

FILED / PRODUIT

CT-2015-001

July 13, 2015

Guillaume Phaneuf for / pour
REGISTRAR / REGISTRAIRE

CT-2015-001

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended; and

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and sections 74.05 and 74.011 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

AVISCAR INC., BUDGETCAR INC. / BUDGETAUTO INC.,
AVIS BUDGET GROUP, INC. and AVIS BUDGET CAR RENTAL, LLC

Respondents

REPLY

A. Overview

1. The Commissioner of Competition (the “**Commissioner**”) repeats and relies upon the allegations in his Amended Notice of Application, and except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in this Reply have the meaning ascribed to them in the Amended Notice of Application.
2. Contrary to the allegation in paragraph 1 of the Response, the Commissioner’s application is not focused on the practice of charging fees and surcharges to consumers who rent passenger vehicles and associated products. The

Commissioner's application is focused on the false or misleading representations the Respondents have made, and continue to make, to promote their passenger vehicles and associated products, as set out in the Commissioner's Amended Notice of Application.

B. Practices and Acts the Respondents Do Not Dispute

3. The Respondents do not dispute many allegations in the Amended Notice of Application. In particular, the Respondents do not dispute that they (or Aviscar Inc. and Budgetcar Inc.):
 - a. exclude Non-Optional Fees from representations they make to consumers to promote their passenger vehicles and associated products;
 - b. **can** but **choose not to** make representations to consumers that contain the total amount consumers will pay to rent a passenger vehicle or associated products;
 - c. display unattainably low prices, and that these unattainably low prices are the **first or only** prices a consumer sees when encountering promotional materials for the Avis and Budget brands of rental vehicles and associated equipment (see e.g., paragraphs 1, 5, 6, 63(b) and 78 of the Response);
 - d. exclude the Non-Optional Fees from representations about the price consumers must pay to rent the Avis and Budget brands of rental vehicles and associated products, which the Respondents acknowledge "vary by region and location" (see e.g., paragraph 39 and also paragraphs 42, 43, 44, 49, 54, 56 and 59 of the Response);
 - e. do **not** apply represented discounts to the total price a consumer must pay to rent the Avis and Budget brands of rental vehicles and associated products (see e.g., paragraphs 75, 76, 91 and 95 of the Response);

- f. **choose** to impose their Non-Optional Fees on consumers to recoup part of their own cost of doing business (see e.g., paragraphs 38, 41, 48, 52, 55, 56 and 59 of the Response); and
 - g. **choose** the names they use to describe their Non-Optional Fees, including “Car tax”, “AC Excise Tax”, “surtaxe stationnement”, “surtaxe emplacement de prestige” and “taxe environnementale de l’Ontario” (see e.g., paragraphs 48, 50 and 57 of the Response).
- 4. Further and notwithstanding the denials contained in paragraphs 4 and 21 to 27 of the Response, the Parent Companies cannot dispute that they (or ABC Rental):
 - a. make representations to consumers in Canada about the prices of rental vehicles and associated products outside Canada (e.g., for locations in the United States) that exclude the same or similar Non-Optional Fees in a same or similar manner as is done with respect to Non-Optional Fees charged in Canada; and
 - b. supply rental vehicles and associated products to Canadian consumers who travel to locations outside Canada (e.g., to locations in the United States).
- 5. Further, and contrary to their denials in paragraphs 5, 7, 10, 11 and 89 of the Response that excluding Non-Optional Fees from price and discount representations influences consumer behaviour, the Respondents acknowledge elsewhere in their Response that this same practice confers a competitive advantage to parties adopting it, that maintaining these practices are necessary “[t]o remain competitive” and that “to reverse them will cause hardship to the Respondents in terms of lost opportunity and loss of competitive advantage” (see paragraphs 38, 70 and 105 of the Response). As such, the Respondents have acknowledged – through the pleas in paragraphs 38, 70 and 105 of the

Response – that excluding Non-Optional Fees from their representations does indeed affect consumer behaviour, and their own belief that this is the case.

6. In addition, and as set out in paragraphs 22-24 of the Response, the Respondents do not deny that the Parent Companies direct, plan or control the Canadian operations of Aviscar Inc. and Budgetcar Inc. The Parent Companies only deny controlling the “day-to-day operations” of Aviscar Inc. and Budgetcar Inc. The Respondents further acknowledge at paragraph 24 of the Response that “Avis and Budget each have one director in common with the U.S. Respondents, use similar infrastructure and software in their day-to-day operations, and consult with employees of their affiliates”.

C. The Respondents’ False or Misleading Representations Are Material

7. Contrary to the allegations in the Response, including paragraphs 5, 7, 10, 11 and 89, the Respondents’ representations have a material impact on consumer behaviour, including consumer purchasing processes and decisions. In addition, other suppliers of rental vehicles and associated products, including for example some third party resellers, do not exclude non-optional fees from their representations, charge different non-optional fee amounts than the Respondents charge and/or use different language than the Respondents do to describe the non-optional fees they charge.

D. The Names the Respondents Use to Describe Their Non-Optional Fees to Consumers Create the General Impression That They Are Mandated by Third Parties

8. Contrary to allegations contained in their Response, including paragraphs 80-87, the names the Respondents use to describe their Non-Optional Fees to consumers, such as “Car tax”, “AC Excise Tax”, “surtaxe stationnement”, “surtaxe emplacement de prestige” and “taxe environnementale de l’Ontario”, and the grouping of Non-Optional Fees together with actual taxes, gives the general impression that the Non-Optional Fees are mandated by third parties,

such as governments and authorized agencies, that require rental car companies to collect such fees from consumers.

E. The Respondents Have Failed to Disclose Altogether Certain Non-Optional Fees

9. Contrary to the allegations contained in the Response, including paragraph 12, the Respondents have failed to disclose all Non-Optional Fees the Respondents exclude from their price and discount representations when consumers make a reservation and prior to purchase. In particular, until approximately February 2013 for their websites and late 2013 / early 2014 for their mobile applications, the Respondents did not disclose the Non-Optional Fees they charged for associated products, including additional insurance coverages, GPS devices and child seats.

F. Subsection 74.011(1) of the *Competition Act* is Constitutional

10. Contrary to the allegations contained in the Response, including paragraphs 99-100, subsection 74.011(1) of the *Competition Act* conforms to the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the “**Charter**”).
11. Subsection 74.011(1) of the *Competition Act* does not place unjustified limits on freedom of expression and, in particular, is not overbroad. False or misleading representations in the sender information or subject matter information of an electronic message affect consumer behaviour, including, in particular, a consumer’s decision to open (or not open) an electronic message and view its contents.
12. As such, subsection 74.011(1) of the *Competition Act* does not contravene the *Charter*. It is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

G. The Doctrine of Estoppel is Unavailable

13. Contrary to the allegations contained in the Response, including paragraphs 104 to 108, the doctrine of estoppel is unavailable to the Respondents as its application would interfere with the positive obligations set out in paragraph 74.01(1)(a), section 74.05 and subsections 74.011(1) and (2) of *Competition Act*. In any event, the Respondents did not rely or did not rely reasonably on any action by the Commissioner to ground an estoppel. Indeed, as per the allegations contained in paragraph 107 of the Response, the Respondents do not even plead any positive action on the Commissioner that could properly give rise to an estoppel.

DATED AT Gatineau, this 13th day of July 2015.

“Original signed by”

John Pecman
Commissioner of Competition

DEPARTMENT OF JUSTICE CANADA

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