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ASSOCIATE COUNSEL

April 15, 1985

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
 2 MARLA J. MILLER
 HOWARD, RICE, NEMEROVSKI, CANADY,
 3 ROBERTSON & FALK
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 4 Three Embarcadero Center, 7th Floor
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 APR 11 1985
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 By _____
 Agency _____

6 OF COUNSEL:
 SCOTT HOVER-SMOOT
 7 Four Embarcadero Center, Suite 3400
 San Francisco, California 94111

8 Attorneys for Defendant and
 9 Counterclaimant Activision, Inc.

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

HOWARD
 RICE
 NEMEROVSKI
 CANADY
 ROBERTSON
 & FALK

13
 14 THE MAGNAVOX COMPANY, a corpora-)
 tion, and SANDERS ASSOCIATES,)
 15 INC., a corporation,)
 16 Plaintiffs,)
 17 vs.)
 18 ACTIVISION, INC., a corporation,)
 19 Defendant.)
 20 _____)
 21 AND RELATED CROSS-ACTION.)
 _____)

No. C 82 5270 CAL
 ACTIVISION INC.'S MEMORANDUM
 IN OPPOSITION TO PLAINTIFFS'
 APPLICATION TO CONTINUE TRIAL
 DATE
 Hearing Date: April 12, 1985
 Time: 9:30 a.m.

22
 23 Magnavox' eleventh-hour attempt to delay the trial date
 24 in this action is both inappropriate and unnecessary. Contrary to
 25 the suggestion in Magnavox' brief, the breakdown of settlement
 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

1 breakdown became apparent on at least by March 29, 1985 when
2 Magnavox itself formally withdrew its offer. Moreover, based on
3 what the parties were informed on April 10, 1985 by Judge Legge's
4 deputy, this trial will in all likelihood not begin until April
5 24, 1985 (and possibly as late as April 29, 1985), thus making it
6 possible for Magnavox' expert witness to testify on May 1, 1985
7 during Magnavox' presentation of its case. A continuance is thus
8 entirely unnecessary.

9
10 I.

11 MAGNAVOX' REQUEST FOR CONTINUANCE IS INAPPROPRIATE.

12 Magnavox miscasts the history of settlement negotiations
13 to bolster its request for delaying the trial. In fact, the
14 settlement negotiations provide no such basis. The true facts are
15 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
20 herewith ("Glick Declaration"), ¶2. The parties requested a
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
24 of the Parties Re Postponement of Trial Date, filed with the
25 Court on February 14, 1985. Magnavox insisted that the trial not
26 be delayed any longer than one month (until April 8, 1985), if

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

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

6 "The parties seek a postponement of one month, or the
7 earliest convenient trial date to the Court after April
8 8, 1985. The parties have been informed by Judge Legge's
9 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."

10 The Court accommodated this request, and set the trial for April
11 22, 1985. Id. For nearly two months after the Court entered this
12 Order on February 14, 1985, Magnavox gave no indication until now
13 that it had any problems with the April 22, 1985 date, when
14 surely its expert witness' academic responsibilities must have
15 been known to it. Id.

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

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

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

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

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
22 (who are not employed by Activision) live in the Bay Area and
23 have substantial professional responsibilities and many time
24 commitments. A new trial date at this point would involve a great
25 amount of effort to re-organize and attempt to accommodate these
26 individuals' schedules. Id.

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

1 MARTIN R. GLICK
 2 H. JOSEPH ESCHER III
 3 MARLA J. MILLER
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 U.S. District Court
 Northern District of California

6 OF COUNSEL:
 7 SCOTT HOVER-SMOOT
 8 Four Embarcadero Center, Suite 3400
 9 San Francisco, California 94111

9 Attorneys for Defendant and
 10 Counterclaimant Activision, Inc.

HOWARD
 RICE
 NEMEROVSKI
 CANADY
 ROBERTSON
 & FALK

Professional Corporation

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

14 THE MAGNAVOX COMPANY, a corpora-)
 15 tion, and SANDERS ASSOCIATES,)
 16 INC., a corporation,)
 17 Plaintiffs,)
 18 vs.)
 19 ACTIVISION, INC., a corporation,)
 20 Defendant.)

No. C 82 5270 CAL
 DECLARATION OF MARLA J.
 MILLER IN SUPPORT OF DEFENDANT
 ACTIVISION, INC.'S OPPOSITION
 TO APPLICATION TO CONTINUE
 TRIAL DATE

Hearing Date: April 12, 1985
 Time: 9:30 a.m.

21 AND RELATED CROSS-ACTION.
 22

23 I, Marla J. Miller declare:

24 1. I am a member of the Bar of the State of California
 25 and an associate with the law firm of Howard, Rice, Nemerovski,
 26 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

1 MARTIN R. GLICK
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6 OF COUNSEL:
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8
9 Attorneys for Defendant and
Counterclaimant Activision, Inc.

HOWARD
RICE
NEMEROVSKI
CANADY
ROBERTSON
& FALK

Professional Corporation

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13
14 THE MAGNAVOX COMPANY, a corpora-)
tion, and SANDERS ASSOCIATES,)
15 INC., a corporation,)
16 Plaintiffs,)
17 vs.)
18 ACTIVISION, INC., a corporation,)
19 Defendant.)

No. C 82 5270 CAL
DECLARATION OF MARTIN R.
GLICK IN SUPPORT OF
DEFENDANT ACTIVISION, INC.'S
OPPOSITION TO APPLICATION TO
CONTINUE TRIAL DATE
Hearing Date: April 12, 1985
Time: 9:30 a.m.

20
21 AND RELATED CROSS-ACTION.
22

23 I, Martin R. Glick, declare:

24 1. I am a member of the Bar of the State of California
25 and a member of the law firm of Howard, Rice, Nemerovski, Canady,
26 Robertson & Falk a Professional Corporation, attorneys for Defendant

DECLARATION OF MARTIN R. GLICK IN SUPPORT OF DEFENDANT ACTIVISION
INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE

1 Activision, Inc ("Activision") in the above-referenced action.
2 Except as otherwise indicated, I have personal knowledge of the
3 matters set forth below, and if called upon to do so, I could
4 and would testify competently to them.

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

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

24 4. In an attempt to break the logjam the parties
25 decided to meet in Chicago--a midway point--on March 12-14, 1985.
26 At the close of that meeting, major issues remained to be resolved.

DECLARATION OF MARTIN R. GLICK IN SUPPORT OF DEFENDANT ACTIVISION
INC.'S OPPOSITION TO APPLICATION TO CONTINUE TRIAL DATE.

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CANADY
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& FALK
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1 These issues were listed in a written document signed by rep-
2 resentatives of each party, with express statement that the list
3 "[did] not constitute a binding agreement, as this agreement
4 which once fully written must be presented to the principals."

5 5. The differences between the parties continued to
6 be discussed after the Chicago meeting. On March 22, 1985, Activision
7 indicated that the then proposed terms of settlement were not
8 acceptable. It was thus apparent to Magnavox by at least March
9 22, 1985, that a settlement was unlikely. One week later, on
10 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.

23 7. Magnavox' counsel apparently intends to call five
24 witnesses at trial. In an effort to resolve this issue, I spoke
25 with Magnavox' counsel James Williams to discuss the amount of
26 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.

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
11 proceeding to put on its case.

12 DATED: April 11, 1985

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NEMEROVSKI
CANADY
ROBERTSON
& FALK

A Professional Corporation


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

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 

JAMES T. WILLIAMS

9
10 Attorneys for Plaintiffs,
11 The Magnavox Company and
Sanders Associates, Inc.

12 Dated: April 10, 1985

HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK

13
14 By 

MARTIN R. GLICK

15
16 Attorneys for Defendant
17 Activision, Inc.

18
19
20
21
22
23
24
25
26 STIPULATION OF THE PARTIES REGARDING THE USE OF PRIOR DEPOSITION
AND TRIAL TESTIMONY