UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLOANTO CORPORATION, AMIGA, INC., ITEC, LLC and AMINO DEVELOPMENT CORPORATION, Plaintiffs, - against - HYPERION ENTERTAINMENT CVBA, Defendant.	Civil Action No.: 2:18-cv-00381-RSM (consolidated with 2:18-cv-00535) PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
HYPERION ENTERTAINMENT CVBA Counterclaim Plaintiff, - against - CLOANTO CORPORATION, AMIGA, INC., ITEC, LLC and AMINO DEVELOPMENT CORPORATION, Counter-Defendants.	

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In its Opposition to Motion for Preliminary Injunction ("Opposition"), Defendant Hyperion Entertainment CVBA ("Hyperion") makes a series of misleading, false, and unavailing claims as to why Plaintiffs should not be entitled to a Preliminary Injunction. Each of these is addressed in turn.

1. The Settlement Agreement clearly limits Hyperion's trademark rights to the use of "AmigaOS" and the "Boing Ball" design mark in connection with AmigaOS 4.0.

Contrary to Hyperion's claim in its Opposition, Plaintiffs do not contend that Hyperion cannot use "AmigaOS" and the "Boing Ball" design mark "in promoting [Hyperion's] products" (See Dkt. No. 48, lines 15-16, Emphasis added.) Plaintiff's contention is that Hyperion cannot use those marks on any product other than AmigaOS 4 and related hardware. Indeed, the trademark rights granted in Section 1(c) of the Settlement Agreement are wholly limited to the "marketing, distributing and making available AmigaOS 4" and related hardware. No mention is made in that Section regarding Amiga OS 3.1 or any other product.

Hyperion further makes the surprisingly specious argument that the Amiga Parties agreed not to challenge Hyperion's use of "AmigaOS" or the "Boing Ball" design mark in connection with uses that were not authorized by the license granted in Section 1(c). In order to do this, Hyperion cites Section 2, and asks the Court to find that the phrase "arising out of Hyperion's use, marketing, licensing, or sublicensing of the Software or Amiga OS4 or Hyperion's use of the Licensed Marks in connection therewith" grants by implication what Section 1(c) expressly contradicts. This makes no sense, given the plain language of Section 1(c) and the fact that the phrase, "Hyperion's use of the Licensed Marks in connection therewith" in Section 2 is logically (and contextually) connected to "AmigaOS4." Contrary to Hyperion's suggestions, the 2009

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Settlement did not grant Hyperion any rights, exclusive or nonexclusive, to use the AmigaOS, the "Boing Ball" design mark, or any other AMIGA mark, in connection with Amiga OS 3.1.

Lastly, Hyperion suggests that it has "independent rights" based on Section 7 of the Agreement, which Hyperion has misleadingly truncated in the Opposition. First, Section 7 addresses the issue of the nature and quality of the goods and services sold in connection with the "Licensed Marks" (i.e., the marks licensed in connection with AmigaOS 4), and stipulates that "AmigaOS 4 in the form currently distributed by Hyperion meets the quality standard set forth above." Following that is a series of disclaimers that, contrary to Hyperion's claim, do not have the effect of expanding the trademark rights granted to Hyperion under Section 1(c):

> Nothing in this Agreement shall however be construed as an admission on the part of Hyperion with respect to the validity or enforceability of any Amiga Marks or the "Boing Ball" logo mark. Furthermore, nothing in this Agreement shall be construed as a waiver or abandonment of Hyperion's independent rights (if any) to the Licensed Marks. Nothing in this Agreement shall be construed as an admission or acknowledgement by the Amiga Parties that Hyperion has any independent rights to the Licensed Marks, or as a waiver or abandonment of Amiga's rights in any Amiga Marks or the Licensed Marks, or the validity or enforceability thereof.

In other words, there was, at best, simply a standoff, and Hyperion was granted no more rights than those that are expressly stated in Section 1(c) of the Settlement Agreement.

2. A Preliminary Injunction is sought on both copyright and trademark grounds.

Hyperion makes the disingenuous argument in its Opposition that "[i]n any case, Plaintiffs' Motion is not based upon an assertion of copyright infringement." (Dkt. No. 48, p. 13, line 16.) It is disingenuous because Hyperion well knows that the infringing product, Amiga OS 3.1.4, is but a version of, i.e., a derivative work based on, Amiga OS 3.1. Not only does Hyperion describe it as such in its public statements, but Hyperion is also opposing this Motion on the claim that it has the right to make this derivative work.

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Hyperion also apparently misunderstands Cloanto's rights in this litigation. Exhibit 3 to the Settlement Agreement, which was signed by Cloanto, consists of two paragraphs, the first of which states that the Acquirer (in this case, Cloanto) "covenants and agrees with [Hyperion] that Acquirer will comply with all obligations of the Amiga Parties under the Settlement Agreement" and the second of which states that Acquirer "acknowledges and agrees that it will be bound by the terms and conditions of the Settlement Agreement applicable to the Amiga Parties…." The "terms and conditions of the Settlement Agreement applicable to the Amiga Parties" necessarily include the right to enforce the Settlement Agreement against Hyperion with respect to the intellectual property that was acquired. In no way does Exhibit 3 extinguish or in any way supersede the prior rights granted to Cloanto loosely described in Exhibit 1 ("Existing License Agreements") of the Settlement Agreement, and Cloanto's position on this Motion is that Hyperion has exceeded the rights granted to it in Section 1(b) of the Settlement Agreement, which rights must be read in *pari materia* with the trademark grant in Section 1(c).

As owner of the copyright in Amiga OS 3.1, and signatory to Exhibit 3, Cloanto's standing to join in this Motion is clear. By the same token, the Amiga Parties can only bring this Motion based on its trademark claims, because it no longer owns the copyrights at issue.

3. Amiga, Inc. did not abandon its trademarks and has never been inactive for a period of three years.

Hyperion's claims that Amiga, Inc. was void or inactive or administratively dissolved from 2010 to 2018. This is both misleading and substantively untrue. As attested to by Bill McEwen in his Declaration attached hereto as Exhibit 1 (hereinafter the "McEwen Declaration"), Amiga, Inc. was engaged in licensing activities throughout the period from the signing of the Settlement Agreement through December 31, 2016, when he resigned as President and sole

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Director of Amiga, Inc. See, McEwen Declaration, ¶¶ 5-8. McEwen again stepped in, in August 2018, to revive Amiga, Inc., the status of which had been "Void, AR's or Tax Delinquent" for failure to file the requisite Annual Franchise Tax Report and pay its franchise taxes. See, McEwen Declaration, ¶ 9; and ¶ 2, Declaration of Gordon E.R. Troy, attached as Exhibit 2 (the "Troy Declaration"). On October 24, 2018, the Annual Franchise Tax Report was filed, the franchise tax was paid, and Amiga, Inc. was revived. See, Troy Declaration, ¶¶ 3-6. Amiga, Inc.'s prior status as "void" has no effect on (and in no way nullifies) any of Amiga's activities stretching back to 2010. § 312 Subchapter XII or Title 8 (Corporations) of Delaware law states, in pertinent part, that

> Upon the filing of the certificate in accordance with § 103 of this title the corporation shall be revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title. Such revival shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its directors or members of its governing body, officers, agents and stockholders or members during the time when its certificate of incorporation was forfeited or void pursuant to this title, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect.

Hyperion's claim that Amiga, Inc. did not use the AMIGA marks during the period 2010-2018 is similarly misleading and untrue. The use of Amiga, Inc.'s trademarks by Cloanto and other licensees of Amiga, Inc. during this period expressly inured to the benefit of Amiga, Inc. See, McEwen Declaration, ¶ 8. The same is true of Hyperion's use, as Hyperion is merely a licensee of Amiga. As mentioned above, Section 7 of the Settlement Agreement expressly addresses the quality and manner of use issue by Hyperion with respect to AmigaOS 4.

4. **Evidence of the Intent of the Parties to the Settlement Agreement Submitted by Plaintiffs is Admissible under Washington law**.

Hyperion's argument that Plaintiffs resort to "inadmissible parol evidence" is misplaced

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for two reasons: first, because the evidence proffered is admissible under the "context rule," and second, because Hyperion's own statements in the Opposition demonstrate an essential ambiguity in the Settlement Agreement.

First, as Hyperion knows from its mention of the "context rule." That rule is broader than a mere determination of the meaning of "specific words and terms used," as Hyperion argues. (Dkt. No. 48, p. 10, line 27.) Rather, it is aimed at determining the intent of the parties in light of the facts and circumstances under which an agreement was executed:

> To determine the intention of the parties to a contract, the finder of fact may consider extrinsic evidence regarding the situation of the parties and the circumstances under which the contract was executed. *Berg*, 115 Wn.2d at 669. Admissible extrinsic evidence does not include "evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term." *Hollis*, 137 Wn.2d at 695; *Ross v. Bennett*, 148 Wn. App. 40, 46, 203 P.3d 383 (2008), *review denied*, 166 Wn.2d 1012 (2009). The subjective intent of a party is generally irrelevant to the interpretation of a contract if the intent of the instrument can be determined from the actual words used. *Hearst Communications, Inc. v. Seattle Times Co*., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Miller v. Kenny, 180 Wn. App. 772, 789, 325 P.3d 278, 287, 2014 Wash. App. LEXIS 1030, *11-13, 2014 WL 1672946 (Court of Appeals of Washington, Div. One, 2014).

The Declaration of Bill McEwen (Dkt. No. 45-9) that Hyperion complains is inadmissible, in fact contains precisely the types of contextual information that is permitted in evidence, as well as evidence of the intent of the drafters – as shown in successive drafts before the final language in Sections 1(b) and 1(c) of the Settlement Agreement was accepted by the parties. McEwen was not providing testimony of his personal (i.e., unilateral) intent, but the context of the Settlement Agreement and the understanding of all the parties, including Hyperion. The Court of Appeals in *Miller v. Kenny* well understood this distinction:

> The line between permissible evidence of context and impermissible evidence of subjective intent is not bright. Under *Hollis*, evidence of a party's unilateral or subjective

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> intent as to the meaning of a contract word or term is inadmissible. *Hollis*, 137 Wn.2d at 695. We have held that extrinsic evidence is admissible to show the intent of a drafter so long as it is not used to change the terms of an agreement. *Saunders v. Meyers*, 175 Wn. App. 427, 440, 306 P.3d 978 (2013).

Miller v. Kenny, *supra*, 180 Wn. App. at 789, 325 P.3d at 287. *See also*, *Ross v. Bennett*, 148 Wn. App. 40, 48, 203 P.3d 383, 387 (Court of Appeals of Washington, 2008) (finding portions of declaration, which contained some of the same kinds of statements as are found in the McEwen Declaration, to be "admissible evidence of the context in which the covenant was formed...")

Second, throughout its Opposition, Hyperion argues that Section 1(c), which contains no mention of the Amiga OS 3.1 (i.e., the "Software"), but restricts the grant of rights in the Licensed Marks to AmigaOS 4, must be interpreted to grant Hyperion rights in AMIGAOS and the "Boing Ball" design mark for use in conjunction with Amiga OS 3.1. Failing that, Hyperion says, the Court should look to other Sections of the Settlement Agreement in order to interpret Hyperion's scope of rights, such as Section 7. It is precisely under circumstances such as these that evidence of the parties' intent is required. Hyperion's attempt to dismiss the plain meaning of its own post-Settlement Agreement press release only emphasizes the need to look at the context of the agreement and the intent of the parties and drafters. Attorney Rhett Barney cites, as Exhibit 1 to his Declaration (Dkt. No. 49-1), an article from amigaworld.net written by some unknown person who purports to provide a summary of the 2009 Settlement Agreement (vs. the specific account of rights contained in Hyperion's own statement.) Ben Hermans, who was Managing Partner of Hyperion's predecessor only up to 2003, is thus incompetent to testify as to what Hyperion meant or didn't mean to say (see Declaration of Ben Hermans, Dkt. No. 50, ¶ 15),

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while Timothy DeGroote, who was Hyperion's Director when the Settlement Agreement was signed, remains silent about Hyperion's press release.

5. **Hyperion's Opposition to a Preliminary Injunction Fails on the Facts**.

Hyperion's claim that Plaintiffs' "own filings" show that Hyperion has been selling AmigaOS 3.1 since 2011 (Dkt. No. 48, p. 3, lines 1-2) is both misleading and contradicted by the facts. In 2011, Hyperion did not sell Amiga OS 3.1 as an independent operating system. Rather, it was provided in Hyperion's AmigaOS 4.1 update to run *inside* AmigaOS 4 on a PowerPC, so that legacy Amiga applications would run better in AmigaOS 4. See, McEwen Declaration, ¶ 11. By contrast, Amiga OS 3.1.4 is a standalone product sold to run on original Amiga equipment, i.e., not inside or even in conjunction with AmigaOS 4 and its related hardware. *Id*.

In fact, Hyperion's attempts at selling Amiga OS 3.1 as an independent operating system (i.e., outside AmigaOS 4) are quite recent. As recounted by Mike Battilana in his Declaration in support of this Motion (Dkt. No. 45-1), Hyperion attempted to sell Amiga OS 3.1 in 2016 under the names "Workbench 3.1" and "New Hyperion 1.3 Kickstart ROM," thus avoiding the use of the "AMIGA OS." Battilana Declaration, Dkt. No. 45-1, ¶ 23. While it is true that Amiga, Inc., did not go after Hyperion for its use of the "Boing Ball" design mark on the altered boot-up screen created by Hyperion, Cloanto went after Hyperion for using Cloanto's WORKBENCH mark, and Hyperion ceased selling Amiga OS 3.1 in the United States. Battilana Declaration, Dkt. 45-1, ¶ 24. Hyperion did not sell any version of AmigaOS 3.1 in the United States thereafter until October 2018, when it decided to launch "AmigaOS 3.1.4." Battilana Declaration, Dkt. No. 45, ¶ 25. In the Opposition, Hyperion failed to produce any evidence to contradict these facts.

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Finally, Hyperion's claim that if a Preliminary Injunction were issued "Hyperion would conservatively lose sales of between $240,000 - $360,000 USD annually" is sheer fantasy, completely unsupported by any facts. See, Declaration of Timothy De Groote (hereinafter "De Groote Declaration"), ¶ 19. De Groote cites initial sales upon release of "approximately $25,000" and sales by Digital River in the amount of $9,000. De Groote Declaration, ¶¶ 7, 12. These might sound like impressive sales for several weeks' worth of sales, but as Mike Battilana points out in his Declaration, "[b]ased on my long experience in the marketplace for software and AMIGA-related software in particular, most of the sales of 'Amiga OS 3.1.4' will be made in the first six months from release, making a preliminary injunction critical at this stage." De Groote makes no attempt to explain how he came to his numbers, and offers no sales figures for past products, despite the fact that Plaintiffs asked for sales data in its discovery requests, and Hyperion responded not by producing such information, but by making numerous specious objections, and stating that it will produce some documents at some unknown time.

CONCLUSION

Plaintiffs have demonstrated the necessity for injunctive relief in order to preserve the status quo (i.e., existing at the commencement of this action) pending trial. Plaintiffs are likely to succeed on their claim that Hyperion has no right to market and sell "Amiga OS 3.1.4" products, and absent a preliminary injunction, Plaintiffs are suffering and are likely to suffer irreparable harm.

For the reasons set forth in Plaintiffs' motion for a Preliminary Injunction and the within Reply to Defendant's opposition, the Court should grant the requested preliminary injunction, and, if the Court deems necessary, set a hearing to determine the amount of the bond.

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DATED this 18th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2019, I electronically filed the foregoing Plaintiffs' Reply to Defendant's Opposition To Plaintiff's Motion for Preliminary Injunction and exhibits 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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