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March 9, 1983

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Re: Magnavox et al. v. Activision

Dear Ed:

We have your letter of February 16, 1983 and have briefly discussed our response thereto with Tom Herbert by telephone. We plan to meet with you and/or Tom to discuss the matter after the hearing in this case on Monday, March 14. We thought a general response might be helpful prior to that meeting leaving the specifics to be dealt with in person.

You, of course, have by now received fully executed copies of both the interrogatory and document request responses. Unexecuted copies were served by mail from here on February 7. The delay in receiving executed copies of the interrogatories was necessary because the responses had to be sent to Knoxville, Tennessee and then on to Nashua, New Hampshire for signature by appropriate officials of Magnavox and Sanders, respectively. We understand that Tom Herbert agreed by telephone conversation with Bob Taylor that this procedure was acceptable.

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Tom Herbert and Ted Anderson have agreed to mutually serve future papers between San Francisco and Chicago by Express Mail or Federal Express. Even that procedure is not infallible; Activision's opposition to plaintiffs' motion to disqualify was due on February 28 and we have still not received the copy Tom Herbert said was served by Express Mail on that day.

With respect to Activision's request for production of documents, that request merely incorporated by reference the documents referred to in Activision's interrogatories to plaintiffs. Plaintiffs' response to the request likewise incorporated by reference their response to the interrogatories. Those interrogatory responses quite clearly stated (page 2) that the documents "will be produced at the location where they are maintained by the plaintiff producing same in the normal course of its business at a time to be mutually agreed upon." Certainly the only logical conclusion to be drawn from that statement is that plaintiffs were refusing to comply with the request, and thus objecting to it, to the extent it sought production in your offices in San Francisco on the stated date.

We should add that Activision has requested quite a large volume of documentation; we do not believe it is reasonable that plaintiffs should be required to transport it all to San Francisco for inspection and copying. If you care to reduce the number of documents you are requesting, we would be happy to consider making copies of them available to you to avoid the necessity for your travelling to the location of the documents. We have already discussed with Tom Herbert the possibility of following a similar procedure with respect to some of the Magnavox sublicenses under the Re. 28,507 patent.

In those interrogatory responses in which plaintiffs offered to produce the documents from which the requested information could be derived or ascertained, it was certainly our intention to fully comply with the requirements of Rule 33(c) regarding specification of the documents being produced. In each such response, we endeavored to identify just what documents or document files contained the necessary information, and they were the documents or document files which plaintiffs themselves

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would have to search to derive that information. If you believe further information is appropriate in regards to specific interrogatories, we will be happy to discuss these with you individually.

You state that an offer to produce documents from which the requested information can be ascertained is appropriate only where the burden of ascertaining or deriving the requested information is substantially the same for both parties. You particularly complained that the Rule 33(c) procedure is not appropriate where the information has been collected in one of the previous lawsuits involving the same patents. This complaint must be dealt with on the basis of individual interrogatories. However, as you know, there have been many previous such lawsuits and extensive papers filed by all the parties to those actions. Merely reviewing all those papers to see if some particular compilation was made in the past can be a very burdensome procedure, and one for which defendants are equally as well equipped as plaintiffs. We might add that in many cases the real problem is the form of the interrogatory itself rather than the response. When an interrogatory requests the identification of "all" persons having knowledge of certain activities or events and "all" documents relating to it, there is little choice but to make a laborious, document-by-document review of the files involved.

With respect to the definition of "Magnavox" and "Sanders", the Federal Rules of Civil Procedure require at most that a party to an action supply in response to discovery request that information which is reasonably available to it. There is, for example, no requirement that they affirmatively seek information from parties to which they are not related or exercise no control over. Our objection to the definition was to the extent it might require either of plaintiffs to go beyond the requirements of the Federal Rules to obtain the requested information.

With respect to identification of the documents which are privileged or otherwise immune, it appears reasonable to us as a matter of our own convenience to locate and isolate such documents at the time we prepare for any production of other documents. After that is done, we can supply you with an identification in relatively short order.

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Our problem with the interrogatory portions requesting document identification relates primarily to ascertaining just what the scope of the interrogatory portion is. Those portions are apparently in each case merely appended to the end of the associated interrogatory. They are in most part largely duplicative of other subparts of the same interrogatory. However, in spite of our objection, unless objectionable on other grounds, in most cases the documents sought to be identified are among the documents which will be produced for your inspection and copying.

In a number of cases, plaintiffs objected to interrogatories seeking information on the '480 patent as premature. With Judge Henderson's denial of plaintiffs' motion to dismiss the second counterclaim and plaintiffs' request for reconsideration of that denial, the basis for that objection is removed. Unless objectionable for some other reason, plaintiffs will answer those interrogatories.

We look forward to meeting with you on Monday.

Very truly yours,

NEUMAN, WILLIAMS, ANDERSON & OLSON

By James T. Williams / sjm
James T. Williams

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CC: Robert P. Taylor, Esquire
Theodore W. Anderson, Esquire