

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

In the Matter of	)	
	)	
MTS, INC., d/b/a TOWER	)	FILE NO. 032-3209
RECORDS/BOOKS/VIDEO,	)	
a corporation,	)	
	)	
and	)	AGREEMENT CONTAINING
	)	CONSENT ORDER
TOWER DIRECT, LLC, d/b/a	)	
TOWERRECORDS.COM,	)	
a corporation.	)	

The Federal Trade Commission has conducted an investigation of certain acts and practices of MTS, Incorporated, a California corporation, and Tower Direct, LLC, a Delaware limited liability company (“proposed respondents”). Proposed respondents, having been represented by counsel, are willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between MTS, Inc., and Tower Direct, LLC, by their duly authorized officers, and counsel for the Federal Trade Commission that:

1. Proposed respondent MTS, Inc., d/b/a Tower Records/Books/Video, (“MTS, Inc.”) is a California corporation with its principal office or place of business at 2500 Del Monte, West Sacramento, California 95691.
2. Proposed respondent Tower Direct, LLC, d/b/a TowerRecords.com, is a Delaware limited liability company and a subsidiary of proposed respondent MTS, Inc. Its principal office or place of business is also at 2500 Del Monte, West Sacramento, California 95691.
3. On February 9, 2004, proposed respondents MTS, Inc., Tower Direct, LLC, d/b/a/ TowerRecords.com, and related entities filed voluntary petitions for relief under the reorganization provisions of Chapter 11 of the Bankruptcy Code, Title 11 U.S.C. 101 *et seq.*, in the United States Bankruptcy Court for the District of Delaware, Case Nos. 04-10393-PJW through 04-10398-PJW, 04-10400-PJW, and 04-10403-PJW through 04-10410-PJW. On February 10, 2004, the bankruptcy cases were consolidated for administration, and a confirmation hearing was set for March 15, 2004. Pursuant to 11 U.S.C. §§ 1106 and 1107, the proposed respondents and related entities remain in possession of their business and property as debtors-in-possession.

4. For the purposes of this agreement, the Commission's action against proposed respondents, including the enforcement of a judgment other than a money judgment, is not stayed by 11 U.S.C. § 362(a)(1), (2), (3) or (6) because it is an exercise of the Commission's police or regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exemption to the automatic stay.

5. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint.

6. Proposed respondents waive:

A. any further procedural steps;

B. the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

C. all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

7. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of sixty (60) days and information about it publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.

8. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true.

9. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and the decision and order to proposed respondents' addresses as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Proposed respondents waive any right they may have to any other

manner of service. The complaint may be used in construing the terms of the order. No agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

10. Proposed respondents have read the draft complaint and consent order. They understand that they may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

11. The proposed respondents, as debtors-in-possession in the bankruptcy cases, and the Commission believe that proposed respondents' entry into this consent order is in the ordinary course of business while proposed respondents remain in bankruptcy. Confirmation of any plan in the bankruptcy cases shall not impair, abrogate, or alter in any way the proposed respondents' duties or obligations or the Commission's rights under this consent order. Notwithstanding the foregoing, if proposed respondents' plan of reorganization is not confirmed by March 19, 2004, then, at the Commission's request, proposed respondents will seek the bankruptcy court's permission under Fed. R. Bankr. P. 9019 to enter this agreement.

## DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security number; (f) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (g) any other information from or about an individual consumer that is combined with (a) through (f) above.

2. Unless otherwise specified, "Respondents" shall mean MTS, Inc., and its successors and assigns (including the reorganized debtor or any entity in which property of the bankruptcy estate vests pursuant to any confirmed plan) officers, agents, representatives, and employees; Tower Direct, LLC, and its successors and assigns (including the reorganized debtor or any entity in which property of the bankruptcy estate vests pursuant to any confirmed plan), officers, agents, representatives, and employees; and both of them and their successors and assigns, officers, agents, representatives, and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which Respondents maintain and protect the privacy, confidentiality, or security of any personal information collected from or about consumers.

## II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. the designation of an employee or employees to coordinate and be accountable for the information security program.
- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.
- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.
- D. the evaluation and adjustment of Respondents' information security program in light of the results of the testing and monitoring required by subparagraph C, any material changes to Respondents' operations or business arrangements, or any other circumstances that Respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

## III.

IT IS FURTHER ORDERED that Respondents obtain an assessment and report (an “Assessment”) from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biannually thereafter for ten (10) years after service of the order that:

A. sets forth the specific administrative, technical, and physical safeguards that Respondents have implemented and maintained during the reporting period;

B. explains how such safeguards are appropriate to Respondents’ size and complexity, the nature and scope of Respondents’ activities, and the sensitivity of the personal information collected from or about consumers;

C. explains how the safeguards that have been implemented meet or exceed the protections required by Paragraph II of this order; and

D. certifies that Respondents’ security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biannual reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP) or holding Global Information Assurance Certification from the SysAdmin, Audit, Network, Security Institute, or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondents shall provide the first Assessment, as well as all: plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biannual Assessments shall be retained by the Respondents until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

#### IV.

IT IS FURTHER ORDERED that Respondents shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance, including but not limited to:

A. for a period of five (5) years:

1. a sample copy of each different print, broadcast, cable, or Internet advertisement, promotion, information collection form, Web page, screen, email message, or other document containing any representation regarding Respondents' online collection, use, and security of personal information from or about consumers. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web. *Provided, however,* that after creation of any Web page or screen in compliance with this order, Respondents shall not be required to retain a print or electronic copy of: (1) any amended Web page or screen to the extent that the amendment does not affect Respondents' compliance obligations under this order; or (2) any Web page or screen that contains a hypertext link to Respondents' privacy policy, but otherwise does not relate to Respondents' compliance obligations under this order.

2. any documents, whether prepared by or on behalf of Respondents, that contradict, qualify, or call into question Respondents' compliance with this order; and

B. for a period of three (3) years after the date of preparation of each biannual Assessment required under Paragraph III of this order: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relating to Respondents' compliance with Paragraphs II and III of this order for the compliance period covered by such biannual Assessment.

#### V.

IT IS FURTHER ORDERED that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having managerial responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

#### VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any change in either corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition following the dismissal or closing of the current bankruptcy cases; or a change in either corporate name or address. *Provided, however,* that, with respect to any proposed change in either corporation about which either Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of

Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that Respondents shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission an initial report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Paragraph in this order that terminates in less than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Paragraph.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of the order, and the dismissal or ruling is either not

appealed or upheld on appeal, then the order will terminate according to this Paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed this \_\_\_\_ day of \_\_\_\_\_, 2004

MTS, INC.

By: \_\_\_\_\_  
Debtors and Debtors-in-Possession

TOWER DIRECT, LLC

By: \_\_\_\_\_  
Debtors and Debtors-in-Possession

\_\_\_\_\_  
ALAN R. MALASKY, ESQ.  
Porter Wright Morris & Arthur LLP  
Counsel for Respondents MTS, Inc. and  
Tower Direct, LLC as Debtors and Debtors-in-  
Possession

FEDERAL TRADE COMMISSION

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APPROVED:

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