

NEUMAN, WILLIAMS, ANDERSON & OLSON

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RS

COPY

July 11, 1985

Algy Tamoshunas, Esquire
North American Philips Corporation
580 White Plains Road
Tarrytown, New York 10591

Re: Magnavox v. Activision

Dear Algy:

Enclosed for your files are copies of the following documents filed today in this action:

1. NOTICE OF PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE CUMULATIVE TESTIMONY
2. PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE CUMULATIVE TESTIMONY
3. MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE CUMULATIVE TESTIMONY
4. ORDER EXCLUDING CUMULATIVE TESTIMONY

Very truly yours,

NEUMAN, WILLIAMS, ANDERSON & OLSON

By

Jim De
James T. Williams

JTW:de
Enclosures

cc: Thomas A. Briody, Esq. - w/o encls.
Louis Etlinger, Esq. - w/encls. ←
Theodore W. Anderson, Esq. - w/o encls.

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9 The Magnavox Company and
Sanders Associates, Inc.

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United States District Court For The
Northern District of California

THE MAGNAVOX COMPANY, a corporation,)	
and SANDERS ASSOCIATES, INC.,)	
a corporation,	)	No. C 82 5270 CAL
)	
Plaintiffs,	)	NOTICE OF PLAINTIFFS'
	)	MOTION IN LIMINE TO
v.	)	EXCLUDE
	)	<u>CUMULATIVE TESTIMONY</u>
ACTIVISION, INC., a corporation,)	
	)	Date: July 22, 1985
Defendant.	)	Time: 8:00 a.m.

TO DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 22, 1985, at 8:00 a.m.,
or as soon thereafter as trial resumes, in the courtroom of the
Honorable Charles A. Legge, Plaintiffs will seek an order

NOTICE OF PLAINTIFFS' MOTION IN
LIMINE TO EXCLUDE CUMULATIVE TESTIMONY - PAGE 2

1 excluding cumulative expert testimony and limiting defendant to
2 one expert witness on each issue to be addressed by defendant's
3 expert witnesses.

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17 United States District Court For The
18 Northern District of California

19 THE MAGNAVOX COMPANY, a corporation,)
20 and SANDERS ASSOCIATES, INC.,)
21 a corporation,)
22)
23 Plaintiffs,)
24)
25 v.)
26)
27 ACTIVISION, INC., a corporation,)
28)
29 Defendant.)

No. C 82 5270 CAL

PLAINTIFFS' MOTION
IN LIMINE TO EXCLUDE
CUMULATIVE TESTIMONY

30 Pursuant to Federal Rule of Evidence 403, plaintiffs,
31 THE MAGNAVOX COMPANY and SANDERS ASSOCIATES, INC., move this Court
32 in limine for an order excluding from the trial needlessly
33 cumulative expert testimony. Defendant will apparently offer at
34 trial two experts on the issues of non-infringement and invalidity
35 and two experts on the issue of implied license. In Defendant's
36 Supplemental Response to Plaintiffs' Interrogatory Number 9, dated
37 October 25, 1984, defendant indicated that it intended to call two
38

1 technical experts, Dr. Shoup and Mr. Thacker and that each expert
2 would testify as to non-infringement and invalidity of the patents
3 in issue including expert opinion testimony on the ultimate issues
4 such as obviousness and infringement. In a letter dated July 2,
5 1985, defendant also indicated that it intends to have two other
6 witnesses, Mr. Lehrberg and Mr. Lopez, both testify as experts on
7 the issue of implied license.

8 The basis for this motion, more fully discussed in the
9 attached Memorandum, is that this duplicative expert testimony
10 should be excluded under Federal Rule of Evidence 403. The
11 testimony of two experts on each issue would be a needless
12 presentation of cumulative evidence which would result in undue
13 delay and a waste of this Court's time and would merely promote a
14 battle in which the parties attempt to call the greatest number of
15 experts.

16 Therefore, to avoid undue delay, waste of this Court's
17 time and needless presentation of cumulative evidence, plaintiffs
18 respectfully move for an order limiting defendant to the testimony
19 of one expert on each of the issues of non-infringement,
20 invalidity, implied license, and all other issues to be addressed
21 by defendant's expert witnesses and that any cumulative expert
22 testimony be excluded.

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United States District Court For The
Northern District of California

THE MAGNAVOX COMPANY, a corporation,)	
and SANDERS ASSOCIATES, INC.,)	
a corporation,	)	No. C 82 5270 CAL
)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT
	)	OF PLAINTIFFS' MOTION
v.	)	IN LIMINE TO EXCLUDE
	)	<u>CUMULATIVE TESTIMONY</u>
ACTIVISION, INC., a corporation,)	
)	
Defendant.)	

Defendant, in its Supplemental Response to Plaintiffs' Interrogatory Number 9, dated October 25, 1984, indicated that it intends to call, inter alia, two experts, Mr. Charles Thacker and Dr. Richard G. Shoup. Defendant further indicates that "Mr. Thacker and Dr. Shoup will each testify that the use of Activision video games does not infringe or contributarily infringe any element of U.S. Patents No. Re. 28,507 ('507) or No. 3,728,480 ('480); and that the '507 patent is itself invalid."

1 Defendant also indicated, in a letter dated July 2, 1985, that it
2 intends to have Mr. Richard Lehrberg and Mr. Thomas Lopez testify
3 as experts on the issue of implied license. This needless
4 duplication of evidence is inappropriate under Federal Rule of
5 Evidence 403.

6 Plaintiffs' motion is analogous to the motion brought in
7 Wetherill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill.
8 1983). There the court granted the plaintiff's motion to exclude
9 cumulative testimony by defendant's expert witnesses. The court,
10 in limiting the defendant to one expert on each issue, observed
11 that Rule 403 should be used to avoid "prolonged battles of the
12 experts, with each side vying to present a longer parade of
13 witnesses to overwhelm" the trier of fact. 565 F. Supp. at
14 1564 n.25. The court further indicated that the exclusion of
15 cumulative expert testimony was "a sound principle to follow
16 unless there are substantial contraindications." Id. Certainly
17 the efficiency of litigation and the interests of justice will not
18 be served if Activision is permitted multiple experts on the same
19 issue. The logical response would be for Magnavox to call even
20 more experts to gain numerical superiority.

21 For the testimony of defendant's experts to be
22 admissible at trial, a two-part test must be satisfied.
23 Initially, the testimony must be found to be relevant. In the
24 context of expert testimony, Rule 702 sets the relevancy standard
25 as helpfulness to the trier of fact. Only after this initial test
26 is satisfied does the focus turn to Rule 403. United States v.
27 Downing, 753 F.2d 1224, 1226 (3d Cir. 1985). Rule 403 requires a
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1 decision to exclude the testimony of two experts proffered by the
2 plaintiff. The testimony of the witnesses was excluded when it
3 became clear that the testimony would have been merely repititious
4 and cumulative of testimony introduced by the defendant. Thus
5 plaintiff was not allowed an expert witness because the
6 defendant's expert had adequately covered the issue.

7 The Whetherill case clearly displays the correct view in
8 a highly technical case. (Wetherill was a DES products liability
9 action). Procedurally, the instant case is similar to Wetherill.
10 In Wetherill, the defendants revised the synopsis of their
11 expert's testimony so that the testimony expected at trial would
12 not have been cumulative. While the court rejected plaintiff's
13 suggestion that the defendant be limited to what appeared on the
14 revised synopsis, the court did limit the defendant to one expert
15 on each issue.

16 Likewise, in the instant action, defendant now
17 apparently expects Mr. Thacker's testimony to cover non-
18 infringement while Dr. Shoup's testimony will cover invalidity.
19 However, defendant still indicates that Mr. Thacker will also
20 provide a second expert's opinion on invalidity while Dr. Shoup
21 will give a second expert's opinion on infringement. Also,
22 defendant still indicates that Mr. Lehrberg and Mr. Lopez will
23 both testify about, and give expert opinion on the implied license
24 issue.

25 This overlap between defendant's experts is needlessly
26 cumulative, would cause undue delay and would waste the time of
27 this court. Furthermore, such an approach will promote a
28

1 "prolonged battle of the experts with each side vying to provide a
2 longer parade of witnesses to overwhelm" the trier of fact.
3 Wetherill. Plaintiffs respectfully request that this Court enter
4 an order limiting defendant to one expert on each issue and
5 excluding all cumulative expert testimony. This case does not
6 present any "substantial contraindications" to the "sound
7 principle" of not allowing a battle of the experts.

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21 a corporation,)

22 Plaintiffs,)

23 v.)

24 ACTIVISION, INC., a corporation,)

25 Defendant.)

No. C 82 5270 CAL

ORDER EXCLUDING
CUMULATIVE TESTIMONY

26 Plaintiffs having applied for an order limiting
27 defendant to one expert on each of the issues of non-infringement,
28 invalidity, implied license, and all other issues to be addressed
by defendant's expert witnesses and excluding cumulative expert
testimony pursuant to Federal Rule of Evidence 403, and good cause
appearing therefor,

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THE COURT ORDERS that defendant be limited to one expert on each of the issues to be addressed by defendant's expert witnesses and orders excluded all cumulative expert testimony.

Dated: _____

Charles A. Legge
United States District Judge