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February 16, 1983

Via Express Mail to
Messrs. Anderson and Williams

Robert P. Taylor, Esq.
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P. O. Box 7880
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Theodore W. Anderson, Esq.
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Neuman, Williams, Anderson & Olson
77 West Washington Street
Chicago, IL 60602

Re: Magnavox et al. v. Activision, Inc.
Civil Action No. C 82 5270 TEH
Our File L-37324/TOH/ESW

Gentlemen:

We have received the unsigned and unverified copy of your response to our First Set of Interrogatories and your response to our First Request for Production, which were mailed to us with Jim Williams' letter dated February 7 to Tom Herbert. These papers did not arrive in our office until February 11, apparently due to the fact that the envelope in which they were sent was not marked as first class mail. To avoid problems of this type in the future, we would suggest that all future papers served between San Francisco and Chicago be sent by Express Mail or Federal Express.

We trust that the answers which you have provided to the interrogatories will be signed and verified, as required by Rule 33(a) of the Federal Rules of Civil Procedure, and forwarded to us shortly.

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You have failed to respond or to object to our Request for Production of Documents insofar as it requested production to be made at our offices in San Francisco on either the originally specified date of January 17, 1983 or the extended date of February 7, 1983. You have also failed to produce any of the documents as requested. By failing to make a timely objection, you have waived any objection to the requested time and place of production, and we therefore ask that you produce the documents in our office immediately. If you fail to do so, we will have no choice but to proceed with a motion for an order compelling discovery and for sanctions under Rule 37 of the Federal Rules of Civil Procedure.

Your responses to the interrogatories fail to comply with the requirements of Rule 33 of the Federal Rules of Civil Procedure, as set forth hereinafter in this letter. Unless complete and proper discovery is made on these matters, they will also be the subject of a motion under Rule 37.

The objection to the definitions of "Magnavox" and "Sanders" as attempting to impose an obligation to supply information beyond that required by the Federal Rules of Civil Procedure is not clear. Please clarify your position.

The introductory comments at the beginning of your responses to the interrogatories indicate that you intend to respond to certain of the interrogatories by producing documents from which the requested information may be derived or ascertained. However, under Rule 33(c) of the Federal Rules of Civil Procedure, the production of business records as an answer to an interrogatory is permitted only when the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. The Rule 33(c) procedure is not a proper response to interrogatories covering matters where Magnavox and/or Sanders has already collected the information requested, e.g. in one of the previous suits involving the same patents.

You have also failed to comply with the requirements of Rule 33(c) insofar as it requires the records from which an answer may be derived or ascertained to be specified in sufficient detail to permit the interrogating party to locate and to identify the records from which the answer may

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be ascertained. Please make this specification immediately, and produce the documents so identified with the other documents being produced in our offices in San Francisco.

The introduction to your response to the interrogatories indicates that documents which you contend are immune from discovery on grounds of attorney-client privilege or otherwise will be identified at or shortly after the time other documents are produced, whereas our interrogatories requested an immediate identification of such documents. You have given no reason for delaying the identification of such documents, and we therefore ask that the documents be identified immediately, as originally requested.

In responding to a number of the interrogatories, you have indicated that certain persons can be identified from documents to be produced, rather than identifying the persons as requested. This is not a proper response in instances where the identities of the persons are already known to Magnavox and/or Sanders, whereas it would be a substantial burden for defendant to try to find them in the records. Furthermore, we have no way of knowing that all of the persons who should be identified will be found in the documents which you eventually produce. The persons must be identified, and we ask that you do so without further delay.

You have objected to every interrogatory which requests the identification of documents as being vague and indefinite. The term "documents" is defined in the introduction to the interrogatories, and in each case the documents to be identified are those which refer or relate to the subject matter of a specific interrogatory. If you have any real doubt as to what we have asked you to identify, please let us know so that we can clarify the requests. Otherwise, the documents should be identified without further delay.

Your objection to Parts D and E of Interrogatory No. 2 as being not relevant or reasonably calculated to lead to the discovery of admissible evidence is not well founded. The communications and documents requested to be identified relate to the interests of plaintiffs in the patents in

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suit and other closely related patents, and this information could have a significant bearing on a number of issues in the case, e.g. ownership of the patents, standing to sue, and matters arising from Paragraphs 13-15 of defendant's Affirmative Defenses. It is therefore requested that the communications and documents be identified immediately.

You have failed to answer or object to Parts D through F of Interrogatory No. 4. Please let us have your answers to those parts immediately. Any objections have been waived by failure to make them in a timely manner.

Your objection to Interrogatory No. 9 and the limitation of your answer to the Re. '507 patent are not proper. The '480 patent is also in suit, and issues regarding the ownership of this and the other patents identified in response to Interrogatories Nos. 1 and 3 are raised by Paragraphs 13-15 of the Affirmative Defenses. Please complete this answer immediately.

In responding to Interrogatory No. 10, you have failed to specify the records from which the answer may be derived or ascertained, and we ask that these documents be identified immediately. You should also identify the persons and documents requested in Parts E and G of this interrogatory.

Your response to Parts A-C and E of Interrogatory No. 12 fails to comply with Rule 33(c) in that it does not specify the business records from which the answer may be derived or ascertained. Please identify these records immediately. You should also identify the persons and documents requested in Parts E and F of this interrogatory.

Your objection to Interrogatory No. 13 and the limitation of your answer to the Re. '507 patent are not proper. The '480 patent is also in suit, and issues regarding the ownership of this and the other patents identified in response to Interrogatories Nos. 1 and 3 are raised by Paragraphs 13-15 of the Affirmative Defenses. Please complete this answer immediately.

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To the extent that you have responded to Interrogatory No. 14, you have limited your response to the Re. '507 patent. Please complete the answer with regard to the '480 patent and the other patents identified in response to Interrogatories Nos. 1 and 3. To the extent that you have responded to Parts A-H and J of Interrogatory No. 14, you have once again failed to specify the records from which the answer may be derived or ascertained, and we ask that you provide this information immediately. You should also identify the persons and documents requested in Parts I and K of this interrogatory.

Your objection to Interrogatory No. 15 and the limitation of your answer to the Re. '507 patent are not proper. The '480 patent is also in suit, and the enforcement of the other patents identified in response to Interrogatories Nos. 1 and 3 is one of the issues raised by Paragraphs 13-15 of the Affirmative Defenses.

In responding to Parts A-F and H of Interrogatory No. 16, you have once again failed to specify the records from which the answer may be derived or ascertained. Please provide this information immediately. You should also identify the persons and documents requested in Parts G and I of this interrogatory.

Your objection to Interrogatory No. 17 and the limitation of your answer to the Re. '507 patent are not proper. The '480 patent is also in suit, and the enforcement of the other patents identified in response to Interrogatories Nos. 1 and 3 is also relevant to the issues raised by Paragraphs 13-15 of the Affirmative Defenses. In responding to Parts A-F of this interrogatory, you have failed to specify any records other than the Briody affidavit from which the answer may be derived or ascertained. You should also identify the persons and documents requested in Parts G and I of this interrogatory.

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Your suggestion that no answer is required to Interrogatories Nos. 18 and 19 is not understood. These interrogatories refer back to the answer to Part F of Interrogatory No. 17 which you have not as yet provided. Are you suggesting that the validity and/or enforceability of none of the patents identified in response to Interrogatories Nos. 1 and 3 has ever been challenged? We are entitled to know the grounds upon which the validity of the patents has been challenged, including the grounds of the greatest concern to Magnavox and Sanders. Please answer these interrogatories without further delay.

Your objections and partial response to Interrogatories Nos. 21 and 23 are not understood. Defendant is entitled to know the identity of plaintiffs, including the full corporate structures of both Magnavox and Sanders. You have not made any objection to providing this information other than its possible relevancy, and we ask that you complete your answers to these interrogatories at this time.

The objection which you have made to Interrogatory No. 24 is not understood. Please indicate the nature of the "further response" which you deem to be neither relevant nor reasonably calculated to lead to admissible evidence. Certainly you do not contend that the meaning of identical or substantially identical terms in patents related to the patent in suit is not relevant. Any evidence as to the meaning of the patent in suit is relevant.

The information sought by Interrogatory No. 26 is believed to be relevant to the issues raised by Paragraphs 13-15 of the Affirmative Defenses. Therefore, please answer this interrogatory and related Interrogatory No. 27.

The answer you have given to Interrogatory No. 28 is not responsive. The '480 patent is in suit, and it is certainly relevant whether Magnavox and Sanders admit that this patent has not been infringed by Activision. Please answer this interrogatory and related Interrogatory No. 29.

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Part D of Interrogatory No. 31 requests an identification of persons having knowledge of the finding of invalidity and/or unenforceability, and your statement that the finding was published in a publically available reporter series is in no way responsive to this interrogatory. Please identify the persons. Since the Re. '598 patent is one of a group which Magnavox and/or Sanders have in the past licensed or asserted in combination with the patents in suit, communications relating to the invalidity or unenforceability of the Re. '598 patent are relevant to this case. Therefore, we think that you should answer Part E of Interrogatory No. 31. The documents requested in Part F of this interrogatory should also be identified.

Interrogatories Nos. 32-37 pertain to the validity and enforceability of the two patents in suit and the other related patents identified in response to Interrogatories Nos. 1 and 3. They also cover knowledge or notice on the part of Magnavox and Sanders as to possible invalidity and unenforceability of the patents. There is no doubt that these matters are relevant and that Interrogatories Nos. 32-37 should be answered.

In your response to Part E of Interrogatory No. 39, it seems strange that only plaintiffs' counsel would have knowledge of the allegedly infringing activities of Activision, particularly when your response to Part B refers to personnel of plaintiffs who first became aware of such activities in early 1981 and to other personnel who may have had earlier knowledge. These persons should be identified, as should the documents requested in Part G.

Interrogatories Nos. 40-41 seek information which is directly relevant to the issue of infringement of the Re. '507 patent. By refusing to identify the noninfringing games, plaintiffs are forcing defendant to take discovery and prepare its case with regard to a number of games which may not actually be in issue. Therefore, it is requested that plaintiffs make at least a tentative identification of the games which they deem not to infringe at this time, subject to revision upon the availability of additional information leading to a different conclusion. Defendant is also entitled to know why these games are not deemed to infringe.

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Interrogatories Nos. 42 and 43 relate to the examination or investigation of the allegedly infringing products by plaintiffs. Your responses seem to indicate that only plaintiffs' counsel participated in such examinations or investigations. If any other persons, e.g. management or technical, were involved, they should be identified. Even though attorneys may have been involved, the information sought is in the nature of facts, not the type of privileged communications or trial preparations which are protected. Therefore, these interrogatories should be answered. The objection based on relevancy seems clearly out of order. Defendant is entitled to know whether plaintiffs' charge of infringement is based on a merely superficial examination or a thorough examination.

Part C of Interrogatory No. 45 requests an identification of all persons having knowledge of the activities of Activision which you contend constitute infringement of the Re. '507 patent. To the extent that all such persons are not identified in the documents which you have indicated will be produced, those persons should be identified at this time, including the Atari representatives mentioned in your response to Part B of this interrogatory. The documents requested in Part E of this interrogatory should also be identified.

Your response to Parts E and F of Interrogatory No. 46 indicates that it is virtually impossible to identify all of the persons and all of the communications requested to be identified. You should identify those persons and communications which can be identified at this time, supplementing your answer later, if necessary. The documents requested in Part E of this interrogatory should also be identified.

Your response to Part A of Interrogatory No. 47 is not complete in that it does not give the names, addresses, telephone numbers and relationship to plaintiffs of the persons who placed the game cartridges into a game console. Your response to Parts D-G of this interrogatory is in reality only a response to Part D. Please respond to the complete interrogatory.

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Interrogatory No. 48 asks whether plaintiffs contend that any of defendant's game cartridges constitutes an infringing structure, i.e. is covered by the claims of one or more of the patents. With this clarification, we trust that you will answer the interrogatory. The limitation of your answer to the Re. '507 patent is not warranted. The '480 patent is also in suit, and the information sought with regard to the remaining patents is relevant at least to the issues raised by Paragraphs 13-15 of the Affirmative Defenses. Related Interrogatory No. 49 should also be answered fully.

Interrogatory No. 55 requests the identification of persons having certain knowledge, and the identity of those persons should already be known to Magnavox and Sanders. Therefore, it is not proper to suggest that defendant try to obtain this information from business records to be produced. Please identify the persons at this time.

The documents requested in Interrogatory No. 57 should be identified.

In objecting to Parts F and G of Interrogatory No. 58, you have only objected to the identity of persons having knowledge of the information and communications set forth in response to Parts A through E. Defendant is entitled to pursue the basis of this information further, and two of the best ways of doing so are through persons having knowledge of the facts and by review of the communications relating thereto. Therefore, the persons and the communications should be identified. The documents requested in Part H of this interrogatory should also be identified.

In response to Part E of Interrogatory No. 59, you have indicated that F. Eugene Simerly is believed to have the specified knowledge. Please complete the answer to this part of the interrogatory, including Mr. Simerly's address, telephone and relationship, if any, to plaintiffs. In addition, all other persons having such knowledge should also be identified. The documents requested in Part G of this interrogatory should also be identified.

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With regard to Part B of Interrogatory No. 60, you should identify the persons having the specified knowledge, rather than suggesting that their identity can be determined from the documents to be produced. Presumably, the identity of these persons is already known to Magnavox and Sanders, and it would be a far greater burden for defendant to have to try to ascertain this information from the documents. The documents requested in Part D of this interrogatory should also be identified.

Contrary to your suggestion, Interrogatory No. 62 does require a response. Taken with your answer to Interrogatory No. 61, this interrogatory relates to the disclaimer of the claims of the Re. '598 patent, and the questions asked in this regard are not the same as the questions asked in Interrogatory No. 31.

Your answers to Interrogatories Nos. 3 and 63 seem to indicate that Magnavox has attempted to license all of the Sanders patents under which Magnavox itself is licensed. Please confirm this understanding, if correct. The identity of the parties to whom Magnavox has attempted to license the patents should be known to Magnavox, and this information can undoubtedly be provided by Magnavox much more easily than it can be derived by defendant from the records to be produced. Therefore, it is not a sufficient answer to Part B of Interrogatory No. 63 to simply produce the records. Likewise, the identity of the persons having knowledge of the licensing attempts is known to Magnavox and should be set forth in response to Part F of the interrogatory, rather than by reference to the business records. The documents requested in Part H of this interrogatory should also be identified.

Your response to Interrogatory No. 64 is not responsive to the interrogatory which, in effect, asks whether plaintiffs contend that the use of an Activision cartridge in a licensed console constitutes an infringement. There is nothing of record at this time which would indicate what, if any, consoles are licensed. It, therefore, appears that Interrogatory No. 64 and related Interrogatory No. 65 require further consideration and response.

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With regard to Part D of Interrogatory No. 67, the identity of the persons having knowledge of commercial success is presumably known to plaintiffs, whereas it would be a substantial burden for defendant to try to obtain this information from plaintiffs' records. Therefore, the persons should be identified directly, rather than by reference to business records. The documents requested in Part F of this interrogatory should also be identified.

Part E of Interrogatory No. 69 requests the identification of documents relating to the existence and determination of the long-felt need satisfied by the subject matter claimed in the Re. '507 patent. If you have any real doubt as to the documents to be identified, please let us know. Otherwise, please identify the documents without further delay.

Parts C and D of Interrogatory No. 71 are not properly answered by reference to business records. Your response to this interrogatory is limited to Sanders personnel, and the information requested has probably already been compiled in connection with one of the previous suits involving the Re. '507 patent. Therefore, the information is much more readily available to plaintiffs than it is to defendant, and it should be provided by direct answer, not by reference to business records. The persons to be identified in response to Part E of Interrogatory No. 71 are presumably known to plaintiffs and should, therefore, be identified, rather than putting defendant to the burden of trying to ascertain the information from plaintiffs' records. The documents requested in Part G of this interrogatory should also be identified.

Except for Activision, your response to Interrogatory No. 73 appears to be limited to licensees of plaintiffs, whereas the interrogatory itself is not so limited. Also, most of the information requested in Interrogatory No. 73 is already known to plaintiffs and can, therefore, be provided by them far more easily than it can be ascertained by defendant from plaintiffs' records. Likewise, the identity of the persons to be identified in response to Part I is presumably known to plaintiffs, and these persons should be identified. The documents requested in Part K of this interrogatory should also be identified.

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The tennis game identified in Part E of Interrogatory No. 74 is described in the enclosed article from Video & Arcade Games, Volume 1, No. 1, Spring 1983. We trust that you are already familiar with this game not only from your prior litigation but also from your response to Interrogatory No. 81. You may wish to supplement your responses to Interrogatories Nos. 74 and 75.

With regard to Interrogatory No. 76, even though this particular case is in the early stages of discovery, the prior art identified is already known to plaintiffs and has undoubtedly been considered by them in previous litigation. It is hard to believe that plaintiffs have not formulated a position as to how the claims define patentable subject matter over this art. The Spacewar game at MIT is described in the Decus publication, and the Spacewar game at Stanford was personally observed by Jim Williams. Under these circumstances, it is ludicrous for you to claim that you do not know what these games are. We, therefore, think that Interrogatory No. 76 should be answered at this time, subject to revision in the event that you subsequently become aware of additional information which would alter your answer.

Interrogatory No. 77 seeks identification of documents relating to certain references and prior art. These documents are believed to be relevant to the validity of the patents in suit and should be identified at this time.

Interrogatory No. 78 is concerned with the identification of persons having knowledge of certain references and prior art which are believed to have a direct bearing on the validity of the claims of the patents in suit. The identity of these persons is also relevant in that it relates to the knowledge of prior art by Magnavox and Sanders. Please identify these persons without further delay.

Please complete the identification of the television game of cricket which is mentioned in your response to Part B of Interrogatory No. 80.

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Regarding your response to Interrogatory No. 81, the dates the prior art identified in response to Interrogatory No. 74 became known to Magnavox and Sanders is relevant to the question of whether Magnavox and/or Sanders had a duty of disclosure of this prior art to the Patent Office regardless of whether the Patent Office eventually located and cited the specific art. These dates may also have a bearing on the good faith of Magnavox and Sanders in bringing the present action and other actions for infringement of the Re. '507 patent. We note that you have answered Interrogatory No. 81 with regard to the Higinbotham tennis game which you professed not to be able to identify in response to Interrogatories Nos. 74 and 75.

The information sought by Interrogatories Nos. 84-87 is relevant to the issue of infringement, and defendant is entitled to know whether plaintiffs consider disappearance or a change in color to constitute imparting a distinct motion within the meaning of Claim 51, which is one of the claims identified in response to Interrogatory No. 38 as being infringed. It is not necessary to consider a complete game in order to answer these interrogatories.

Please identify the "other counsel" mentioned in your response to Part B of Interrogatory No. 98, and please identify the "counsel for Sanders" mentioned in response to Part C of this interrogatory. Part D of Interrogatory No. 98 seeks a description of the circumstances under which the decision to reissue the '284 patent was made. If you really do not understand what is requested, please let us know what is not clear to you so that we can clarify it. Otherwise, please answer the interrogatory. Please identify the "counsel for Sanders" mentioned in response to Part E of Interrogatory No. 98. The documents requested in Part G of this interrogatory should also be identified.

Please identify the "Counsel for Sanders" mentioned in response to Parts A and D of Interrogatory No. 99. The documents requested in Part G of this interrogatory should also be identified.

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Please identify the "Counsel for Sanders" mentioned in response to Part A of Interrogatory No. 100. The word "during" was omitted after "considered" in line 3 of Part E of Interrogatory No. 100. Please respond to this part with this clarification. Please identify the "Counsel for Sanders" mentioned in response to Part F of Interrogatory No. 100. Your answer to Part G of Interrogatory No. 100 is not responsive. Please identify the communications as requested. The documents requested in Part H of this interrogatory should also be identified.

Interrogatories Nos. 101-104 relate to the prior art considered by the Examiner in the examination of the application leading to the Re. '507 patent. From your response to Interrogatory No. 101 and others, it appears that you may wish to raise an issue as to whether the subject matter of the '480 patent is prior art. The mere raising of the issue does not, however, provide a basis for refusing to answer Interrogatories Nos. 101-104, and we want you to answer these interrogatories.

Interrogatories Nos. 105-116 relate to the Spacewar game which Jim Williams observed at Stanford. As you are well aware, this particular Spacewar game is of particular interest because it was known to one of the attorneys who participated in the preparation, filing and/or prosecution of the application which led to the Re. '507 patent. This information is clearly relevant to the issue of validity, notwithstanding the Spacewar game(s) considered by Judge Grady and/or Judge Leighton. Moreover, defendant is entitled to know what prior art was considered by the Examiner. Please answer Interrogatories Nos. 105-116 immediately.

We assume that your objection to Interrogatories Nos. 117-123 as being irrelevant was based upon the hope that you would be successful on your motion to dismiss the counterclaim regarding the '480 patent. Since the '480 patent was in suit at the time the interrogatories were asked and answered, these interrogatories should have been answered. Now that your motion has been denied, we trust that the answers will be forthcoming without further delay.

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Interrogatories Nos. 124 and 125 are directed to the identification of persons and documents relied upon in the preparation of your responses to the interrogatories. The identification of the persons is relevant in the event that we wish to take further discovery, e.g. by deposition, with regard to the matters raised in your responses to the other interrogatories. The identification of the documents relied upon is likewise relevant, and production of these documents has been requested.

As you may know, Local Rule 230-4(a) requires counsel to meet and confer concerning all disputed issues before bringing a motion under Rule 37 of the Federal Rules of Civil Procedure. In the event that we have not received complete responses to all of the interrogatories discussed in this letter by Friday, February 25, I suggest that we meet on that date after the deposition of Mr. Paul. Such a face-to-face meeting would certainly be preferable to a telephone conference and, since you will already be here for the deposition, it is probably a convenient time for you.

Very truly yours,

FLEHR, HOHBACH, TEST,
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Edward S. Wright

ESW:kb
Enclosure
cc: Mr. James Levy
Michael A. Ladra, Esq.
Thomas O. Herbert, Esq.