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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE MAGNAVOX COMPANY, a corporation, and SANDERS ASSOCIATES, INC., a corporation, Plaintiffs, vs. ACTIVISION, INC., a corporation, Defendant. AND RELATED CROSS-ACTION.	No. C 82 5270 CAL MEMORANDUM OF ACTIVISION, INC. IN OPPOSITION TO MAGNAVOX' MOTION FOR RECONSIDERATION OF THE ORDER RE FURTHER PROCEEDINGS OF MARCH 13, 1986 AND AMENDMENT OF JUDGMENT

MEMORANDUM OF ACTIVISION IN OPPOSITION TO MAGNAVOX' MOTION FOR RECONSIDERATION OF THE ORDER AND AMENDMENT OF JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

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INTRODUCTION

On March 13, 1986, this Court entered a final judgment stating explicitly that this action is "final except for the accounting and award of damages." By Order dated March 13, 1986, this Court stayed "further proceedings in this action . . . pending the outcome of defendant's interlocutory appeal to the Court of Appeals for the Federal Circuit." In the same Order, the Court also "denied" Plaintiffs' request for injunctive relief, on the ground that the "present record does not support the necessity or appropriateness of injunctive relief." The denial of an injunction was "without prejudice" to Magnavox' "raising the issue of injunctive relief during the further proceedings in this case."

Magnavox has now filed a meritless motion for reconsideration of the Court's order denying it injunctive relief, and an amendment of judgment to that effect. Magnavox raises absolutely no new legal theory or any evidence as to why the Court erred in denying it injunctive relief. As we set forth below, Magnavox' additional "argument"--that the denial of injunctive relief affects its relations with potential licensees--is not supported by any evidence. In fact, Magnavox seriously misrepresents to this Court the effect of its denial of injunctive relief on a now pending action on the '507 patent in New York. Magnavox' argument that the Court's denial of an injunction somehow prevents the parties from taking an interlocutory appeal pursuant to 28 U.S.C. Section 1292(c)(2) is completely without support as a matter of law or fact. This Court already has found that this action is final except for an

accounting, and this Court need not reverse its ruling on the injunction to allow an appeal to go forward.

The filing of Magnavox' motion to reconsider and for amendment of judgment serves only to further extend the date when an interlocutory appeal can be taken to the Federal Circuit.[1/] Activision respectfully requests therefore that the Court dispense with oral argument on this meritless motion, and decide this matter promptly, so that Activision can proceed to take its interlocutory appeal.

HOWARD RICE NEMEROVSKI CANADY ROBERTSON & FALK
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I.

MAGNAVOX HAS FAILED TO COME FORWARD WITH ANY NEW LEGAL THEORY OR ANY EVIDENCE TO WARRANT THE COURT'S REVERSAL OF ITS ORDER DENYING AN INJUNCTION.

As this Court found in its Order dated March 13, 1986, "the present record does not support the necessity or appropriateness of injunctive relief." In its motion for reconsideration of this ruling, Magnavox has failed to come forward with any evidence (let alone any new evidence) or new legal theory to warrant the

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1/ Pursuant to Federal Rule of Appellate Procedure 4(a)(4), "a notice of appeal filed before the disposition [of a motion to alter or amend judgment] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Thus, the filing of Magnavox' motion renders Activision's notice of appeal to the Federal Circuit--refiled by Activision after this Court issued its formal Judgment--a nullity.

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imposition of an injunction. As if repeating the same arguments will somehow make the Court change its mind, Magnavox has done no more than to rehash arguments already considered and rejected by this Court.

As Activision set forth in its earlier oppositions to Magnavox' arguments, Magnavox utterly has failed to demonstrate the necessity of an injunction pending the outcome of Activision's interlocutory appeal.[2/] Magnavox cannot deny the critical factors strongly militating against an injunction and which clearly underlie the Court's reasoning in denying injunctive relief: (i) injunctions in patent cases are discretionary (see 35 U.S.C. §283); (ii) Magnavox presented no evidence at trial or the status conference or in its subsequent reply memorandum to support the exercise of the Court's discretion to enter an injunction; and (iii) Activision has demonstrated its good faith by offering to escrow amounts to cover the royalties on any of its sales of obsolete inventory.[3/]

Magnavox' attempt to drum up a reason for the Court to reverse its ruling--the effect of this Court's denial of an

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2/ Activision will not restate its objections to the necessity, form and content of injunctive relief, and respectfully requests that the Court refer to its Memorandum in Opposition to Motion to Strike Notice of Appeal and for Entry of Conclusions of Law and Judgment dated January 29, 1986 and its Supplemental Memorandum in Opposition to Entry of Injunction dated February 20, 1986, where those arguments are set forth in their entirety.

3/ The proposed injunction re-submitted by Magnavox in its proposed order is identical to the language this Court rejected when it denied Magnavox an injunction on March 13, 1986.

injunction on another pending case--is based on a complete mis-characterization. In the pending case of Nintendo of America, Inc. v. The Magnavox Co., 86 Civ. 1606 (S.D.N.Y.), plaintiff Nintendo (not Magnavox) filed an action for declaratory relief that the '507 patent is invalid and that Nintendo does not infringe. Magnavox sought--and the court denied--Magnavox' request for a preliminary injunction before trial. At the hearing on that motion held on March 20, 1986, Magnavox' counsel never got to the "merits" of his argument; instead he virtually conceded at the oral argument that a preliminary injunction could be dispensed with when the judge proposed to combine the motion for an injunction with a trial on the merits. (A copy of the transcript of the Nintendo hearing is attached as Exhibit A hereto.)

In short, Magnavox has come up with absolutely no new legal theory or any factual support for an injunction against Activision, and its motion to reconsider (and amend judgment) should be denied.

II.

AS STATED IN THIS COURT'S JUDGMENT, THIS ACTION IS "FINAL EXCEPT FOR THE ACCOUNTING AND AWARD OF DAMAGES," AND THUS APPEALABLE UNDER 28 U.S.C. SECTION 1292(c)(2).

Magnavox' belated contention that the Court's denial of an injunction makes this action somehow not final for purposes of an appeal under 28 U.S.C. Section 1292(c)(2) is predicated on a mis-statement of the facts and the law. First, Magnavox' entire

position on this point conveniently ignores the fact that this Court has now entered a final judgment--at Magnavox' request--which states explicitly that this action is "final except for the accounting and award of damages." There is no ambiguity in the record on this point. Second, although Magnavox may disagree with the decision, the Court has made a "final determination": it has denied Magnavox an injunction. The Court will, however, permit Magnavox to raise the issue, if necessary, after the interlocutory appeal when the District Court once again obtains jurisdiction over this case.

Magnavox can point to absolutely no authority for its position that this action is not now appealable under Section 1292(c)(2). The cases it does cite are so far removed from the facts and principles at issue here as to serve only to emphasize the lack of merit of Magnavox' contention.

For example, Magnavox cites as authority (without any explanation or elaboration) Stamicarbon, N.V. v. Escambia Chemical Corp., 430 F.2d 920 (5th Cir.), cert. denied, 400 U.S. 944 (1970), a case entirely irrelevant to this action. In Stamicarbon, an appellant-defendant took the extraordinary position that the order it had appealed from was in fact not an appealable order under Section 1292(a)(4) (the predecessor to the current patent interlocutory appeal statute) because, among other reasons, the district court had failed to act explicitly on plaintiff's request for injunctive relief. Appellant took the position that this "lack of action coupled with an erroneous finding--based upon a stipulation--could lead to ambiguities that would becloud" the

holding of the court. Id. at 930. The Stamicarbon court adopted a "pragmatic approach to the denial of the requested injunction" and disposed of appellant's arguments. Id. at 931. The court ruled that the lower court had apparently made either a "mere oversight" or "error" in entering a finding which incorrectly used the present tense (rather than past tense) and which thus seemed to imply continuing infringement. In fact, the parties had stipulated to no infringement after a certain date, and plaintiff had introduced no such further evidence of infringement at trial. The appellate court corrected the misstated finding of fact to reflect the parties' stipulation and thus, no finding of continuing infringement. Noting that it was "in the district court's discretion to grant an injunction against continuing infringement," the appellate court determined that "[i]n the absence of a finding of continuing infringement, we therefore assume that the district court had nothing on which to base the grant of an injunction and, sub silentio, denied it." Id. at 931.

Here, of course, an appellate court need not divine the Court's intent, since this intent was made manifestly clear when the Court denied Magnavox' request for injunctive relief at this time. Moreover, the Court's ruling in this action is based on the explicit statement that there is nothing in the record on which to base an injunction.

Similarly, Magnavox' recitation to precedents interpreting 28 U.S.C. Section 1292(a)(1)--the special statute governing interlocutory appeals from orders regarding "granting, continuing,

modifying, refusing or dissolving injunctions"--is nothing more than a procedural sleight of hand to confuse the issue, and totally beside the point.[4/] A brief description of the facts of the cases cited by Magnavox once again belies their relevance to this case.

For example, in Switzerland Cheese Association, Inc. v. Horne's Market, Inc., 385 U.S. 23 (1966), the Supreme Court held that the denial of a summary judgment because of the existence of disputed material facts in a trademark action seeking damages and a permanent injunction was not an appealable order under Section 1292(a)(1). The Court reasoned that the order was "strictly a pretrial order" that did not go to the merits of the claim, and as such was not "'interlocutory' within the meaning of §1292(a)(1)." Id. at 25. Clearly, neither the facts nor statute at issue in Switzerland Cheese bear any relevance to this action.

Equally irrelevant is Magnavox' citation to Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1984), in which a district judge's refusal to approve a consent decree (which would have contained a

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4/ In fact, the dissimilarity between Section 1292(a)(1) governing appeals from orders regarding injunctions, and Section 1292(c)(2) regarding interlocutory appeals in patent cases was emphasized by the court in another case cited by Magnavox as authority for an unrelated proposition--American Cyanamid Co. v. Lincoln Laboratories, Inc., 403 F.2d 486 (7th Cir. 1968). Moreover, in American Cyanamid, unlike the instant case, a party sought to appeal a finding of patent validity and infringement while there remained to be decided substantial unadjudicated issues of unfair competition, antitrust violations, and intervening patent rights. Under those circumstances, the action was not final except for an accounting and thus was not yet appealable under Section 1292(c)(2).

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permanent injunction) in an action brought by the Department of Labor against the Teamsters Union employee benefit funds was deemed appealable under Section 1292(a)(1). In Donovan, the court reasoned that the district judge's action had "enough of the practical consequences of denying a preliminary injunction" to allow interlocutory appeal. Id. at 1176. Here again, neither the facts nor the statute at issue in Donovan have the remotest connection to this case.

CONCLUSION

Magnavox has established no new legal theory or come forward with any evidence whatsoever to warrant this Court reversing its order denying injunctive relief. Under these circumstances, Activision respectfully urges that the Court dispense with oral argument on this meritless motion and, to that end, enter the order in the form submitted with this brief. See Fed. R. Civ. P. 78 (court may make provision for determination of motions without oral

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hearing). Magnavox' motion for reconsideration and for amendment of judgment should be denied in its entirety.

DATED: April 11, 1986.

MARTIN R. GLICK
H. JOSEPH ESCHER III
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041186/6-355900Jm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NINTENDO OF AMERICA, INC.,

Plaintiff,

v. 86 Civ. 1606 LBS

THE MAGNAVOX COMPANY and
SANDERS ASSOCIATES, INC.,

Defendants.

----------x

March 20, 1986
2:15 o'clock p.m.

Before:

HON. LEONARD B. SAND,

District Judge

APPEARANCES

MUDGE, ROSE, GUTHRIE, ALEXANDER & FERDON
BY: JOHN J. KIRBY,
SHELLEY B. O'NEILL and RICHARD H. STERN,
Attorneys for plaintiff

FITZPATRICK, CELLA, HARPER & SCINTO
BY: JOHN THOMAS CELLA,
- and-
NEUMAN, WILLIAMS, ANDERSON & OLSON
BY: THEODORE W. ANDERSON and JAMES J.WILLIAMS,
Illinois Bar
Admitted pro hac vice
Attorneys for defendant

EXHIBIT A

(Case called)

(In open court)

THE COURT: I have read the briefs and the affidavits, except for I haven't read all of the reply affidavits. I have read most of them.

Who speaks for the movant?

MR. CELLA: If the court please, my name is John Thomas Cella, from the firm of Fitzpatrick, Cella, Harper & Scinto, attorney of record for defendants.

I would like, if I may, to introduce Messrs. Theodore Anderson and James Williams, from the firm of Neuman, Williams, Anderson & Olson, Chicago, and respectfully move their admission to the bar of this Court for the purpose of this case.

THE COURT: I take is there is no objection?

MR. KIRBY: No, your Honor, there isn't.

THE COURT: Your motion is granted.

MR. ANDERSON: May it please the court, this, as you know from the briefs, is a motion for a preliminary injunction to prevent the infringement of the 507 patent, which is a patent that was filed in 1969 and issued in 1972 to a basic TV game concept and invention.

The actual patent is Tab B to Professor Ribbens' affidavit, and it relates generally to a unique combination of elements which enables one to play on an ordinary

television set or a monitor games involving a human player manipulating a device to move a symbol about, often called the hitting symbol, observable on a screen, and to cause that symbol, when it comes into a coincident condition with another machine-controlled symbol, often called the hit symbol, to cause the hit symbol to take on a motion, or as the claim says, to impart a motion, a distinct motion, to that hit symbol.

The 507 patent, as the prior decisions have stated, literally created the television game industry. It is a little hard to put one's self back into 1970, but, of course, at that time the only use for television sets was to sit in front of them and watch them.

The inventors at Sanders who came up with several inventions, including this one, changed all of that and --

THE COURT: What will the difference be between preliminary injunction and the trial on the merits? What will remain to be decided?

MR. ANDERSON: Your Honor, I think in the preliminary injunction we only have to establish a likelihood of success. If the patent -- Nintendo so saw fit not to pursue it further or settle, nothing would be left. If they wish to contend either their devices don't infringe for some reason -- and I would like to go into

that -- or the patent is invalid, there will be something left to try perhaps.

I might say that the devices that Nintendo makes are virtually identical and have been adjudicated. They even use the same microprocessor type, the 6502 type.

THE COURT: After the motion for preliminary injunction is granted or denied, between that time and the time of trial on the merits, would there be discovery to be conducted or anything else?

MR. ANDERSON: There would be some discovery to be conducted, I presume.

THE COURT: How soon would you be ready to try the case on the merits?

MR. ANDERSON: I think we could be ready to try the case on the merits by summer and maybe earlier, but I think I have to say by summer, July, August, because we would have to get confirmation of some of the things that we have asserted based on our analysis of their circuits and their instructions and things they have given us, but I think that could be done fairly expeditiously.

THE COURT: The thought that I had as I read through these submissions was that this was perhaps a prime candidate for the invocation of the power which the court has under the rule to combine the motion for a preliminary injunction with a trial on the merits and put the case down

for trial on the merits almost as soon as the parties say they would be ready for that trial, and it seems to me there would be very -- there are obviously many issues that are raised.

I am satisfied counsel haven't created this bulk of documents without good cause, but why isn't that an appropriate procedure?

MR. ANDERSON: Your Honor, I think the status quo is that the new home entertainment system that they're just introducing is just being introduced into the marketplace, and they're apparently planning a major campaign.

The video game industry, as they say -- and I have some reports -- indicate it has really turned around. It bottomed out about a year ago. It is now on the rise. We have other licensees, potential licensees --

THE COURT: All of that may argue for expedition, but you have been corresponding about this matter for several years, you haven't sought preliminary injunction in any of the other cases that you're relying on. You're engaging only in licensing, so it isn't a question of your inability to prove loss of profits.

I understand the need for expeditious treatment, but if we put this case down for trial early in the fall and combine the two, it seems to me that that might really be a happy resolution in terms of -- oh, you eliminate many

of the issues which otherwise one struggles over, whether there is irreparable harm and things of that sort.

Why doesn't that commend itself?

MR. ANDERSON: Certainly that is an approach and a solution. I think from our perspective, we would like to see the interim protection, but I guess I would hear what Mr. Kirby has to say about that.

MR. KIRBY: Your Honor, I think that your suggestion is appropriate. I have done my best to review what our needs would be in terms of preparing for trial, and I think, your Honor, we can be ready for trial in the early fall.

I make one assumption there, and that is that we have discovery demands ready to be served which we will serve tomorrow. I will make one blanket discovery request which I assume will give the defendants no problem, and that is that they make available to us all discovery produced in the prior actions.

I have obtained a great deal of that by talking to defendants in the prior actions, but I really need to make sure I have the universe.

We would then go on to redepose, where necessary, and where the depositions were adequate, we could rest on them. I think we would be able to try the case, your Honor -- if you set it down for the 1st of October, we would be

ready to try the case at that time.

THE COURT: What is the timetable on the case now on appeal? Has that been argued or is that in the early stages?

MR. KIRBY: Your Honor, it is in the very early stages. My understanding is that now, as we furnish to the court the conclusions of law and order that were issued just really a few days ago, Activision had filed a notice of appeal, and controversy then ensued as to whether or not that notice of appeal was proper.

As I understand it now, they are proceeding on that notice of appeal, but my guess is, your Honor, that that would not be argued before early summer at the earliest.

Is that correct, Mr. Anderson?

MR. ANDERSON: Yes, your Honor, Activision has filed an amended notice of appeal this week, now that the judgment has been entered and we have the usual time to designate counterappeal and they have the usual briefing period. Usually the federal circuit is very reluctant to grant extensions or any significant extensions, so I think it will move as fast as an appeal can move.

THE COURT: What fiscal problems do you see, assuming we try this in early October?

MR. ANDERSON: If we tried it in early October,

it would have been argued by then, and as Mr. Kirby suggests, perhaps not decided. The court also prides itself on the speed with which it decides cases. I have one I wrote in October and I don't have a decision yet.

THE COURT: What is the first Monday in October?

THE CLERK: October 6, your Honor.

MR. ANDERSON: That will be fine, your Honor.

MR. KIRBY: Thank you, your Honor.

THE COURT: Let's talk about some other things. We'll put it down October 6 for trial.

MR. ANDERSON: Your Honor, I have a longstanding committment to take a vacation in Kenya, but I think it is after that. I don't know the date off the top of my head. It depends on how long this trial will be.

THE COURT: That was my next question, whether anybody would venture an estimate as to that.

MR. KIRBY: Your Honor, I think that Mr. Anderson, who has tried what he says is the same case three times before, may have --

THE COURT: Does it get longer or shorter?

MR. KIRBY: -- he may have a better estimate of his case. My guess, your Honor, is that it would take approximately a week to put on the plaintiff's case here.

Of course, your Honor is going to have to make some determination -- I assume there will be a pretrial and

we'll discuss who will go first. We have moved for declaratory judgment, but we have those issues, but I think --

THE COURT: We'll work that all out. We don't have to worry about a jury.

MR. KIRBY: Your Honor, we have requested a jury.

Now, your Honor, I think that we ought to stick to the trial date that your Honor sets, subject, of course, if we know the Federal Circuit is going to come down in another week, your Honor and, indeed, we might want to know what they say.

THE COURT: I have to tell you something about the nature of our docket. We have a very heavy proportion of our time that is devoted to criminal matters, and Congress, in its wisdom, has enacted the Speedy Trial Rule, so that I can give you a firm day for a nonjury matter because if the worst happens, we would try that from 4:30 to 7:30 or later each day, I would just split the day in some fashion.

We have obviously less flexibility with a jury. We can't keep jurors in the evening.

So that I am not trying to talk anyone out of a jury. I haven't tried a patent case to a jury. It would be an interesting experience, but it just creates another element of uncertainty in terms of the calendar.

MR. KIRBY: Your Honor, I obviously could not,

standing here, tell you that we would be prepared at this time ever to waive a jury, but certainly, your Honor, that is something that we would keep for us and remembering, of course, what your Honor said about the docket and when the case could be tried.

Obviously, we are anxious to have it tried, too.

THE COURT: All right. So that you think the plaintiff's case is a week and defendant's case would be --

MR. ANDERSON: Your Honor, in my experience, a jury trial in a patent matter at least is usually twice as long for the same subject matter as for a nonjury trial, so it would heavily depend on that.

I think in the last Activision case in California, we put our case on in four days, I believe. I would think that would be appropriate at this time.

I would also suggest, your Honor, that the patentee in most cases goes first even in declaratory judgment cases.

THE COURT: Let's not argue that now, but I will tell you when it will be appropriate to argue that.

If we are going to go to trial on October 6, then I am assuming it is a jury case, I would like any non-standard voir dire -- I am working backwards now -- any non-standard voir dire requests and requests to charge two weeks prior to that. I don't have a calendar in front of

me, Danny.

MR. ANDERSON: That will be the 22nd, your Honor.

THE COURT: That is September 22nd?

Okay. Thank you. Two weeks before that, which would be September 8, I would like a pretrial order, and my clerk will give you a copy of my pretrial order form, and it is in that document -- or in your submissions together with that document -- that you can address the question of sequence of proof.

Then going back two weeks earlier from that date to August 25 is a cut-off date for all discovery, and the trial, of course, will be on preliminary injunction and on the merits.

All right. Now, I would like to be advised as soon as the decision has been made whether the case will proceed as a jury or nonjury case. That affects the size of panels that we bring in as well as calendar and other considerations.

MR. ANDERSON: Again, in patent cases before the bench, generally it is bifurcated, liability is decided first and damages. In jury trials, it is normally the other way.

I presume, then, that would perhaps be contingent on Nintendo's decision.

What is the Court's pleasure?

THE COURT: If it is nonjury, I think we would clearly bifurcate it; if it is before a jury, then we have sometimes bifurcated. Some districts -- Denver, I am told they bifurcate everything. They never try damages. Once liability is decided, the parties resolve it. That also should be addressed in connection with the pretrial order.

Now, I have a feeling that, having done all of this, I have deprived myself of the opportunity of seeing whatever it is you were going to show me on that video machine?

MR. ANDERSON: Your Honor, we would be happy to put on the show anyway. What we were going to show the court is Nintendo's game tennis and explain a bit about how it is done, what the mechanism is in it that does it and then show the court Activision's game tennis which was held to be an infringement and explain a little bit, as in the affidavit and the briefs, of how it is accomplished inside the mechanism.

THE COURT: I am sure that would be fascinating. If you don't feel terribly deprived and whoever it is who had the task of bringing that down and setting it up would not feel terribly deprived, I think maybe I can wait for the fall for that.

MR. ANDERSON: All right.

THE COURT: Is there anything else then?

I don't think there is any need for an order because I see there has been a reporter, so there is a transcript of all of this.

MR. KIRBY: Your Honor, I have nothing more other than to make clear that I was not just engaging in colloquy. I would like to have the discovery from the other cases, and then we will move rapidly forward.

I assume there is no objection to furnishing us what Magnavox handed over to the other three defendants.

MR. ANDERSON: I don't think that presents any problem. There were protective orders in every case, your Honor, so we may have trouble with the other side's documents and evidence. I certainly will cooperate with Mr. Kirby in every way that I can do within the limits and constraints that I am under.

MR. KIRBY: I am sure we'll work it out.

Your Honor, we have nothing else. Thank you.

THE COURT: Thank you.

(Court adjourned)

DECLARATION OF SERVICE

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 April 11, 1986, I served

MEMORANDUM OF ACTIVISION, INC IN OPPOSITION TO MAGNAVOX' MOTION FOR RECONSIDERATION OF THE ORDER RE FURTHER PROCEEDINGS OF MARCH 13, 1986 AND AMENDMENT OF JUDGMENT, [Proposed] ORDER DENYING SAME.

by causing to have a true copy hand-delivered to:

Robert L. Ebe, Esq.
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3 Embarcadero Center, 28th Floor
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HOWARD RICE NEMEROVSKI CANADY ROBERTSON & FALK
Professional Corporation

and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Theodore W. Anderson, Esq.
Neuman, Williams, Anderson & Olson
77 W. Washington Street
Chicago, IL 60602

I, Cheryl Leger, declare under penalty of perjury that the foregoing is true and correct and was executed at San Francisco, California on April 11, 1986.

Cheryl Leger

CHERYL LEGER