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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

_____)
UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
MICRO STAR SOFTWARE, INC., and)
STEPHEN BENEDICT,)
)
 Defendants.)
_____)

Civil Action No.:

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, has commenced this action by filing the Complaint herein; Defendants have waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to the settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law;

1
2 NOW, THEREFORE, upon stipulation of Plaintiff and Defendants, it is hereby ORDERED,
3 ADJUDGED AND DECREED as follows:

4 1. This Court has jurisdiction of the subject matter and of the parties.

5 2. The Complaint states a claim upon which relief may be granted against the Defendants under
6 Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission Act ("FTC Act"), 15
7 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b.

8 3. Entry of this order is in the public interest.

9 DEFINITIONS

10 IT IS ORDERED THAT:

11 4. "Continuity Program" shall mean any plan, arrangement, or system pursuant to which a
12 consumer receives periodic shipments of products or the provision of services without prior notification
13 by the seller before each shipment or service period, regardless of any trial or approval period allowing
14 the consumer to return or be reimbursed for the product or service.

15 5. "Trial Conversion Offer" shall mean any offer by the Defendants to provide a trial period of
16 products or services to consumers where, as a result of accepting the trial period of products or
17 services, consumers are enrolled in a Continuity Program, or are otherwise subsequently required to
18 contact the Defendants to avoid receiving additional products or services and incurring any financial
19 obligation for such additional products or services.

20 CIVIL PENALTY

21 IT IS FURTHER ORDERED THAT:

22 6. Defendants, their successors and assigns, shall pay to Plaintiff a civil penalty, pursuant to
23 Section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of
24 \$90,000. Defendants are jointly and severally responsible for paying the penalty.

25 A. Defendants have previously deposited the sum of \$90,000 into an escrow account
26 established and managed by the Federal Trade Commission ("Commission"). After
27 entry of this Order, the Commission shall transfer this sum from this escrow fund to
28 Plaintiff as a civil penalty.

1 B. In the event of any default in payment, which default continues for ten days beyond the
2 due date of payment, the entire unpaid penalty, together with interest, as computed
3 pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall
4 immediately become due and payable.

5 CONSUMER NOTIFICATION

6 IT IS FURTHER ORDERED THAT:

7 7. Defendants, their successors and assigns, and their officers, agents, servants, employees and
8 attorneys, and all persons in active concert or participation with any one or more of them who receive
9 actual notice of this Consent Decree by personal service or otherwise, shall clearly and conspicuously
10 disclose all terms and conditions of any Continuity Program, Trial Conversion Offer, or prenotification
11 negative option plan covered by the Negative Option Rule required to be disclosed by Paragraphs 8-
12 10 of this Consent Decree, on all packages shipped by the Defendants to consumers.

13 PROHIBITED BUSINESS ACTIVITIES

14 IT IS FURTHER ORDERED THAT:

15 8. Defendants, their successors and assigns, and their officers, agents, servants, employees and
16 attorneys, and all persons in active concert or participation with any one or more of them who receive
17 actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined from:

18 A. Making any representation, in any manner, expressly or by implication, in connection
19 with the offering to consumers of any Trial Conversion Offer, including, but not limited
20 to, that consumers will incur no risks or obligations, unless, at the time of making such
21 representation, all material terms and conditions of the Trial Conversion Offer are
22 clearly and conspicuously disclosed, including:

- 23 i. if true, that consumers who accept a Trial Conversion Offer are required to
24 contact the Defendants to avoid receiving additional products or services and
25 incurring any financial obligation for such additional products or services;
26 ii. if true, that consumers are automatically enrolled in a Continuity Program, if
27 they make an initial purchase, accept free products or services or products or
28 services for a trial period, or fail to contact the Defendants to cancel; and

1 iii. at least one reasonable means consumers may effectively use to prevent the
2 shipment of additional products, the provision of additional services, or any
3 financial obligation for additional products or services.

4 B. Misrepresenting any material term or condition of any Trial Conversion Offer.

5 C. Selling or distributing or causing to be sold or distributed products or services by means
6 of a Continuity Program without first obtaining the consent of consumers to participate
7 in a Continuity Program before any shipment of products or provision of services is
8 made. Prior to obtaining consumers' consent, Defendants shall disclose clearly and
9 conspicuously in all promotional materials and solicitations, all material terms and
10 conditions of the Continuity Program, including, but not limited to:

11 i. the fact that periodic shipments of products or the periodic provision or the
12 continuation of services will occur without further action by consumers;

13 ii. a description of each good or the type of good to be included in each shipment
14 or a description of the services that will be performed or continued;

15 iii. the approximate interval between each shipment or service period;

16 iv. the cost or range of costs for each shipment or service period, including
17 whether consumers must pay for shipping and handling;

18 v. a description of the billing procedure to be employed for each shipment or
19 period of service;

20 vi. the minimum number of purchases or minimum service period required, if any;

21 vii. all material terms and conditions of a guarantee, refund or return policy if any
22 representation is made about such a policy, or, if the Defendants have a policy
23 of not making refunds or accepting returns, a statement that this is the
24 Defendants' policy; and

25 viii. a description of the terms, conditions, and procedures under which consumers
26 may cancel further shipments or discontinue a service.

27 D. Shipping merchandise to consumers without obtaining their prior express consent to
28 receive products, as required by Section (a) of the Unordered Merchandise Statute, 39

1 U.S.C. § 3009(a), or as the Statute may hereafter be amended; provided that, if the
2 Defendants require that consumers contact the Defendants to reject products, the
3 shipping of such products when consumers fail to contact the Defendants will not
4 constitute a violation of this Order, if the Defendants have clearly and conspicuously
5 disclosed to consumers that they must contact the Defendants to reject the products
6 and consumers have given their prior, express consent to this procedure. A copy of the
7 Statute is attached hereto as “Appendix A” and is incorporated herein as if fully set
8 forth verbatim; and

- 9 E. Making any representation, in any manner, expressly or by implication, that consumers
10 owe money for Continuity Program membership fees or for merchandise shipped to
11 consumers, unless the Defendants have obtained consumers’ express consent to pay
12 membership fees and to receive and pay for merchandise.

13 9. Defendants, their successors and assigns, and their officers, agents, servants, employees and
14 attorneys, and all persons in active concert or participation with any one or more of them who receive
15 actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined from ever
16 violating, directly or through any corporation, subsidiary, division or other device, any provision of the
17 Federal Trade Commission's Trade Regulation Rule entitled “Telemarketing Sales Rule,” 16 C.F.R.
18 Part 310, or as it may hereafter be amended, including, but not limited to:

- 19 A. Failing to disclose, in a clear and conspicuous manner, before a customer pays for
20 products or services offered, all material restrictions, limitations, or conditions to
21 purchase, receive, or use the products or services that are the subject of the sales offer,
22 as required by Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule, and
23 B. Failing to disclose that the seller has a policy of not making refunds, cancellations,
24 exchanges, or repurchases, or, if the seller or telemarketer makes a representation
25 about a refund, cancellation, exchange, or repurchase policy, failing to disclose all
26 material terms and conditions of such policy, as required by Section 310.3(a)(1)(iii) of
27 the Telemarketing Sales Rule. A copy of this Rule is attached hereto as “Appendix B”
28 and is incorporated herein as if fully set forth verbatim.

1 10. Defendants, their successors and assigns, and their officers, agents, servants, employees
2 and attorneys, and all persons in active concert or participation with any one or more of them who
3 receive actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined
4 from ever violating, directly or through any corporation, subsidiary, division or other device, any
5 provision of the Federal Trade Commission's Trade Regulation Rule entitled "Use of Prenotification
6 Negative Option Plans" ("Negative Option Rule"), 16 C.F.R. Part 425, or as it may hereafter be
7 amended. A copy of this Rule is attached hereto as "Appendix C" and is incorporated herein as if fully
8 set forth verbatim.

9 MONITORING COMPLIANCE OF SALES PERSONNEL

10 IF IS FURTHER ORDERED THAT:

11 11. Defendants, in connection with any business where (1) any Defendant is the majority
12 owner of the business or directly or indirectly manages or controls the business, and where (2) the
13 business is engaged in telemarketing, any other business activities involving Continuity Programs, Trial
14 Conversion Offers, or prenotification negative option plans covered by the Negative Option Rule, or
15 assisting others engaged in these activities, are hereby permanently restrained and enjoined from:

16 A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and
17 independent contractors engaged in sales or other customer service functions comply
18 with Paragraphs 8-10 of this Order. Such steps shall include adequate monitoring of
19 sales presentations or other calls with customers, and shall also include, at a minimum,
20 the following:

- 21 i. listening to the oral representations made by persons engaged in sales or other
22 customer service functions;
23 ii. establishing a procedure for receiving and responding to consumer complaints;
24 and
25 iii. ascertaining the number and nature of consumer complaints regarding
26 transactions in which each employee or independent contractor is involved;
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28

1 *provided* that this Paragraph does not authorize or require the Defendants to
2 take any steps that violate any federal, state, or local laws;

- 3 B. Failing promptly to investigate fully any consumer complaint received by any business to
4 which this Paragraph applies; and
5 C. Failing to take corrective action with respect to any sales person whom the Defendants
6 determine is not complying with this Order, which may include training, disciplining,
7 and/or terminating such sales person.

8 RECORD KEEPING

9 IT IS FURTHER ORDERED THAT:
10

11 12. For a period of three (3) years from the date of entry of this Consent Decree, Defendants,
12 and defendants' agents, employees, officers, and servants, corporations, successors, and assigns, and
13 those persons in active concert or participation with them who receive actual notice of this Order by
14 personal service or otherwise, in connection with any business where (1) any Defendant is the majority
15 owner of the business or directly or indirectly manages or controls the business, and where (2) the
16 business is engaged in telemarketing, any other business activities involving Continuity Programs, Trial
17 Conversion Offers, or prenotification negative option plans covered by the Negative Option Rule, or
18 assisting others engaged in these activities, are hereby restrained and enjoined from failing to create, and
19 from failing to retain for a period of three (3) years following the date of such creation, unless otherwise
20 specified:

- 21 A. Copies of all sales scripts, training materials, advertisements, or other marketing
22 materials utilized; provided that copies of all sales scripts, training materials,
23 advertisements, or other marketing materials utilized shall be retained for (3) years after
24 the last date of dissemination of any such materials;
25 B. Records kept in the ordinary course of business evidencing the affirmative consent of
26 consumers, received by the seller before any shipment of products or provision of
27 services is made, to participate in or join any Continuity Program;

- 1 C. Books, records and accounts that, in reasonable detail, accurately and fairly reflect the
2 cost of products or services sold, revenues generated, and the disbursement of such
3 revenues;
- 4 D. Records containing the names, addresses, phone numbers, dollar amounts paid,
5 quantity of products or services purchased, and description of products or services
6 purchased, for all consumers to whom such business has sold, invoiced or shipped any
7 products or services;
- 8 E. Records that reflect, for every consumer complaint or refund request, whether received
9 directly or indirectly or through any third party:
- 10 i. the consumer's name, address, telephone number and the dollar amount paid by
11 the consumer;
- 12 ii. the written complaint or refund request, if any, and the date of the complaint or
13 refund request;
- 14 iii. the basis of the complaint, including the name of any salesperson complained
15 against, and the nature and result of any investigation conducted concerning any
16 complaint;
- 17 iv. each response and the date of the response;
- 18 v. any final resolution and the date of the resolution; and
- 19 vi. in the event of a denial of a refund request, the reason for the denial; and
- 20 F. Records accurately reflecting: the name, address, and telephone number of each person
21 employed in any capacity by the Defendants, including as an independent contractor;
22 that person's job title or position; the date upon which the person commenced work;
23 and the date and reason for the person's termination, if applicable. The Defendants
24 shall retain such records for any terminated employee for a period of two (2) years
25 following the date of termination.

26 DISTRIBUTION OF ORDER AND RULES

27 IT IS FURTHER ORDERED THAT:

- 28 13. For a period of three (3) years from the date of entry of this Order, Defendants shall:

- 1 A. Provide a copy of this Order, the Telemarketing Sales Rule, the Statement of Basis and
2 Purpose for the Telemarketing Sales Rule, the Unordered Merchandise Statute, and the
3 Negative Option Rule to, and obtain a signed and dated acknowledgment of receipt of
4 same from, each officer or director, each individual serving in a management capacity,
5 all personnel involved in responding to consumer complaints or inquiries, and all sales
6 personnel, whether designated as employees, consultants, independent contractors or
7 otherwise, immediately upon employing or retaining any such persons, for any business
8 where (1) any Defendant is the majority owner of the business or directly or indirectly
9 manages or controls the business, and where (2) the business is engaged in
10 telemarketing, any other business activities involving Continuity Programs, Trial
11 Conversion Offers, or prenotification negative option plans covered by the Negative
12 Option Rule, or assisting others engaged in these activities; and
13 B. Maintain for a period of three (3) years after creation, and upon reasonable notice,
14 make available to representatives of the Commission, the original signed and dated
15 acknowledgments of the receipt of copies of this Order, as required in Subsection A. of
16 this Paragraph.

17 COMPLIANCE REPORTING BY DEFENDANTS

18 IT IS FURTHER ORDERED THAT:

- 19 14. In order that compliance with the provisions of this Order may be monitored:
20 A. For a period of three (3) years from the date of entry of this Order, the Defendants,
21 their successors and assigns, shall notify the Commission of the following:
22 i. Any changes in the Defendants' residence, mailing addresses, and telephone
23 numbers, within ten (10) days of the date of such change;
24 ii. Any changes in the individual Defendant's employment status (including self-
25 employment) within ten (10) days of such change. Such notice shall include the
26 name and address of each business that Defendant is affiliated with or
27 employed by, a statement of the nature of the business, and a statement of
28

1 Defendant's duties and responsibilities in connection with the business or
2 employment; and

- 3 iii. Any proposed change in the structure of the corporate Defendant or any
4 proposed change in the structure of any business entity owned or controlled by
5 the individual Defendant, such as creation, incorporation, dissolution,
6 assignment, sale, merger, creation, dissolution of subsidiaries, proposed filing of
7 a bankruptcy petition, or change in the corporate name or address, or any other
8 change that may affect compliance obligations arising out of this Order, thirty
9 (30) days prior to the effective date of any proposed change; *provided*,
10 however, that, with respect to any proposed changes about which the
11 Defendants learn less than thirty (30) days prior to the date such action is to
12 take place, the Defendants shall notify the Commission as soon as is practicable
13 after learning of such proposed change;

14 B. One hundred eighty (180) days after the date of entry of this Order, the Defendants,
15 their successors and assigns, shall provide a written report to the FTC, sworn to under
16 penalty of perjury, setting forth in detail the manner and form in which the Defendants
17 have complied and are complying with this Order. This report shall include but not be
18 limited to

- 19 i. Defendants' then current address and telephone number;
20 ii. The individual Defendant's then current employment, business addresses and
21 telephone numbers, a description of the business activities of each such
22 employer, and the individual Defendant's title and responsibilities for each
23 employer;
24 iii. Copies of all sales scripts, training materials, advertisements, packaging, or
25 other marketing materials utilized;
26 iv. A copy of each acknowledgment of receipt of this Order obtained by the
27 Defendants pursuant to Paragraph 13; and
28

1 v. A statement describing the manner in which the Defendants have complied and
2 are complying with the provisions of this Order;

3 C. Upon written request by a representative of the Commission, the Defendants, their
4 successors and assigns, shall submit additional written reports (under oath, if requested)
5 and produce documents on fifteen (15) days' notice with respect to any conduct
6 subject to this Order;

7 D. For the purposes of this Order, the Defendants, their successors and assigns, shall,
8 unless otherwise directed by the Commission's authorized representatives, mail all
9 written notifications to the Commission to: Associate Director, Division of
10 Enforcement, Bureau of Consumer Protection, 600 Pennsylvania Ave., N.W.,
11 Washington, D.C. 20580 (or by hand delivery to Fourth Floor, 601 Pennsylvania Ave.,
12 N.W., Washington, D.C. 20004), Re: U.S. v. Micro Star Software, Inc., et al.;

13 E. For the purposes of this Paragraph, "employment" includes the performance of services
14 as an employee, consultant, or independent contractor; and "employers" include any
15 individual or entity for whom the individual Defendant performs services as an
16 employee, consultant, or independent contractor;

17 F. For purposes of the compliance reporting required by this Paragraph, the Commission
18 is authorized to communicate directly with the Defendants' attorney of record.

19 TAXPAYER IDENTIFICATION NUMBER

20 15. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the
21 Federal Trade Commission their taxpayer identifying numbers (employer identification numbers), which
22 shall be used for purposes of collecting and reporting on any delinquent amount arising out of
23 Defendants' relationship with the government.

24 RETENTION OF JURISDICTION

25 16. This Court shall retain jurisdiction of this matter for the purposes of enabling any of the
26 parties to this Consent Decree to apply to the Court at any time for such further orders or directives as
27 may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the
28 enforcement of compliance therewith, or for the punishment of violations thereof.

1 JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendants,
2 pursuant to all the terms and conditions recited above.

3
4 Dated: _____, 2002.

5 _____
United States District Judge

6 The parties, by their respective counsel, hereby consent to the terms and conditions of the
7 Consent Decree as set forth above and consent to the entry thereof. Defendants waive any rights that
8 may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412.

9 DATED:

FOR THE UNITED STATES OF AMERICA:

10 ROBERT MCCALLUM
11 Assistant Attorney General
12 Civil Division
13 U.S. Department of Justice

14 PATRICK O'TOOLE
15 United States Attorney

16 By: _____

17 Assistant United States Attorney (Bar No. _____)
18 880 Front Street
19 Room 6293
20 San Diego, CA 92101-8893
21 (619) 557-5610

22 EUGENE M. THIROLF
23 Director
24 Office of Consumer Litigation

25 By: _____

26 Attorney
27 Office of Consumer Litigation
28 Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

FOR THE FEDERAL TRADE COMMISSION

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FOR THE DEFENDANTS
MICRO STAR SOFTWARE, INC.

By: _____
STEPHEN BENEDICT, President

STEPHEN BENEDICT

STEPHEN BENEDICT

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D. REED FREEMAN, JR.