meeting
 22 the third prong of establishing unreasonableness, which it simply cannot do in this case.

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 25 ⁹ *Id.*, Ex. B, pp. 20-22.

26 ¹⁰ Exhibit C, p. 23, to Mr. Carton's declaration shows additional payments to Mr. McEwen, as well as payments to another corporate insider, Mr. Barrie John Moss. (Dkt 5, ¶1.)

1 The expanded purposeful-direction analysis used in the tort context also readily shows
 2 that the intentional tortious actions of Amiga Washington, Itec and Amiga Delaware, were all
 3 expressly aimed at, and had effects in, Washington, as the assets subject to the security
 4 agreement necessarily resided with its owner, Amiga Washington, in this state (Carton Dec.,
 5 Ex. B, p. 17, ¶1), and the payments to insiders, etc., were delivered by Itec to Washington
 6 (Carton Dec., Exs. A & C). Itec then consummated that injury by fraudulently conveying
 7 Amiga Washington's assets out of Washington and away from the latter company's creditors.
 8 These creditors included Hyperion (Dkt 66, ¶20), who was required by the 2001 Agreement to
 9 seek all of its remedies against Amiga Washington in Washington. Rosenberg, 42 F.Supp.2d at
 10 1036-37. Yahoo! Inc. v. La Lique Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207
 11 (2006)(en banc)(the "brunt" of the harm need not be suffered by the claimant in the forum
 12 state, only a "jurisdictionally sufficient amount of harm.").

13 Finally, by its express language the Security Agreement (Carton Dec., Ex. B, p. 17, ¶1)
 14 "assigned" numerous assets to Itec, making it the putative owner, possessor or user of the same.
 15 Mr. Garry Hare, the President and CEO of KMOS/Amiga Delaware, agrees that Itec purported
 16 to be the owner of Amiga Washington assets. (Carton Dec., Ex. I, p. 39, ¶2.) It is this
 17 possession, ownership or use by Itec that, in part and "but-for," gave rise to Hyperion's claim
 18 of fraudulent conveyances. RCW 4.28.185(1)(c).

19 In summary, then, Hyperion submits that its allegations and supporting evidence easily
 20 meet the requirements of FRCP 9(b) and readily inform the counterclaim defendants the "who,
 21 what, when, where and how of the misconduct charged." (*See* Itec's brief at p. 18.) Certainly,
 22 those allegations and additional evidence handily demonstrate that personal jurisdiction exists
 23 over Itec, and that is all that is at issue in this motion. Rosenberg, 42 F.Supp.2d at 1037.

24 C. JURISDICTION EXISTS OVER ITEC UNDER THE LANHAM ACT

25 Mr. Grzymala tries to escape this Court's original jurisdiction under the Lanham Act
 26 (Hyperion's Sixth Cause of Action, Dkt 66, ¶¶67-78) by asserting that "Itec asserts no rights or

1 claims to any of the Amiga-related trademarks.” (Grzymala Dec., ¶20.) This, of course, is not
 2 true, as can be seen in ¶1 of the Security Agreement (Carton Dec., Ex. B, p. 17). In addition,
 3 Garry Hare directly contradicts Mr. Grzymala’s assertion by stating that “Itec’s acquisition
 4 included Amiga OS source code including . . . associated trademarks.” (Carton Dec., ¶16, Ex.
 5 I, pp. 39-41, at ¶2.) Finally, Mr. Grzymala contradicts himself at paragraphs 33 and 34 of his
 6 declaration, for there he acknowledges that Itec seeks to obtain on behalf of Amiga Delaware
 7 exactly what Amiga Delaware seeks, which of course includes trademark rights. (Complaint,
 8 Dkt 1, ¶¶39-53.) As this Court noted in its recent decision in Childers, d/b/a Artemis Solutions
 9 Group v. Sagem Morpho, Inc., et al., 2006 WL 3523626, at p. 6 (W.D.Wash., 12/6/2006),
 10 “Plaintiff is the master of his own Complaint and defendants cannot characterize his action in a
 11 manner he categorically rejects.” The Court made that observation while rejecting the
 12 defendant’s challenge to personal jurisdiction over it under the Lanham Act. Itec’s challenge
 13 here should be rejected for the same reasons stated in that decision.

15 **D. VENUE IS PROPER IN THIS DISTRICT**

16 Itec’s challenge to venue in this motion is not well founded, as 28 USC §1391 clearly
 17 requires that venue be proper only over one defendant, and here Hyperion (the only defendant)
 18 has conceded that venue is proper in this district. (Carton Dec., ¶25.) Furthermore, if personal
 19 jurisdiction exists over Itec, venue would be independently proper pursuant to §1391(c).

20 **E. THE CLAIMS AGAINST ITEC ARE NOT APPROPRIATE FOR TRANSFER**

21 Hyperion objects to the change of venue requested by Itec for the following reasons.
 22 First, Itec bears the burden of proving that jurisdiction and proper venue exist in New York,
 23 and it cannot do so considering the mandatory forum selection clause of the 2001 Agreement
 24 that limits Hyperion’s right to seek declaratory relief to this District. Commodity Futures
 25 Trading Comm’n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). Second, if the Southern District
 26 of New York were a possibility, the Court would then need to engage in a balancing test of

1 public and private considerations. Hatch v. Reliance Ins. Co., 758 F.2d 409, 414 (9th Cir.
2 1985); Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).
3 Here, the only “interests” that favor New York are Itec’s desire to have a second bite at the
4 apple, and Itec’s desire to drive up Hyperion’s litigation expenses. Because neither of those
5 “interests” is legitimate, the motion to transfer should be denied.

6 **IV. CONCLUSION**

7 Hyperion respectfully asks this Court to deny Itec’s motion to dismiss or transfer.

8 DATED this 26th day of November, 2007.

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