

IN THE MATTER OF

AMERCO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9193. Complaint, June 24, 1985—Decision, May 18, 1987*

This consent order requires, among other things, a Phoenix, Ariz.-based respondent, U-Haul International, Inc., the nation's largest renter of trucks and trailers, and its Las Vegas, Nev.-based parent company, AMERCO, from initiating or participating in any judicial or administrative proceeding in which their main purpose is to harass or injure any competitor or potential competitor. Additionally, respondents are required for ten years: (1) to give the FTC prior notice before participating in any bankruptcy proceeding of a competitor; (2) to obtain FTC approval before filing a plan of reorganization to acquire a competitor in bankruptcy; (3) to provide the FTC with a copy of any lawsuit filed against a competitor; and (4) to obtain FTC approval before acquiring any competitor worth \$5 million or more.

Appearances

For the Commission: *Gerald T. Gregory.*

For the respondents: *Allen Ward, Baker & Hostetler, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that AMERCO, a corporation, and U-Haul International, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITION

1. For the purpose of this complaint, the term "*moving equipment*" shall include trucks, trailers, and/or equipment such as tow bars, hand trucks, hitches, and furniture pads.

RESPONDENTS

2. Respondent AMERCO is a corporation, existing and doing business under the laws of Nevada. Its principal place of business is 3111 Bel Air, Las Vegas, Nevada.

3. For the fiscal year ending March 31, 1984, AMERCO had operating revenues of approximately \$626.2 million; profits after taxes of approximately \$41.7 million; and assets of approximately \$947.3 million.

4. Respondent U-Haul International, Inc. ("UHI") is a corporation, existing and doing business under the laws of Oregon. Its principal place of business is 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.

5. For the fiscal year ending March 31, 1984, UHI had operating revenues of approximately \$51.6 million and assets of approximately \$33.8 million.

6. AMERCO owns 100 percent of a large number of corporations, including UHI, whose operations relate to the rental of moving equipment. These corporations are collectively referred to herein as "U-Haul." AMERCO has managed and controlled U-Haul since at least 1978 and continues to manage and control U-Haul.

7. UHI is the accounting clearinghouse for and provides technical and advisory services to U-Haul.

8. Respondents AMERCO and UHI maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

TRADE AND COMMERCE

9. There are two types of moving equipment rentals. One type involves only round-trip rentals, in which the moving equipment is returned to the location from which it was taken. The other type involves one-way rentals, in which the moving equipment is returned to a location other than the one from which it was taken. One-way rentals require a network of locations; round-trip rentals require only a single location.

10. The relevant product market ("one-way rental market") is the offering, directly through a network of store locations and/or indirectly through a network of dealer franchise locations, of one-way rentals of moving equipment. The firms (including associations of firms such as U-Haul) in this market purchase, lease, and/or manufacture moving equipment; provide for the maintenance and repair of that equipment; and distribute that equipment to a network of store locations

and/or franchise dealer locations, through which network the one-way rentals are made available to the public.

11. The relevant geographic market is the United States.

12. The United States one-way rental market ("relevant market") is highly concentrated, and entry into it is very difficult.

13. U-Haul has been the dominant firm in the relevant market for at least ten years and continues to dominate that market.

COMPETITION IN THE RELEVANT MARKET

14. Jartran, Inc. ("Jartran"), a Florida corporation, entered the relevant market in 1979. By 1980 it had gained approximately 10% of all revenues generated in the relevant market, and this gain was largely at the expense of U-Haul.

15. U-Haul and Jartran have competed with one another and each with the other firms in the relevant market since approximately 1979, and continue to do so.

16. On or about June 16, 1980, UHI, on behalf of U-Haul and AMERCO, sued Jartran in federal district court in Arizona for false and misleading advertising, seeking approximately \$375 million in damages.

17. On or about December 31, 1981, Frank B. Hall & Company ("Hall"), a Delaware corporation, acquired the majority of Jartran's common stock. On or about December 31, 1981, Jartran filed in federal bankruptcy court in Northern Illinois for reorganization under 11 U.S.C. 1101-1174 ("Chapter 11 reorganization").

18. During January 1982, UHI, on behalf of U-Haul and AMERCO, filed a claim in Jartran's Chapter 11 reorganization proceeding for up to approximately \$375 million. This claim was based on the damages UHI sought in its then on-going lawsuit against Jartran in Arizona for false and misleading advertising.

ANTICOMPETITIVE ACTS AND PRACTICES

19. During Jartran's Chapter 11 reorganization proceeding, UHI, on behalf of U-Haul and AMERCO, engaged in acts and practices that, in their individual and collective character, were inconsistent with U-Haul's legitimate interests as a creditor, and in fact were intended primarily to delay or prevent Jartran's reorganization as a competitor. Examples of such acts and practices by UHI, on behalf of U-Haul and AMERCO, include the following.

a. On several occasions, UHI proposed that AMERCO acquire Jartran, when UHI and AMERCO knew or had reason to believe that

such an acquisition would probably violate Section 7 of the Clayton Act, 15 U.S.C. 18, or at least would raise serious questions under that Act. Thus, such proposals could probably not be confirmed under the applicable bankruptcy laws, 11 U.S.C. 1101-1174, and could only delay Jartran's reorganization. Representatives of Jartran's unsecured creditors repeatedly requested that UHI seek government clearance of the proposed acquisition, or government comment on its legality, but UHI refused to approach government antitrust agencies for such purposes.

b. UHI opposed a settlement between Hall and certain Jartran creditors, even though this settlement would have effected an increase in the amount of money Jartran would distribute to UHI pursuant to Jartran's reorganization.

c. UHI attempted to void Hall's acquisition of Jartran, although Hall's financial support of Jartran was necessary for Jartran's survival.

d. UHI engaged in such additional acts and practices as (1) instigating, without colorable legal authority, an alter ego proceeding against Hall and a breach of fiduciary duty proceeding against Jartran's Board of Directors, (2) delaying Jartran's reorganization by attempting to have the vote resolicited on a modified reorganization plan, although such resolicitation would be pointless and unnecessary at law because the modified plan had been approved by those Jartran creditors adversely affected by it and because the modified plan made more money available to UHI and certain other Jartran creditors than did the previous reorganization plan, and (3) delaying confirmation of Jartran's reorganization plan through frequent, repetitious, and costly opposition.

20. Certain of the acts and practices, of which examples are set forth in the preceding paragraph, lacked any basis in law; others were not baseless, and were taken under color of law. Even the acts and practices that were not baseless were ultimately dismissed by the court having jurisdiction over the matter or withdrawn by UHI.

EFFECTS AND VIOLATION

21. By means of its anticompetitive acts and practices, respondent UHI, on behalf of U-Haul and respondent AMERCO, has pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition and it has in fact injured competition by jeopardizing and substantially delaying Jartran's emergence as a reorganized company, capable of resuming its role as an effective competitor.

22. The aforesaid acts and practices constitute an attempt by a domi-

nant firm to monopolize the relevant market and constitute unfair methods of competition or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 15th day of August, 1985, A.D., at 10:00 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, Gelman Building, 2120 L Street, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that respondents, U-Haul International, Inc., and AMERCO, are in violation of Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief applicable to each respondent as is supported by the record and is necessary and appropriate including, but not limited to:

1. A prohibition against initiating or participating in any judicial or administrative proceeding not substantially for the purpose pleaded, but primarily to harass or injure any U. S. competitor in the one-way rental of moving equipment (hereinafter, "competitor") or franchise dealer of any competitor;

2. A prohibition against participating in any proceeding initiated under the bankruptcy laws in which any competitor or franchise dealer of any competitor is the debtor; in such a proceeding, a respondent would be free to divest any claim against the competitor or franchise dealer or put that claim in a blind trust or other arrangement in which each respondent's interest as a creditor is represented by legal or other representatives not under its control;

3. A prohibition against initiating or participating in any judicial or administrative proceeding against any competitor or franchise dealer of any competitor without (a) providing the Commission with (1) a copy of the complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in the proceeding, (2) a copy, upon request, of each filing made in the proceeding by each respondent and (3) a complete statement of the factual and legal bases underlying each respondent's initiation of or initial participation in the proceeding; (b) providing the court or tribunal in which the proceeding is being conducted with a copy of the Commission's complaint and order in the instant matter;

4. A prohibition against acquiring, without Commission approval, any competitor or any claim against any competitor;

5. A requirement to (a) distribute a copy of the Commission's complaint and order in this matter to all directors, officers, subsidiaries, and operating divisions, (b) notify the Commission of any material proposed change in a corporate respondent such as dissolution, assignment or sale, (c) file with the Commission a report, in writing, setting forth in detail the manner and form in which respondents have complied with the order issued in this matter and (d) provide the Commission, upon its request during any Commission investigation or litigation concerning respondents' compliance with such order, with

all documents relevant to compliance with the order in this matter, including documents subject to the attorney - client privilege,

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent AMERCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business at 3111 Bel Air, Las Vegas, Nevada.

Respondent U-HAUL INTERNATIONAL, INC. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal place of business at 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

A. For the purpose of this order, the following definitions shall apply:

1. "person" is any natural person, corporate entity (including subsidiaries thereof), partnership, joint venture, trust or legal entity;

2. "competitor" is any person or association of persons that offers one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons;

3. "potential competitor" is any person or association of persons that either respondent knows or has reason to believe is planning or preparing to offer one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons.

B. *It is ordered*, That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from initiating or participating in any judicial or administrative proceeding where such respondent's primary purpose is to harass or injure any competitor or potential competitor.

C. *It is further ordered*, That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, during the period of ten (10) years from date of service of this order, forthwith cease and desist from:

1. participating in any proceeding initiated by a competitor under the Bankruptcy Code, without (a) first giving twenty (20) days written notice to the Federal Trade Commission (or, if fewer than twenty (20) days, written notice shall be given to the Federal Trade Commission as soon as is reasonably practicable under the circumstances), and (b) serving a copy of each pleading filed by either respondent in the proceeding on the Federal Trade Commission by first-class mail at the same time that the pleading is filed;

2. filing or seeking to file in any proceeding initiated by a competitor under the Bankruptcy Code, without the prior approval of the Federal Trade Commission, a plan of reorganization by which either or both respondents would acquire the whole or any part of the stock, share capital, assets or equity interest of such competitor;

3. initiating or participating in any judicial or administrative proceeding against any competitor without providing the Federal Trade Commission (a) within ten (10) days of filing the complaint, petition, or pleading in question, a copy of that complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in such a proceeding, and (b) within twenty (20) days of receiving a request from the Federal Trade Commission for such a statement, a statement of the factual and legal bases underlying each respondent's reasons for the initiation of or initial participation in such a proceeding; provided, however, that this subparagraph C.3 shall not apply to any insurance subrogation claim for personal injury or for damage to property.

D. *It is further ordered*, That each respondent, including each of its successors and assigns, directly or indirectly, during the period of ten (10) years from the date of service of this order:

1. shall not acquire from any person any claim or right under any claim such person has against a competitor, other than by means of insurance subrogation to any claim for personal injury or for damage to property;

2. shall not acquire, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, or equity interest in any competitor; provided, however, that nothing in this subparagraph D.2 shall prohibit respondents from:

- a. acquiring any assets the total value of which in any single acquisition is less than five million dollars (\$5,000,000), or

- b. entering into any transaction with any subsidiary or affiliate of either respondent, with any company wholly developed by either respondent, or with any noncompetitor, where such transaction involves the conduct of business, including mergers, consolidations, joint ventures, or other reorganizations, solely with or among these entities.

E. *It is further ordered*, That for a period of ten (10) years from the date of service of this order, respondents, including their successors and assigns, shall distribute a copy of the Federal Trade Commission's Complaint and Order to: (1) respondents' directors and officers and their successors, (2) respondents' in-house counsel and their successors, (3) respondents' auditor and its successors, (4) AMERCO District Vice Presidents and their successors, and (5) respondents' outside counsel in any judicial or administrative proceeding involving a competitor, other than a proceeding based on an insurance subrogation claim for personal injury or for damage to property. Respondents shall make their initial distribution under this paragraph E within thirty (30) days of date of service of this order.

F. *It is further ordered*, That respondents, including their successors and assigns, shall:

1. file with the Federal Trade Commission within ninety (90) days of date of service of this order a report in writing setting forth in detail the manner and form in which respondents have complied and are complying with this order;

2. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed change in the corporation which may affect compliance obligations arising out of this order.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

In June, 1985, the Commission issued the complaint in this matter. It alleged, *inter alia*, that the respondents "pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition." I agree that the Commission had a reason to believe that the respondents had violated section 5 of the Federal Trade Commission Act when the complaint was issued. I also agree that the proposed consent order should prevent the conduct alleged in the complaint.

I have two concerns with the proposed consent order. First, I do not believe that it should prohibit the respondents from making certain acquisitions without securing prior Commission approval. In my view, an order should, in general, be directed to the wrongdoing alleged. In the present case, it is difficult to justify a prior approval provision because the complaint does not allege that the respondents made an acquisition that violated section 7 of the Clayton Act. Second, I believe that the entire order—rather than simply certain sections—should terminate after ten years.

Notwithstanding these reservations, I have voted to accord final approval to the proposed consent order. On balance, I am of the opinion that the litigation should at this time be brought to a close.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I support the majority's decision to give final approval to the consent agreement. I do so because I am persuaded that there is reason to believe U-Haul engaged in sham litigation against a competitor in an attempt to monopolize the market for one-way truck and trailer rentals. Moreover, I am persuaded that the consent order provides an effective and, for the most part, appropriate remedy for the conduct alleged.

My only reservation about the order stems from its inclusion of a ten-year prior approval requirement for asset acquisitions with a total value of at least \$5 million. The theory of the case is not that U-Haul sought to monopolize the market by acquiring competitors but that sham litigation, including sham proposals by U-Haul to acquire Jartran as part of reorganization plans, was undertaken for that purpose. Therefore, I question the relevance of the prior approval requirement to the violations alleged. Moreover, the \$5 million asset threshold for competitive concern has not been adequately justified. For these reasons, I would have preferred that the prior approval requirement be deleted from the consent order.

Set Aside Order

109 F.T.C.

IN THE MATTER OF

THE ADVERTISING CHECKING BUREAU, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket C-2947. Consent Order, Jan. 4, 1979—Set Aside Order, May 19, 1987*

The Federal Trade Commission has set aside a 1979 consent order with The Advertising Checking Bureau, Inc. (93 F.T.C. 4), thus removing restrictions on respondent's involvement in cooperative advertising programs.

ORDER REOPENING AND SETTING ASIDE ORDER

ISSUED ON JANUARY 4, 1979

On January 16, 1987, The Advertising Checking Bureau, Inc. ("ACB") filed its Petition to Reopen Proceeding And To Set Aside Consent Order ("Petition"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, requesting that the Commission set aside the order in Docket No. C-2947, issued on January 4, 1979.¹ ACB's petition was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that ACB violated section 5 of the Federal Trade Commission Act by auditing price restrictive cooperative advertising programs. ACB's conduct, as alleged in the complaint, had the effect of fixing or "illegally influencing" the resale prices of dealers selling ACB's clients' merchandise and eliminating intra-brand competition. It is clear that the complaint challenging ACB's conduct applied a *per se* rule of illegality. The order prohibits ACB from "designing, implementing, conducting, administering or auditing" any cooperative advertising program that conditions the right of any dealer to obtain cooperative advertising allowances or credits because the dealer, among other things, sells or advertises merchandise at a discount or sale price.²

In its petition, ACB asserts that the order's prohibitions hinder ACB's efforts to compete with cooperative advertising auditing firms not subject to the order's constraints. ACB states that setting aside

¹ ACB also requests the Commission to withdraw the Commission's "Policy Statement Regarding Price Restrictions In Advertising Programs" ("Policy Statement"), 4 Trade Reg. Rep. (CCH) ¶39,057 (October 26, 1981), issued on June 27, 1980. In conjunction with the issuance of this order, the Commission is also withdrawing its policy statement.

² The order does not bar ACB from auditing cooperative advertising programs that restrict any dealer's right to obtain cooperative advertising allowances for the advertising of "closeouts," "irregulars" or "seconds."