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April 15, 1985

LAWRENCE E. APOLZON VASILIOS D. DOSSAS EDWARD W. MURRAY TODD P. BLAKELY SUSAN K. BENNETT WILLIAM P. OBERHARDT ROBERT W. FIESELER SANDRA B. WEISS HUGH A. ABRAMS RAYMOND N. NIMROD ROGER H. STEIN

SIDNEY NEUMAN FRED T. WILLIAMS COUNSEL

VAN METRE LUND NORMAN M. SHAPIRO ASSOCIATE COUNSEL

Algy Tamoshunas, Esquire North American Philips Corporation 580 White Plains Road Tarrytown, New York 10591

## Re: Magnavox v. Activision

Dear Algy:

We have entered into a stipulation regarding the use of prior deposition and trial testimony at the Activision trial. A copy is enclosed herewith.

Further, enclosed are copies of plaintiffs' application for continuance of trial and supporting memorandum, and Activision's reply.

Very truly yours,

NEUMAN, WILLIAMS, ANDERSON & OLSON

By James T. Williams

JTW:de Enclosures

cc: Thoms A. Briody, Esq. - w/o encls. Louis Etlinger, Esq. - w/encls. Theodore W. Anderson, Esq. - w/o encls.

	1	MARTIN R. GLICK H. JOSEPH ESCHER III MARLA J. MILLER HOWARD, RICE, NEMEROVSKI, CANADY,	RECEIVED-CALLIGAR	
	3 4 5	ROBERTSON & FALK A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, California 94111 Telephone: 415/434-1600	APR111985	
	6 7 8	OF COUNSEL: SCOTT HOVER-SMOOT Four Embarcadero Center, Suite 3400 San Francisco, California 94111		
	9	Attorneys for Defendant and Counterclaimant Activision, Inc.		
	10		2	
HOWARD	11	UNITED STATES DISTRICT COURT		
RICE	12	NORTHERN DISTRICT	OF CALIFORNIA	
CANADY	13			
DBERTSON & FALK rafessional Corporation	14	THE MAGNAVOX COMPANY, a corpora- ) tion, and SANDERS ASSOCIATES, ) INC., a corporation, )	No. C 82 5270 CAL ACTIVISION INC.'S MEMORANDUM	
	16 17	Plaintiffs, )	IN OPPOSITION TO PLAINTIFFS' APPLICATION TO CONTINUE TRIAL DATE	
	18	VS. )	Hearing Date: April 12, 1985	
		ACTIVISION, INC., a corporation, )	Time: 9:30 a.m.	
	19	Defendant. )		
	20	AND RELATED CROSS-ACTION. )		
	21	)		
	22		the first data	
	23		cempt to delay the trial date	
24		in this action is both inappropriate		
25 the suggestion in Magnavox' brief, the breakdown of settler			he breakdown of settlement	

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26 negotiations provides no basis for a continuance, and in any event the

ACTIVISION INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION TO CONTINUE TRIAL DATE

breakdown became apparent on at least by March 29, 1985 when Magnavox itself formally withdrew its offer. Moreover, based on what the parties were informed on April 10, 1985 by Judge Legge's 3 deputy, this trial will in all likelihood not begin until April 24, 1985 (and possibly as late as April 29, 1985), thus making it possible for Magnavox' expert witness to testify on May 1, 1985 during Magnavox' presentation of its case. A continuance is thus entirely unnecessary.

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MAGNAVOX' REQUEST FOR CONTINUANCE IS INAPPROPRIATE.

Magnavox miscasts the history of settlement negotiations to bolster its request for delaying the trial. In fact, the settlement negotiations provide no such basis. The true facts are basically these:

16 When the parties by stipulation dated February 14, 1985 17 agreed to postpone the trial date, they had, as the stipulation 18 recited, reached an apparent agreement in principle on the major 19 points of the settlement. Declaration of Martin R. Glick filed herewith ("Glick Declaration"), ¶2. The parties requested a 20 21 continuance then because they had "not yet drafted the final 22 documents... which drafting and negotiating [would] require the 23 concerted efforts of the parties and their attorneys." Stipulation of the Parties Re Postponement of Trial Date, filed with the 24 25 Court on February 14, 1985. Magnavox insisted that the trial not be delayed any longer than one month (until April 8, 1985), if 26 ACTIVISION INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS! APPLICATION TO CONTINUE TRIAL DATE

-2-

possible, and insisted that Activision stipulate to this despite the fact that Activision had been informed by Judge Legges's deputy that May 6, 1985 was the earliest possible date to reschedule the trial. Glick Decl., ¶2. The parties thus prepared and signed a stipulation that recited:

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"The parties seek a postponement of one month, or the earliest convenient trial date to the Court after April 8, 1985. The parties have been informed by Judge Legge's deputy that May 6, 1985, at 9:30 a.m. may be the earliest trial date available and, while the parties continue to prefer an earlier date, they consent to postponement until May 6, 1985 should be the Court's order."

The Court accommodated this request, and set the trial for April 22, 1985. Id. For nearly two months after the Court entered this Order on February 14, 1985, Magnavox gave no indication until now that it had any problems with the April 22, 1985 date, when surely its expert witness' academic responsibilities must have been known to it. Id.

Immediately after the continuance was granted on February 14, 1985, several weeks of negotiations--not drafting--ensued, 18 during which time it became apparent, despite the parties' good faith belief at the time of the continuance, that there were wide differences. Id., ¶3. The parties agreed that because these differences were so great, there was no point in trying to draft documents. In fact, the letters exchanged by the parties immediately prior to the stipulation and continuance of February 14, 1985 had differed in material respects, and the parties were aware of this fact. Id.

In an attempt to break the logjam the parties decided ACTIVISION INC.'S MEMORNADUM IN OPPOSITION TO PLAINTIFFS' APPLICATION TO CONTINUE TRIAL DATE

-3-

to meet in Chicago--a midway point--on March 12-14, 1985. Id., ¶4. At the close of that meeting, major issues remained to be resolved. These issues were listed in a written document signed by representatives of each party, with the express statement that the list "[did] not constitute a binding agreement, as this agreement which once fully written must be presented to the principals." Id.

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The differences between the parties continued to be discussed after the Chicago meeting. <u>Id</u>., ¶5. On March 22, 1985, Activision indicated that the then proposed terms of settlement were not acceptable. <u>Id</u>. It was thus apparent to Magnavox by at least March 22, 1985, that a settlement was unlikely. <u>Id</u>. One week later, on March 29, 1985, Magnavox formally withdrew its offer. <u>Id</u>.

15 Although informal discussions have continued intermittently 16 since March 29, 1985, Activision has organized its case and its 17 witnesses on the assumption that the trial will begin on April 18 22, 1985. Id., ¶6. This is not an easy task. One witness is over 19 seventy years old, employed, and lives in New York. Another 20 witness, also from the East Coast, has a very busy work schedule 21 that is difficult to accommodate. Three of Activision's experts (who are not employed by Activision) live in the Bay Area and 22 23 have substantial professional responsibilities and many time 24 commitments. A new trial date at this point would involve a great amount of effort to re-organize and attempt to accommodate these 25 26 individuals' schedules. Id.

ACTIVISION INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION TO CONTINUE TRIAL DATE.

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It is disingenuous for Magnavox to claim this late in the day that its key witness is now unavailable until May 1, 1985, and to attempt to link this fact to the breakdown in settlement negotiations. Throughout, Magnavox' expert has been on the faculty at University of Michigan, and presumably knew what his schedule would be well before April 9, 1985, when Magnavox filed its motion to delay the trial.

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## II.

## A CONTINUANCE IS ENTIRELY UNNECESSARY.

Because of the Court's schedule, this trial will in all likelihood not begin until April 24, 1985. This will allow Magnavox' expert to testify on May 1, 1985, and makes Magnavox' motion unnecessary.

Magnavox' counsel apparently intends to call five
witnesses at trial. In an effort to resolve this issue, Magnavox
and Activision counsel together discussed the amount of time that

20 Notably, Magnavox has failed to provide a declaration from its expert witness setting forth when and why he is unavailable. 21 The only declaration filed by Magnavox is a non-specific general statement by its attorney--based entirely on hearsay--that he is 22 "familiar with the factual matters discusssed in [the] memorandum," and that they are "truly and correctly set forth" to the "best of 23 [his] knowledge and belief." Counsel for Activision informed Magnavox counsel on Thursday morning, April 11, 1985, that it intends 24 to challenge the Magnavox' declaration as hearsay. Activision informed Magnavox, however, that it would not object to receiving 25 a signed declaration from Magnavox' expert witness even as late as the morning of the hearing on this motion. Declaration of Marla 26 J. Miller, filed herewith, ¶¶2-3.

ACTIVISION INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATON TO CONTINUE TRIAL DATE.

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	1 2 3 4 5 6 7 8	MARTIN R. GLICK H. JOSEPH ESCHER III MARLA J. MILLER HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, California 94111 Telephone: 415/434-1600 OF COUNSEL: SCOTT HOVER-SMOOT Four Embarcadero Center, Suite 3400 San Francisco, California 94111	APR111985
	9	Attorneys for Defendant and Counterclaimant Activision, Inc.	
	10	2	÷
HOWARD	11	UNITED STATES I	DISTRICT COURT
RICE EMEROVSKI CANADY		NORTHERN DISTRIC	CT OF CALIFORNIA
ROBERTSON & FALK Projessional Componentio	14 15 16	THE MAGNAVOX COMPANY, a corpora- tion, and SANDERS ASSOCIATES, INC., a corporation, Plaintiffs,	<pre>&gt; No. C 82 5270 CAL &gt; DECLARATION OF MARLA J. MILLER IN SUPPORT OF DEFENDAN ACTIVISION, INC.'S OPPOSITION </pre>
	17	vs.	TO APPLICATION TO CONTINUE TRIAL DATE
	18 19	) Hearing Date: Ap	) Hearing Date: April 12, 1985 ) Time: 9:30 a.m.
	20 21	AND RELATED CROSS-ACTION.	- ) ) )
	22		·
	23	I, Marla J. Miller declar	e:
	24	1. I am a member of the Bar of the State of California and an associate with the law firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk, a Professional Corporation, attorneys DECLARATION OF MARLA J. MILLER IN SUPPORT OF DEFENDANT ACTIVISION INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE	
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1 for Defendant Activision, Inc. ("Activision") in the above-2 referenced action. Except as otherwise indicated, I have personal 3 knowledge of the matters set forth below, and if called upon to do 4 so, I could and would testify competently to them.

2. On Thursday morning, April 11, 1985, I called Magnavox' counsel Mr. James T. Williams and informed him that Activision would object to his declaration filed in support of Magnavox' motion to continue the trial date, on the ground that it is based entirely on hearsay. I informed him that Activision required a declaration signed by Magnavox' expert himself setting forth the reasons why the expert witness was unavailable to testify until May 1, 1985. I informed Mr. Williams that Activision would accept a declaration from Magnavox' expert witness even as late as the morning of the hearing on April 12, 1985.

3. That same morning of April 11, 1985, I spoke by telephone with Mr. Robert L. Ebe, local counsel for Magnavox, and repeated what I had told Mr. Williams about Magnavox' fatally defective declaration. I informed Mr. Ebe of my earlier phone conversation with Mr. Williams on the same subject.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on April 11, 1985, at San Francisco, California.

Marla J Miller

MARLA J. MILLE

11 HOWARD RICE 12 MEROVSKI CANADY 13 OBERTSON & FALK 14

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	1 2 3 4 5 6 7 8 9	MARTIN R. GLICK H. JOSEPH ESCHER III MARLA J. MILLER HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, California 94111 Telephone: 415/434-1600 OF COUNSEL: SCOTT HOVER-SMOOT Four Embarcadero Center, Suite 3400 San Francisco, California 94111 Attorneys for Defendant and	APR111985	
	10	Counterclaimant Activision, Inc.		
HOWARD RICE IEMEROVSKI CANADY	11 12 13	UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA		
ROBERTSON & FALK Protessional Corporatio	14	THE MAGNAVOX COMPANY, a corpora- tion, and SANDERS ASSOCIATES, )) INC., a corporation, )) Plaintiffs, )) VS. )) ACTIVISION, INC., a corporation, )) Defendant. )) AND RELATED CROSS-ACTION. )) I, Martin R. Glick, declare		
	24			
	25			
	26	Robertson & Falk a Professional Corpor DECLARATION OF MARTIN R. GLICK IN SUP INC.'S OPPOSITION TO APPLICATION TO CO	PORT OF DEFENDANT ACTIVISION	
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Activision, Inc ("Activision") in the above-referenced action. Except as otherwise indicated, I have personal knowledge of the matters set forth below, and if called upon to do so, I could and would testify competently to them.

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When the parties by stipulation dated February 2. 14, 1985 agreed to postpone the trial date, they had, as the stipulation recited, reached an apparent agreement in principle on the major points of the settlement. Magnavox insisted that the trial not be delayed any longer than one month (until April 8, 1985), if possible, and insisted that Activision stipulate to this despite the fact that Activision had been informed by Judge Legge's deputy that May 6, 1985 was the earliest possible date to reschedule the trial.

3. Immediately after the continuance was granted on February 14, 1985, several weeks of negotiations -- not drafting --15 ensued, during which time it became apparent, despite the parties' good faith belief at the time of the continuance, that there were 17 wide differences. The parties agreed that because these differences 18 were so great, there was no point in trying to draft documents. 19 In fact, the letters exchanged by the parties immediately prior 20 to the stipulation and continuance of February 14, 1985 had 21 differed in material respects, and the parties were aware of this 22 23 fact.

In an attempt to break the logjam the parties 24 4. decided to meet in Chicago -- a midway point -- on March 12-14, 1985. 25 At the close of that meeting, major issues remained to be resolved. 26 DECLARATION OF MARTIN R. GLICK IN SUPPORT OF DEFENDANT ACTIVISION INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE.

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These issues were listed in a written document signed by representatives of each party, with express statement that the list "[did] not constitute a binding agreement, as this agreement which once fully written must be presented to the principals."

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T**JSON** EALK 5. The differences between the parties continued to be discussed after the Chicago meeting. On March 22, 1985, Activision indicated that the then proposed terms of settlement were not acceptable. It was thus apparent to Magnavox by at least March 22, 1985, that a settlement was unlikely. One week later, on March 29, 1985, Magnavox formally withdrew its offer.

11 6. Although informal discussions have continued 12 intermittently since March 29, 1985, Activision has organized its 13 case and its witnesses on the assumption that the trial will 14 begin on April 22, 1985. This is not an easy task. One witness 15 is over seventy years old, employed, and lives in New York. 16 Another witness, also from the East Coast, has a very busy work 17 schedule that is difficult to accommodate. Three of Activision's 18 experts (who are not employed by Activision) live in the Bay Area 19 and have substantial professional responsibilities and many time 20 commitments. A new trial date at this point would involve a great 21 amount of effort to re-organize and attempt to accommodate these 22 individuals' schedules.

7. Magnavox' counsel apparently intends to call five
witnesses at trial. In an effort to resolve this issue, I spoke
with Magnavox' counsel James Williams to discuss the amount of
time that would be necessary for Magnavox to put on its witnesses. The
DECLARATION OF MARTIN R. GLICK IN SUPPORT OF DEFENDANT ACTIVISION INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE.

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	1	following trial schedule for Magnavox was discussed, and is
	2	entirely feasible:
	3	Wednesday, April 24 - Opening statements
	4	Thursday, April 25 - Ralph Baer
	5	Monday, April 29 - Ralph Baer
	6	Tuesday, April 30 - Briody, Levy, Bushnell
	7	Wednesday, May 1 - Magnavox' expert.
	8	Moreover, in the event that Magnavox completes its case, but for
	9	its expert, before May 1, Activision would agree to recess for a
	10	day or two, and await the testimony of Magnavox' expert before
LICIAIARD	11	proceeding to put on its case.
HOWARD RICE VEMEROVSKI	12	DATED: April 11, 1985
CANADY	13	A1 \ .
ROBERTSON & FALK	14	Mt Frich
A Professional Corporatio	15	MARTIN R. GLICK
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	26	DECLARATION OF MARTIN R. GLICK IN SUPPORT OF DEFENDANT ACTIVISION INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE

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	1 2 3 4 5	MARTIN R. GLICK H. JOSEPH ESCHER III MARLA J. MILLER HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, California 94111 Telephone: 415/434-1600		
	6 7 8	OF COUNSEL: SCOTT HOVER-SMOOT Four Embarcadero Center, Suite 3400 San Francisco, California 94111		
	9	Attorneys for Defendant and Counterclaimant Activision, Inc.		
	10			
LOWARD	11	UNITED STATES I	DISTRICT COURT	
HOWARD RICE JEMEROVSK CANADY ROBERTSON	13	NORTHERN DISTRICT OF CALIFORNIA		
& FALK 4 Professional Corporation	14	THE MAGNAVOX COMPANY, a corpora- tion, and SANDERS ASSOCIATES, INC., a corporation, Plaintiffs, vs.	No. C 82 5270 CAL STIPULATION OF THE PARTIES REGARDING THE USE OF PRIOR DEPOSITION AND TRIAL TESTIMONY	
	18	ACTIVISION, INC., a corporation,		
	19	Defendant.	)	
	20			
	21	AND RELATED CROSS-ACTION.		
	22			
	23	I.		
	24	IT IS HEREBY STIPULATED BETWEEN ALL PARTIES TO THIS ACTION THAT the deposition and trial testimony taken in the		
	25			
	26	following actions in the United Stat STIPULATION OF THE PARTIES REGARDING AND TRIAL TESTIMONY		

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Northern District of Illinois may be used in this action as if they
 were depositions upon oral examination taken in this action:

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HOWARD

ROBERTSON & FALK

A Professional Corporation

RICE NEMEROVSKI CANADY The Magnavox Company and Sanders Associates, Inc. v.
Bally Manufacturing Corporation, et al., Consolidated Civil Actions
No. 74C1030; 74C2510; 75C3153; 75C3933; and <u>The Magnavox Company</u>
and Sanders Associates, Inc. v. APF, et al., Consolidated Civil
Actions No. 77C3159; 78C4951; 78C5041; 80C2409; 80C4124.

II.

9 Notwithstanding the foregoing, this Stipulation shall 10 not apply to the deposition or trial testimony of expert witnesses, 11 nor shall this Stipulation permit Magnavox or Sanders Associates 12 to use the prior deposition or trial testimony of Ralph Baer, 13 William Rusch, William Harrison, Louis Etlinger, Richard Seligman, 14 Edward Smiley, Gordon Green, Theodore Mairson, Arnold Schumacher, 15 Herbert Campman, Robert Mayer, William Streeter, Algy Tamoshunas 16 and Thomas Briody.

## III.

All parties reserve the right to object to the introduction into evidence of all or part of that certain testimony described above in Paragraph I except for objections based on the form of /// 22

26 STIPULATION OF THE PARTIES REGARDING THE USE OF PRIOR DEPOSITION TESTIMONY

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1	the question which were not raised at the time the testimony		
2	was given. It is further agreed that this Stipulation is for the		
3	purpose of this action only and that the matters contained herein		
4	are not admitted for the purpose of any other trial or litigation.		
5		Respectfully submitted,	
6	DATED: April 12, 1985	NEUMAN, WILLIAMS, ANDERSON & OLSON	
7		· · · ·	
8		By J. J. WILLIAMS	
10		Attorneys for Plaintiffs,	
11		The Magnavox Company and Sanders Associates, Inc.	
HOWARD	Dated: April 10 , 1985	HOWARD, RICE, NEMEROVSKI, CANADY	
RICE 12 NEMEROVSKI CANADY 13	Dacea. hprif <u>10</u> , 1903	ROBERTSON & FALK	
ROBERTSON & FALK 14		By Mat Rill	
A Professional Corporation 15		MARTIN R. GLICK	
16		Attorneys for Defendant Activision, Inc.	
17		Activisión, inc.	
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26	STIPULATION OF THE PARTIES RE AND TRIAL TESTIMONY	GARDING THE USE OF PRIOR DEPOSITION	

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