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Activision, Inc.

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UNITED STATES COURT OF APPEALS

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FOR THE FEDERAL CIRCUIT

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THE MAGNAVOX COMPANY, a corpora-)
tion, and SANDERS ASSOCIATES,)
15 INC., a corporation,)

No. 86-852

16

Plaintiffs-Appellees,)

ACTIVISION, INC.'S SUPPLEMENTAL
BRIEF REGARDING MAGNAVOX'
MOTION TO DISMISS AND FOR
SANCTIONS

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vs.)

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ACTIVISION, INC., a corporation,)

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Defendant-Appellant.)

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On March 13, 1986, the District Court entered a

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formal Judgment and Conclusions of Law clearing up any

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ambiguity that this action is now final except for an accounting

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1 and thus appealable pursuant to 28 U.S.C. Section 1292(c)(2). ^{1/}
2 Copies of these documents are attached. Activision respectfully
3 submits that Magnavox' pending Motion to Dismiss Appeal should
4 thus be considered moot, and that Activision's Notice of Appeal
5 dated January 8, 1986 should be treated pursuant to Federal Rule
6 of Appellate Procedure 4(a)(2) as if filed on March 13, 1986, after
7 and on the day of entry of the District Court's formal Judgment.

8 Activision respectfully submits that Federal Rule of
9 Appellate Procedure 4(a)(2) should govern this situation. That
10 rule provides that except as to certain exceptions not relevant
11 here,

12 "a notice of appeal filed after the announcement of a
13 decision or order but before the entry of the judgment
14 or order shall be treated as filed after such entry and
 on the day thereof."

15 Here, Activision filed its notice of appeal on January 8, 1986,
16 after the District Judge's announcement of its decision, but

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21 ^{1/}Promptly upon receiving a copy of the District Judge's
22 Judgment, counsel for Activision spoke to Mr. Francis X. Gindhart,
23 Clerk of this Court and informed him of the District Judge's action.
24 Supplemental Declaration of Marla J. Miller, filed herewith. Mr.
25 Gindhart suggested that Activision file an Amended Notice of Appeal,
26 which he would treat as part of the same appeal now docketed. Mr.
Gindhart further suggested that Activision file this supplemental
brief regarding the motion now pending to dismiss Activision's
appeal in order to inform the Court of the District Court's entry
of formal judgment. Id. Concurrently with this supplemental brief,
Activision is filing an amended notice of appeal with the District
Court, a copy of which is attached.

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1 before the entry of a formal "Judgment" by the District Court on
2 March 13, 1986.^{2/} The effect of Rule 4(a)(2) would be to treat
3 Activision's notice of appeal as if filed on March 13, 1986, and,
4 presumably, the briefing and hearing schedule would flow from that
5 date.

6 Under these circumstances, the Court need not decide
7 Magnavox' motion to dismiss appeal, filed before the District
8 Judge entered its formal Judgment, and Magnavox' motion should be
9 dismissed as moot.

10 CONCLUSION

11 To resolve any lingering ambiguity as to the appropriate
12 appellate procedure, and to protect all parties' rights to appeal,

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21 ^{2/} As set forth more fully in Activision's Brief Regarding
22 Magnavox' Motion to Dismiss Appeal and for Sanctions, filed with
the Court on February 21, 1986, Activision filed its Notice of Appeal
23 on January 8, 1986 from a document entitled "Findings of Fact"
which was unmistakably explicit that the District Court had found
24 Magnavox' patent infringed and not invalid, and which on its face
made clear that the action was "final except for an accounting."
25 Activision filed its Notice of Appeal in a good faith effort to
preserve its right to an interlocutory appeal, and offered to coop-
26 erate with opposing counsel in clearing up any ambiguity as to the
form of the District Court's order.

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1 Activision requests that the Court enter the attached order
2 denying Magnavox' Motion to Dismiss Appeal as moot, and confirming
3 that Activision's Notice of Appeal shall be treated pursuant to
4 Rule 4(a)(2) as if filed on March 13, 1986, the day the District
5 Judge entered its formal judgment.

6 DATED: March 17, 1986

MARTIN R. GLICK
H. JOSEPH ESCHER III
MARLA J. MILLER
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10 By 
11 MARTIN R. GLICK

Attorneys for Defendant-Appellant,
ACTIVISION, INC.

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PROOF OF SERVICE BY FEDERAL EXPRESS MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111.

On March 17, 1986, I served the attached Activision, Inc.'s Supplemental Brief Regarding Magnavox' Motion to Dismiss and for Sanctions; Supplemental Declaration of Marla J. Miller in Support of Activision Inc.'s Brief Regarding Magnavox' Motion to Dismiss Appeal and for Sanctions; [Proposed] Order Denying Magnavox' Motion to Dismiss Appeal and Establishing Effective Date of Activision Inc.'s Notice of Appeal, by placing a true copy thereof enclosed in a sealed Federal Express envelope with postage thereon fully prepaid, delivered by Federal Express and addressed as follows:

Theodore W. Anderson, Esq.
Neuman, Williams, Anderson & Olson
77 W. Washington Street
Chicago, IL 60606

I, Cheryl Leger, declare under penalty of perjury that the foregoing is true and correct and was executed at San Francisco, California on March 17, 1986.



CHERYL LEGER

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE MAGNAVOX COMPANY, a corpora-)
tion, and SANDERS ASSOCIATES,)
INC., a corporation,)
Plaintiffs-Appellees,)
vs.)
ACTIVISION, INC., a corporation,)
Defendant-Appellant.)

No. 86-852
[Proposed] ORDER DENYING
MAGNAVOX' MOTION TO DISMISS
APPEAL AND ESTABLISHING
EFFECTIVE DATE OF ACTIVISION
INC.'S NOTICE OF APPEAL

This Court has considered the written arguments presented
by the parties and for good cause shown, it hereby ORDERED:

1. Appellees The Magnavox Company and Sanders Associates
Inc.'s Motion to Dismiss Appeal is denied as moot;
2. Pursuant to Federal Rule of Appellate Procedure