No. 11-2053

United States Court of Appeals
For the First Circuit

MARCIA MEI-LEE LIU, individually and on behalf of a class of all others similarly situated

Plaintiff-Appellant,

v.

AMERCO; U-HAUL INTERNATIONAL, INC.

Defendants-Appellees.

Appeal from Order of the
United States District Court for the District of Massachusetts
C.A. No. 1:10-cv-11221-GAO

INITIAL BRIEF OF PLAINTIFF-APPELLANT

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument may assist the Court in understanding many of the issues presented on appeal, because the District Court's two-page Order under review includes no analysis of the primary issues briefed by the parties below.

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), the Class Action Fairness Act, because the aggregated amount in controversy exceeds $5,000,000, exclusive of interest and costs, and Plaintiff-Appellant Marcia Mei-Lee Liu ("Plaintiff") and other members of the putative class are citizens of different states than the Defendants-Appellees AMERCO and U-Haul International, Inc. (collectively referred to as "U-Haul" or "Defendants"). Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this appeal because the District Court allowed Defendants' motion to dismiss and disposed of all of Plaintiff's claims in a final order of judgment.

The District Court's orders dismissing this case, Addendum at 1-3, were entered on August 22, 2011. Plaintiff filed a timely notice of appeal on September 13, 2011.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In an action seeking damages caused by Defendants' alleged attempt to collude on prices with their primary competitor, did the District Court err in finding that Plaintiff did not plausibly allege injury where Plaintiff, based on an econometric analysis of publicly available pricing data described in detail in the Class Action Complaint, Joint Appendix ("JA") 38-57 (the "Complaint"), specifically alleged: "The unlawful efforts to collude set forth herein caused damage to the Plaintiff and the members of the Class because they paid at least 10% more for their one-way truck rentals than they would have in the absence of the unlawful attempt to collude set forth herein"? JA 53 at ¶ 76.

2. Do the allegations of the Complaint below, taken as true, allege a plausible violation of Mass. Gen. L. c. 93A?

STATEMENT OF THE CASE

On June 9, 2010, the Federal Trade Commission (the "FTC") filed a complaint against, and simultaneously entered into a consent decree with, U-Haul to resolve the FTC's allegation that U-Haul violated Section 5 of the FTC Act, 15 U.S.C. § 45 ("Section 5"), by inviting U-Haul's primary competitor, Avis Budget Group, Inc. ("Budget"), to collude on one-way truck rental rates.[1] The consent decree provided for significant injunctive relief, but did not provide for restitution or payment to injured parties, even though the FTC determined that U-Haul's conduct was "particularly egregious" and likely to harm consumers. JA 30-37; U-Haul International, Inc. and AMERCO; Analysis of Agreement Containing Consent Order to Aid Public Comment, 75 Fed. Reg. 35,033, 35,035 (June 21, 2010) (Addendum at 4-6).[2]

Plaintiff purchased two one-way truck rentals from Defendant U-HAUL International, Inc. during the period in which the FTC alleged that U-Haul

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[1] Both of these documents are fairly incorporated into the Complaint. *See Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 3 (1st Cir. 2011). Copies of the final public versions of these documents (published after a 30-day notice-and-comment period) are included in the Joint Appendix. *See* JA 8-37.

[2] The FTC can only challenge conduct under Section 5 if it believes that the conduct "causes or is likely to cause substantial injury to consumers . . . ." 15 U.S.C. § 45(n).

attempted to collude on price. JA 39 at ¶¶ 2-3; JA 48-49 at ¶ 50. After conducting an analysis of publicly available pricing data related to the one-way truck rental market, Plaintiff filed her Complaint on July 21, 2010. Plaintiff alleged that Defendants' attempt to collude was an unfair business practice in violation of Mass. Gen. L. c. 93A ("93A") that damaged Plaintiff and the members of a putative class because Plaintiff and the putative class members paid at least 10% more than they would otherwise have paid in the absence of U-Haul's efforts to collude. JA 53 at ¶ 76; JA 56 at ¶¶ 90-96.

On September 17, 2010, Defendants moved to dismiss, arguing that either: (1) Plaintiff's allegations, even if true, did not state a claim under 93A; or (2) Plaintiff's allegations did not plausibly allege a violation of 93A. *See* Defs.' Mem. In Supp. Of Their Joint Mot. To Dismiss For Failure To State A Claim, District Court Dkt. # 13. Extensive briefing was completed below on November 22, 2010. On August 10, 2011, the District Court held oral argument. *See* JA 58-102 (transcript of oral argument). On August 22, 2011, the District Court dismissed Plaintiff's claim on neither of the primary grounds pressed by Defendants. Addendum at 1-2 (District Court Order). Rather, the District Court found that Plaintiff failed to plausibly allege injury as required by 93A. *Id.* Specifically, the District Court held that Plaintiff should have provided detailed information

regarding competitors' prices at the time of her purchases. *Id.* Because this information has not been publicly available for years, and thus this supposed defect could not be cured by amendment, Plaintiff filed a timely notice of appeal on September 13, 2011.

STATEMENT OF FACTS

A. U-Haul's Alleged Anticompetitive Activity[3]

U-Haul is the largest competitor in the one-way truck rental business in the United States, controlling approximately 54% of the market. Budget is U-Haul's next largest competitor. Together, they account for approximately 70% of one-way truck rental transactions. JA 41 at ¶¶ 17-20.

Prior to 2006, price competition from Budget was forcing U-Haul to lower its rates. Thus, in 2006, Edward J. Shoen ("Shoen"), the Chairman and President of AMERCO, and the Chief Executive Officer and Chairman of U-Haul International, Inc., developed a scheme to eliminate price competition and increase rates. Shoen instructed regional managers to raise their rates, contact their counterparts at Budget and inform them of the increase, and encourage those Budget managers to follow the rate increase. If Budget would not follow the rate increase, U-Haul regional managers were instructed to lower rates below Budget's

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[3] Plaintiff's allegations regarding U-Haul's alleged misconduct largely are drawn from the complaint filed by the FTC. As is often true in cases arising from alleged violations of competition law, the details of U-Haul's conduct are at this stage solely in Defendants' possession. This may be especially true here, because U-Haul was uncooperative during the FTC investigation. Addendum at 6 (finding that "U-Haul impeded the Federal Trade Commission's investigation of this matter" by inappropriately redacting damaging portions of crucial documents).

and inform Budget of this rate reduction in order to force Budget to comply with U-Haul's effort to raise rates. JA 42-43 at ¶¶ 25-32.

Pursuant to this scheme, Shoen distributed a memorandum to U-Haul dealers providing a script for how to contact Budget:

> We are successfully meeting or beating our Budget and Penske competitors. However, their rates are WAY TOO LOW. When you and your MCP [regional manager] decide it is time to bring some One-Way rates back up above a money loosing [sic] 35¢ mile, have your Dealers let the Budget and Penske Dealers know. Try "Are you tired of renting 500 miles for $149 and a $28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too." Dealers know how to have this conversation and who to call to have it . . . [W]e should be able to exercise some price leadership and get a rate that better reflects our costs.

JA 43 at ¶ 32 (emphasis in original).

Accordingly, in late 2006, U-Haul representatives nationwide contacted Budget and invited price collusion. For example, Robert Magyar, U-Haul's regional manager in Tampa, Florida, contacted Budget as requested and e-mailed Shoen to describe his efforts. JA 44 at ¶¶ 33-36.

These efforts succeeded in significantly raising industry-wide one-way truck rental rates from about September 2006 to September 2007. At that time, rates began to drop again somewhat, although not down to competitive levels. Accordingly, and as reflected in internal U-Haul documents identified by the FTC and quoted in the Complaint, Shoen again expressly instructed regional managers

to invite Budget to raise prices. These instructions were carried out. JA 44-45 at ¶¶ 37-44.

Shoen reinforced this second invitation to raise prices by using AMERCO's February 7, 2008 shareholder earnings call, which he knew Budget would monitor, to induce Budget to raise prices with U-Haul. As extensively quoted in the Complaint, Shoen stated during this call that: (1) U-Haul had recently raised rates and competitors should follow; (2) U-Haul would wait a while for Budget to raise rates; (3) Budget did not have to match U-Haul's rates exactly; U-Haul would tolerate a small price differential of 3 to 5%; and (4) U-Haul would respond by lowering prices if Budget attempted to gain market share through offering low prices. As the transcript of the call makes clear, this invitation to collude was part of an orchestrated effort by Shoen to reduce uncertainty regarding U-Haul's pricing and thereby drive up market prices. JA 46-48 at ¶¶ 45-47.

Shoen's instructions and efforts were successful in again substantially raising one-way truck rental rates. These rates remained at supracompetitive levels until the end of 2008, when the recession caused by the financial collapse at that time placed sufficient downward pressure on pricing to dampen the effectiveness of Shoen's scheme. JA 48 at ¶ 48.

B. Plaintiff's Damages Allegations

Plaintiff purchased one-way truck rentals from U-Haul in October 2007 and August of 2008 for transportation of goods to Boston, and within Massachusetts, respectively. JA 39 at ¶¶ 1-3. To confirm that the prices that she paid were likely artificially inflated, Plaintiff (through her counsel) conducted a detailed econometric analysis of pricing related to the one-way truck rental market.[4] This analysis consisted of two separate but related comparisons. First, Plaintiff reviewed price increases between September 2006 and September 2008 in the "Truck Rental, Without Drivers" Producer Price Index category established by the U.S. Bureau of Labor Statistics. JA 48-50 at ¶¶ 50-59.[5] These prices increased a total of 46.1% during the relevant time period and fluctuated in a manner that is consistent with the allegations of misconduct in the Complaint. *Id.*

Second, Plaintiff performed "yardstick" and multiple regression analyses that compared price changes in the rental truck industry with those in the rental passenger car industry. JA 50-53 at ¶¶ 60-72. These types of analyses are well

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[4] Plaintiff's economic allegations were based on a report and analysis of publicly-available pricing data created by an expert retained by Plaintiff's counsel.

[5] While this is not a perfect proxy for U-Haul's prices, it is the best publicly available proxy, and the U.S. Census has determined that U-Haul is a significant driver of pricing in this index. JA 49 at ¶ 55.

accepted to show both impact (injury) and damages in unfair competition cases. *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 3.06a2 (3d ed. Supp. 2010). Specifically, they are used to determine what portion of price fluctuation is a result of collusion or attempted collusion, by comparing prices between the market in which there has been anticompetitive activity and another, similar, market which appears to be free from anticompetitive conduct. JA 50-53 at ¶¶ 60-72. In this case, Plaintiff used the rental passenger car industry as the best available comparison market because that industry is characterized by similar supply features as the truck rental industry. JA 51 at ¶ 64. For example, a primary input cost in the two industries is the cost of the vehicle itself and employee costs. *Id.* The passenger rental car industry also is characterized to a large extent by similar cost structures and similar (although not identical) demand features. JA 51 at ¶ 65.

The results of these two analyses, set forth in detail in the Complaint, allowed Plaintiff to allege with a high degree of reliability[6] as follows:

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[6] Plaintiff's regression analysis was shown to have an "R squared" of 0.81. This means that Plaintiff's economic model explained approximately 81% of the variation in pricing in the relevant market. An R squared statistic of 0.81 is indicative of a reliable economic model. *See, e.g.*, William E. Griffiths et al., *Learning And Practicing Econometrics* 303-04 (1st ed. 1993).

> [R]egression demonstrates that between the period September 2006 and September 2008 the overcharge resulting from the misconduct alleged herein was well in excess of 10%, meaning that it is more likely than not that members of the class paid at least 10% more on average for one-way truck rentals during the class period than they would have paid absent the unlawful conduct alleged herein[;]
>
> * * *
>
> The increase in prices cannot be explained by factors other than the efforts to collude set forth herein[;] and
>
> * * *
>
> The unlawful efforts to collude set forth herein caused damage to the Plaintiff and the members of the Class because they paid at least 10% more for their one-way truck rentals than they would have in the absence of the unlawful attempt to collude set forth herein.

JA 52-53 at ¶¶ 70, 71, 76.

C. The Order Below

On August 22, 2011, following extensive briefing and oral argument, the District Court issued a two-page Order[7] granting Defendants' motion to dismiss. Addendum at 1-2. The District Court assumed *arguendo*, but did not determine, that "U-Haul had committed an actionable wrong that had a price-raising effect generally on the national market . . . ," *id.* at 1, and acknowledged that Plaintiff

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[7] The District Court did not issue a separate memorandum.

alleged that she purchased one-way rentals from U-Haul during the time that prices increased nationally. *Id.*

Nevertheless, the District Court held that "[P]laintiff has failed to plausibly allege an injury," because "[w]hether she overpaid, and whether such overpayment was caused by U-Haul's unrequited attempts to collude with Avis Budget Group, Inc., is left entirely to conjecture." *Id.* at 1-2. In the District Court's view, Plaintiff should have alleged additional details related to her transaction, such as "what she paid for her one-way truck rentals or what available competitors' rates were at the time." *Id.* at 1. The District Court reached this conclusion even though the available competitors' rates at the time of the relevant purchases were no longer publicly available by the time the alleged unlawful activity could reasonably have been identified. At oral argument, the District Court seemed to be under the misimpression that these pricing allegations were required pursuant to the pleading requirements articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), even though imposition of the requirement would effectively foreclose the pursuit of *any* claim premised on U-Haul's alleged misconduct. JA 92.

SUMMARY OF THE ARGUMENT

On June 9, 2010, the FTC filed a complaint against Defendants alleging that, between 2006 and 2008, U-Haul engaged in an unlawful effort to collude with its largest competitor, Budget, on the price of one-way truck rentals. According to the FTC, these efforts included an explicit written instruction from U-Haul's most senior executive to its regional managers across the United States instructing them to contact their counterparts at Budget, and "tell your Budget[] . . . rep that U-Haul is up and they should be too." JA 43 at ¶ 2. This effort to collude, which the FTC concluded was "particularly egregious," *see* Addendum at 6, was a violation of Section 5 and, thus, Chapter 93A.[8] Plaintiff thus brought her action against U-Haul for this violation, relying on the FTC's allegations regarding U-Haul's conduct, and on her expert's detailed econometric analysis of publicly available pricing data to support her damages allegations.[9]

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[8] While Plaintiff alleges a violation of 93A, and the FTC alleged a violation of Section 5, the two statutes have nearly identical wording, and the Massachusetts Legislature has expressly directed that 93A be interpreted consistently with Section 5. *See infra* Section IV.B.2.

[9] The internal documents uncovered by the FTC strongly support the conclusion that Defendants did indeed attempt to collude. They also strongly support the conclusion that Plaintiff was injured by this conduct, given that it can be

Plaintiff's damages allegations were consistent with the conclusion of the FTC, which determined that U-Haul's alleged misconduct was likely to harm consumers. Plaintiff's allegations were also consistent with scholarly authority, which is literally unanimous that efforts to collude such as the one alleged by Plaintiff are likely to cause economic damage to consumers in the form of elevated prices. The reason this is so was explicitly recognized by U-Haul's own top executive during the course of an earnings call: such efforts to collude reduce uncertainty in the market, thereby lessening the fear among competitors that price increases will lead to reduced market share.[10] *See* JA 46-47 at ¶ 47(b) (quoting Shoen that one of his goals was to reduce pricing uncertainty in the market); Phillip E. Areeda & Herbert Hovenkamp, VI *Antitrust Law* ¶ 1419a (2010); ¶ 1419d; and ¶ 1419e (discussing the likely economic effects of an effort to collude). Moreover, regardless of whether or not U-Haul's effort to collude increased prices market-wide, there is no question that U-Haul's price increases, which were an element of its alleged unlawful effort to collude, caused damages to U-Haul's customers, including Plaintiff and the members of the putative class.

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reasonably inferred that the regional employees setting the prices paid by Plaintiff followed the unambiguous orders from top management to improperly raise prices.

[10] Neither U-Haul nor the District Court ever cited any authority to the contrary, and Plaintiff is aware of none.

This straightforward analysis should on its own have been more than sufficient to render Plaintiff's allegation of economic injury plausible under the standard set forth in *Twombly*. The Complaint, however, also contains 25 paragraphs of detailed economic analysis, including a regression analysis of publicly available pricing data in a comparable industry, *see* JA 48-53 at ¶¶ 50-75, in support of Plaintiff's allegation that: "The unlawful efforts to collude set forth herein caused damage *to the Plaintiff* and the members of the Class because they paid at least 10% more for their one-way truck rentals than they would have in the absence of the unlawful attempt to collude set forth herein." JA 53 at ¶ 76 (emphasis added).

Nevertheless, the District Court found that "the plaintiff has failed to plausibly allege an injury" because "[w]hether she overpaid, and whether such overpayment was caused by U-Haul's unrequited attempts to collude with Avis Budget Group, Inc., is left entirely to conjecture." Addendum at 1-2. This was error that Plaintiff respectfully requests should be reversed.

In addition, although the District Court did not explicitly reach the questions, *see* Addendum at 1-2, Plaintiff respectfully requests that this Court exercise its discretion to determine that: (1) an invitation to collude (even if not accepted) is a violation of both Section 5 and 93A; and (2) Plaintiff sufficiently alleged a

violation of 93A for her complaint, filed 15 months ago as of the filing of this brief, to proceed to discovery. These were the primary issues raised by U-Haul in support of its motion to dismiss. *See* Defs.' Mem. In Supp. Of Their Joint Mot. To Dismiss For Failure To State A Claim, District Court Dkt. # 13. Because the District Court failed to address and resolve these questions, reversal of the District Court solely on the narrow grounds that its analysis of Plaintiff's injury allegations was error will only result in inefficiency and further delay. Defendants undoubtedly will seek a decision on the merits of their primary arguments below, and, whichever way the District Judge assigned to the matter decides the issues, the losing party undoubtedly will attempt to present them to this Court for review. Efficiency thus dictates that this Court address the merits of these arguments now. There can be no serious question that: (1) The Complaint plausibly alleges an invitation to collude in the setting of prices; and (2) such anticompetitive behavior is a violation of 93A. This Court should conclude as much at this time.

ARGUMENT

I. Standard Of Review

The standard of review is *de novo*, because the District Court dismissed the Complaint for failure to plausibly state a claim. *Haley v. City of Bos.*, __ F.3d __, 2011 WL 4347027, *3 (1st Cir. Sept. 19, 2011); *Poirier v. Mass. Dep't of Corr.*, 558 F.3d 92, 94 (1st Cir. 2009).

II. An Unfair Or Deceptive Act That Causes Injury Is A Violation of 93A

In order to survive a motion to dismiss, a party alleging a violation of Mass. Gen. L. c. 93A § 2 must plausibly allege: (1) that the defendant committed an unfair or deceptive act or practice in the conduct of trade or commerce; (2) economic injury;[11] and (3) a causal connection between the economic injury and the defendant's unfair or deceptive practice. *See, e.g.*, *Hershenow v. Enter. Rent-A-Car Co. of Bos.*, 445 Mass. 790, 797, 840 N.E.2d 526, 532 (2006).

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[11] As this Court has acknowledged, it is not entirely clear under Massachusetts Supreme Judicial Court precedent whether economic damage always is required in cases brought pursuant to 93A. *See Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250, 253-55 (1st Cir. 2010). Since Plaintiff here plainly alleged economic damage, however, she assumes *arguendo* that such damage is a required element of a 93A claim.

III. *Twombly* Requires Only That A Plaintiff's Allegations Be *Plausible*

In reviewing a complaint, this Court must view the allegations as a whole rather than piece-meal, *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d at 8, 14-15 (1st Cir. 2011), and "indulge all reasonable inferences in favor of the pleader." *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010) (*en banc*). Taking this approach, "[t]he make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief." *Sepulveda-Villarini v. Dep't of Educ.*, 628 F.3d 25, 29 (1st Cir. 2010) (Souter, J., by designation) (citing *Ashcroft v. Iqbal*, _____ U.S. _____, 129 S. Ct. 1937, 1950-51 (2009) and *Twombly*, 550 U.S at 555). This is a "plausibility," not a "probability" standard, and "a well-pleaded complaint may proceed even if . . . a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. Detailed factual allegations are not required. *Ocasio-Hernandez*, 640 F.3d at 14-15. This remains particularly true with regard to antitrust actions, even post-*Twombly*, because "'the proof is largely in the hands of the alleged conspirators.'" *In re Gabapentin Patent Litig.*, 649 F. Supp. 2d 340, 347 (D.N.J. 2009) (citation omitted).

IV. Plaintiff Plausibly Alleged An Unfair Business Practice That Caused Economic Injury

A. The District's Court's Finding That Plaintiff Did Not Plausibly Allege Injury Was Plainly Incorrect

1. Plaintiff Alleged Economic Injury

The District Court's finding that "[w]hether [Plaintiff] overpaid, and whether such overpayment was caused by U-Haul's unrequited attempts to collude with Avis Budget Group, Inc., is left entirely to conjecture" was fundamentally wrong. Addendum at 1-2. On the contrary, Plaintiff alleged that:

> The unlawful efforts to collude set forth herein caused damage to the Plaintiff and the members of the Class because they paid at least 10% more for their one-way truck rentals than they would have in the absence of the unlawful attempt to collude set forth herein.

JA 53 at ¶ 76. The District Court simply ignored this allegation. This error alone merits reversal.

2. Plaintiff's Allegation Of Economic Injury Was Plausible

The plainly non-conclusory allegation of economic injury contained in paragraph 76 of the Complaint and quoted above was entirely plausible given: (1) Plaintiff's 25 paragraphs of allegations setting forth detailed econometric analysis of pricing data relevant to the one-way truck rental market, all of which should have been afforded a presumption of truth; (2) the conclusion of the FTC, which of necessity must have found that the alleged conduct likely harmed consumers in

order to proceed with its complaint against U-Haul; and (3) unanimous scholarly opinion that conduct such as that alleged in the Complaint is likely to cause economic harm to consumers such as Plaintiff.

a. Plaintiff's Economic Analysis Confirms The Plausibility Of Her Injury Allegations

As set forth in greater detail above, Plaintiff alleged a detailed analysis of pricing relevant to the one-way truck rental market that is entirely plausible. Plaintiff alleged that during the period of alleged unlawful conduct, September 2006 to September 2008, prices of truck rentals generally increased by 46.1% and fluctuated in a manner consistent with the allegations of misconduct. JA 48-50 at ¶¶ 50-59. In addition, using a "yardstick" and multiple regression analysis that compared truck rental prices with prices in a similar market, Plaintiff alleged that prices in the market for one-way truck rentals were significantly higher than expected during the period of alleged anticompetitive activity, and that these high prices could not be explained by factors other than Defendants' efforts to collude. JA 50-53 at ¶¶ 60-72.[12]

[12] Not surprisingly, Defendants indicated in briefing below that they disagreed with much of Plaintiff's econometric analysis. Thus, as in nearly all cases alleging unlawful activity sounding in antitrust, a court eventually will have to conduct a *Daubert* analysis and resolve conflicting expert positions. But this is not the appropriate stage for such an inquiry. At this stage, Plaintiff's econometric

b. The Conclusions Of The FTC Support The Plausibility Of Plaintiff's Injury Allegations

The FTC determined that U-Haul's conduct was "particularly egregious." Addendum at 6. Further, as noted above, the FTC is only permitted to challenge conduct under Section 5 (as it did here) where it believes that the conduct "causes or is likely to cause substantial injury to consumers…." 15 U.S.C. § 45(n).

Notably, the FTC concluded that Defendants' unlawful conduct likely harmed consumers *even if* Budget did not directly accept U-Haul's invitation to collude, a point on which the FTC expressed no opinion. Addendum at 6. As the FTC noted:

> An unaccepted invitation to collude may facilitate coordinated interaction by disclosing the solicitor's intentions and preferences. For example, in this case Budget learned from Mr. Magyar that if

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allegations, like the rest of her non-conclusory allegations, are entitled to the presumption of truth unless unreasonable. *See, e.g.*, *Ocasio-Hernandez*, 640 F.3d at 12. Courts have uniformly rejected "*Daubert*-style inquir[ies]" in connection with motions to dismiss. *Bearden v. Honeywell Int'l, Inc.*, No. 3:09-01035, 2010 WL 1223936, at *4 (M.D. Tenn. Mar. 24, 2010); *see also In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 283 n.3 (S.D.N.Y. 2010) ("We also reject defendants' argument that plaintiffs cannot rely on the conclusions of confidential experts to overcome a motion to dismiss because such expert testimony would not survive a *Daubert* challenge."). This Court should similarly refuse Defendants' inevitable invitation to conduct a *Daubert*-style inquiry into Plaintiff's pre-filing expert analysis, which was of necessity based on publicly available data rather than Defendants' own transactional data.

> Budget raised its rates U-Haul would not undercut Budget. Thus, the improper communication from U-Haul could have encouraged Budget to raise rates. Similarly, the public statements made by the CEO of U-Haul could have encouraged competitors to raise rates.

Id. The FTC determined that U-Haul's invitation likely harmed consumers even if not accepted[13] because: "even an unaccepted solicitation may facilitate coordinated interaction by disclosing the intentions or preferences of the party issuing the invitation." *Id.* at 6 n.4.[14] The FTC's conclusions regarding damages should alone be enough to render it "plausible" that U-Haul's conduct caused the economic harm alleged by Plaintiff.

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[13] As set forth below, the FTC has determined in numerous prior actions over the past twenty years that invitations to collude likely harm consumers even if not accepted.

[14] Of course, for purposes of this action, if Plaintiff plausibly alleged that U-Haul raised prices as part of its attempt to collude, and that Plaintiff and the members of the prospective class – all of whom rented from U-Haul by definition – rented trucks at those higher prices, it makes no difference whether Budget actually did raise its prices. Plaintiff and the members of the prospective class were harmed by *U-Haul's* increases undertaken as part of *U-Haul's* alleged unfair business practice. JA 53 at ¶ 76.

c. Scholarly Authority Confirms That, As Shoen Himself Recognized, Invitations To Collude Are Likely To Lead To Improper Price Increases And Harm Consumers

Plaintiff's expert econometric analysis and the FTC's determination that Defendants' alleged conduct in this case likely harmed consumers are each consistent with both the overwhelming weight of legal and economic authority and Shoen's own understanding of why he was attempting to collude with Budget. As Professors Areeda and Hovencamp have concluded: "[T]he solicitation to engage in illegal collaboration is itself dangerous to competition because it can facilitate undesirable coordination, whether or not we can prove a conspiracy in any particular case." *See e.g.*, Phillip E. Areeda & Herbert Hovenkamp, VI *Antitrust Law* ¶ 1419a (2010). *See also id.* at ¶ 1419d ("[A] solicitation to raise prices in concert may reduce . . . uncertainty, either by setting a target price or by raising confidence that rivals will follow."); ¶ 1419e ("Though unaccepted, a solicitation can facilitate tacit coordination. It informs the solicitee(s) that the solicitor would be likely to follow upward price leadership in the future and perhaps even the amount or character of an acceptable increase . . . . In short, the enemy of tacit coordination is uncertainty about rivals' prospective conduct, and the unaccepted solicitation reduces that uncertainty."); *Corp. Counsel's Antitrust Deskbook* § 12:12 (2009) ("Thus, a failed invitation to collude can very well be successful

because it implies so much, competitively speaking. While a competitor rejects the offer, the invitation still might cause the competitor to react in a way that affects competition. The competitor rejecting the invitation might take certain actions with respect to pricing that it would not have taken had it not received the invitation to fix prices."); Susan S. DeSanti & Ernest A. Nagata, *Competitor Communications: Facilitating Practices orInvitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 63 Antitrust L.J. 93, 105-07 (1994) (cataloging various ways in which an invitation to collude results in competitive harm).

Critically, U-Haul itself recognized this point. Shoen, its most senior executive, stated on a public conference call that one of his strategic goals was to get Budget to raise prices by reducing Budget's uncertainty as to U-Haul's intentions:

> I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut.
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> * * *

> And if they [Budget] perceive that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound effect on us.

JA 46-47 at ¶¶ 47(b)-(c). While actual collusion would of course be the most certain method of reducing uncertainty, Shoen's words apply almost equally to the actual tactics alleged in the Complaint. Plaintiff's allegation that Shoen's efforts at price collusion had precisely the effect he intended should certainly be deemed plausible.

d. The District Court Apparently Misunderstood *Twombly* And Thus Both Failed To Make Appropriate Inferences In Favor Of Plaintiff And Required Unnecessary Details In The Complaint

Ignoring all of the arguments identified above, the District Court dismissed the Complaint because it found that that Plaintiff did not plausibly allege injury because she did not allege details about the specific prices that she personally paid or what specific prices available competitors were offering at the exact time of her individual transactions. While not analyzed in the District Court's Order, certain questions during oral argument suggested that the Court incorrectly believed that these details were required by *Twombly*. JA at 92.[15]

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[15] Factually this action is entirely distinguishable from *Twombly*, in which the Supreme Court found an inference of collusion not more plausible than an inference of uncoordinated activity. *Twombly*, 550 U.S. at 564-70. In this case, no inference is required to reach the conclusion that U-Haul engaged in an effort to

First, as this Court has made clear, even after *Twombly*, the Court must "indulge all reasonable inferences in favor of the pleader." *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010) (*en banc*). Here, Plaintiff's allegation that the employees responsible for pricing her rentals did what their top management instructed them to do, including raising prices as part of a scheme to unlawfully collude with Budget, thereby injuring Plaintiff, is certainly plausible and should have been credited. This case is thus analogous to *Ocasio-Hernandez v. Fortuno-Burset*, in which this Court reversed the District Court's dismissal order where the District Court refused to credit numerous allegations of plaintiffs on the grounds that the allegations did not "lead to the conclusion that" Defendants violated the law. 640 F.3d 1, 14 (1st Cir. 2011). Similarly, here, the District Court refused to reasonably infer that if, as the District Court assumed, U-Haul was raising prices to supracompetitive levels, it also at least plausibly overcharged Plaintiff at the locations where she rented her trucks.

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collude, because the Complaint includes allegations of direct evidence of the effort. *Compare* JA 38-57 (Complaint) *with* Consolidated Amended Class Action Complaint, *Twombly v. Bell Atl. Corp.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. April 11, 2003), 2006 WL 2472651 at *10-*36. Nor, given the detailed allegations in the Complaint, is the inference that Plaintiff was not injured equally plausible as the inference that she was injured.

Second, the District Court improperly demanded more detail in the complaint than *Twombly* requires. In this regard the opinion below is again strikingly similar to that of the District Court in *Ocasio-Hernandez*, which held that the plaintiffs' allegations of improper questioning about their hiring circumstances were inadequate because they "'contain[ed] no specific account of these conversations.'" *Ocasio-Hernandez*, 640 F.3d at 14, and that the plaintiffs' allegations regarding their replacements after they were fired were "conclusory" because "the 'plaintiffs [did] not identify who replaced any or all of the plaintiffs, nor the date of these replacements.'" *Id.* This Court soundly rejected both of these holdings, noting that "factual allegations in a complaint do not need to contain the level of specificity sought by the district court, . . . [in order] to provide the defendants 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

The District Court here similarly required superfluous factual detail regarding Plaintiff's individual transactions, and ignored the straightforward and sufficient allegation – backed by economic analysis, scholarly authority, and the FTC's own conclusions – that Plaintiff paid at least 10% more for her truck rentals than she would have absent Defendants' illegal scheme.

Indeed, the District Court's supposed requirement here is even more unreasonable than the details required by the Court in *Ocasio-Hernandez*, because the detail demanded by the Court below *was not available to Plaintiff at the time the violation could have been reasonably uncovered*. As a result, adoption of the District Court's standard would impose a literally insuperable burden on any plaintiff seeking damages as a result of unlawful conduct such as that alleged in the Complaint. That cannot be the law. *See, e.g., In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 1003 n.10 (N.D. Ill. 2011) ("If private plaintiffs, who do not have access to inside information, are to pursue violations of the law, the pleading standard must take into account the fact that a complaint will ordinarily be limited to allegations pieced together from publicly available data.").[16]

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[16] Accordingly, numerous courts have held, post-*Twombly*, that "'[T]he existence of antitrust injury is not typically resolved through motions to dismiss . . . .'" *Rochester Drug Co-op. v. Braintree Labs.*, 712 F. Supp. 2d 308, 318 (D. Del. 2010) (citation omitted); *see also, e.g.*, *In re Neurontin Antitrust Litig.*, Master File No. 02-1390, 2009 WL 2751029, at *11 (D.N.J. Aug. 28, 2009) (same); *BanxCorp v. Bankrate, Inc.*, No. 07-3398 (SDW), 2008 WL 5661874, at *4 (D.N.J. July 7, 2008) (same). This case should be no exception.

B. An Invitation To Collude Is A Clear Violation Of 93A

As noted above, the District Court did not address Defendants' arguments that an invitation to collude can never be a violation of Section 5 of the FTC Act (and thus Chapter 93A) if that invitation is not accepted. The District Court also did not address Defendants' arguments that Plaintiff has not plausibly alleged an actionable invitation to collude. The issues are closely intertwined with the question of injury because one of the reasons that invitations to collude are actionable is that they tend to cause injury to consumers. *See supra* Sections IV.A.2.(b)-(c). It is thus appropriate for these questions to be addressed and resolved by this Court now. Efficiency also dictates this approach. If this Court addresses only the District Court's injury analysis, the underlying questions Defendants have raised will have to be resolved by a District Court on remand. And whichever party prevails, the loser is certain to seek immediate appellate review. Given that this case already has been pending for well over a year, it is in the interest of justice and efficiency for this Court to address these additional arguments now. *See, e.g.*, *N.H. Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 52 (1st Cir. 1984) (Breyer, J.) ("In this case, the truckers advanced and had full opportunity to argue the issues below; their trial brief on these issues is in the record; the appellants briefed the issues in this court; and we see no reason to

protract the litigation of these issues further by remanding the case for another decision and perhaps another appeal.").

1. An Invitation To Collude Is The "Quintessential Example" Of A Section 5 Violation

In assessing U-Haul's conduct, three FTC Commissioners stated that "[i]nvitations to collude are the *quintessential example* of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act . . . ." Addendum at 6 (emphasis added). This position is not new. The FTC's case against U-Haul was only the most recent link in an unbroken chain of consistent FTC enforcement positions for nearly twenty years that invitations to collude constitute an unfair method of competition. *See In re Valassis Commc'ns, Inc.*, Dkt. No. C-4160, 2006 WL 1367833 (F.T.C. Apr. 19, 2006) (invitation to collude by allocating customers and fixing prices deemed unlawful); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998) (invitation "to join a coordinated price increase" deemed unlawful); *In re Precision Moulding Co.*, 122 F.T.C. 104, 105-06 (1996) (invitation to fix and raise prices deemed unlawful); *In re YKK (U.S.A.) Inc.*, 116 F.T.C. 628, 629-30 (1993) (invitation to fix prices deemed unlawful); *In re AE Clevite, Inc.*, 116 F.T.C. 389, 391 (1993) (invitation to refrain from competition in pricing deemed unlawful); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 945 (1992) (invitation to fix prices deemed

unlawful); *see also In re FMC Corp.*, 133 F.T.C. 815, 821 (2002); *In re MacDermid, Inc.*, Dkt No. C-3911, 2000 WL 195669 (F.T.C. Feb. 4, 2000).

The FTC's position on this issue is based on its conclusion, which is supported by all scholarly authority on this topic, that invitations to collude are generally harmful to competition and to consumers even if they are not accepted.[17] *See supra* Sections IV.A.2.(b)-(c). Even if the FTC's position were not self-evidently correct, it would be entitled to "great weight" and should not be disturbed, especially at the pleadings stage. *See FTC v. Mandel Bros.*, 359 U.S. 385, 391 (1959) (FTC "construction is entitled to great weight . . . even though it was applied in cases settled by consent rather than in litigation."); *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 497 (1st Cir. 2009) ("Where, as here, a

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[17] In briefing below, U-Haul suggested that a determination that an invitation to collude violates Section 5 would somehow be novel because no federal court has yet addressed the issue. *See* Defs.' Mem. In Supp. Of Their Joint Mot. To Dismiss For Failure To State A Claim, District Court Dkt. # 13, at 5-7. U-Haul has the analysis precisely backward: the reason no federal court has yet addressed the issue is that the question should so obviously be answered in the FTC's favor that not one litigant in 20 years has yet challenged the FTC's position on this point. This is in contrast to other alleged anticompetitive activity, which, as Defendants note, past litigants have not hesitated to challenge. *See Id.* In any event, given the unanimity of the scholarship regarding the likely damages associated with an invitation to collude, and the fact that Shoen himself intended his invitation to collude to cause precisely the harm the FTC deems associated with such activity, this Court should not hesitate to be the first reach the conclusion that an invitation to collude can be a violation of Section 5, and certainly was such a violation under the circumstances of this case.

substantial body of FTC complaints and consent decrees focus on a class of conduct, it is hard to see why a court would choose flatly to ignore it.").

2. A Violation Of Section 5 Is By Definition A Violation Of Chapter 93A

Mass. Gen. L. c. 93A § 2(a) states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Chapter 93A expressly directs courts to be guided by both FTC *and* federal court interpretations of the FTC Act when considering whether business practices are "unfair." Mass. Gen. L. c. 93A § 2(b) ("It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under section[] . . . nine . . ., the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act . . . ."); *Boos v. Abbott Labs.*, 925 F. Supp. 49, 56 (D. Mass. 1996) ("Chapter 93A is a 'mini-F.T.C.' act, the prohibitions of which are specifically keyed to interpretations of Section 5 of the [FTC] Act.").

Accordingly, a long line of Massachusetts and other authority has relied on FTC complaints and consent decrees interpreting the FTC Act to determine what conduct is "unfair" under 93A. *See e.g.*, *In re TJX Cos.*, 564 F.3d at 489 (relying on FTC complaints and consent decrees and vacating dismissal of 93A claim);

Schubach v. Household Fin. Corp., 375 Mass. 133, 135, 376 N.E.2d 140, 141 (1978) (relying on FTC complaints and consent decrees and affirming decision denying motion to dismiss 93A claim). The law is thus unambiguous that because the FTC has determined that invitations to collude violate Section 5 even if they are not accepted, such invitations also violate 93A if (as is alleged here) they cause economic injury.

3. Plaintiff Has Plausibly Alleged An Invitation To Collude In Violation Of 93A

Defendants concede, as they must, "that the FTC has contended that the actions of U-Haul in this case constituted an invitation to collude in violation of Section 5." Defs.' Mem. In Supp. Of Their Joint Mot. To Dismiss For Failure To State A Claim, District Court Dkt. # 13, at 9. Defendants' concession alone resolves any doubt as to whether Plaintiff has "plausibly" alleged a cognizable legal claim here.

Moreover, unless this Court were to take the unprecedented action of ruling that an unaccepted invitation to collude could never be a violation of 93A, a motion to dismiss is not appropriate in this specific case given the unusually egregious nature of U-Haul's alleged conduct. The challenged conduct was directed from the very top of the corporate chain of command in unambiguous terms, and was knowingly undertaken with the goal of inflicting precisely the

injury that animates the FTC's determination that invitations to collude are unlawful. JA 46-47 at ¶¶ 47(b)-(c). Indeed, the FTC concluded:

> Although this case involves particularly egregious conduct, it is possible that less egregious conduct may result in Section 5 liability. It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.

Addendum at 6. Accordingly, if *any* invitation to collude could be actionable, as the FTC has consistently determined is the case, then Plaintiff has at the very least stated a "plausible" claim that Defendants' invitation to collude here, described in great detail in the Complaint below, violated 93A. Dismissal of Plaintiff's claim thus is entirely unwarranted.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the District Court's order dismissing the case and remand the case for further proceedings.

/s/ Charles E. Tompkins
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Dated: November 2, 2011

RULE 32(A)(7) CERTIFICATE OF COMPLIANCE

I, Charles E. Tompkins, hereby certify that the Initial Brief of Appellant complies with the type-volume limitation of Fed. R. Civ. App. 32(a)(7)(B) because this brief contains 7,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and that this brief has been prepared in a proportionally spaced Time New Roman 14 point typeface using Microsoft Word.

/s/ Charles E. Tompkins
Charles E. Tompkins

LOCAL RULE 28.0
ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 10-11221-GAO

MARCIA MEI-LEE LIU, individually and on behalf of a class of all others similarly situated,
Plaintiff,

v.

AMERCO and U-HAUL INTERNATIONAL, INC.,
Defendants.

ORDER
August 22, 2011

O'TOOLE, D.J.

After review of the parties' submissions and a hearing on the matter, the defendants' Joint Motion to Dismiss for Failure to State a Claim (dkt. no. 12) is GRANTED.

Even assuming arguendo that an invitation to collude is an actionable unfair or deceptive business act or practice under Chapter 93A, the plaintiff has failed to plausibly allege an injury. As to her own transactions, she alleges only that she "purchased a one-way truck rental from U-Haul" on two occasions, (Compl. ¶¶ 2, 3), that on both occasions she "used U-Haul's website to reserve the truck and obtain a rate quote and reservation confirmation directly from U-Haul," (id. ¶ 4), and that "[i]n both instances, [she] paid more for these products than she would have paid absent Defendants' unlawful conduct set forth herein," (id. ¶ 5). The rest of the complaint alleges the defendants' invitation to collude and its purported effect on prices in the national market for truck rentals. The plaintiff does not set forth any facts about her own transactions, such as what she paid for her one-way truck rentals or what available competitors' rates were at the time. Even if U-Haul had committed an actionable wrong that had a price-raising effect generally on the national market, the basic facts about the plaintiff's individual transactions are necessary to judge whether she was in fact harmed by those general phenomena. Whether she overpaid, and whether such overpayment

was caused by U-Haul's unrequited attempts to collude with Avis Budget Group, Inc., is left entirely to conjecture.

The plaintiff has failed to plead facts sufficient to "raise a right to relief above the speculative level." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In the absence of "allegations plausibly suggesting (not merely consistent with)" a valid claim for relief, id. at 557, the complaint must be dismissed.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARCIA MEI-LEE LIU
Plaintiff

v. **CIVIL ACTION NO. 10-11221-GAO**

AMERCO and U-HAUL INTERNATIONAL, INC.
Defendants

ORDER OF DISMISSAL

O'Toole, D.J.

In accordance with the Court's Order dated August 22, 2011 granting the Defendants' Joint Motion to Dismiss for Failure to State a Claim (dkt. no. 12) it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

Dated: 8/22/2011 **By /s/Christopher Danieli**
Deputy Clerk

- What are the most common compliance issues institutions face under HMDA and Regulation C?
- What parts of Regulation C would benefit from clarification or additional guidance?
- Are there technical issues regarding Regulation C that should be resolved?

E. Other Issues

As part of its review of Regulation C, the Board is seeking to identify emerging issues in the mortgage market that may warrant additional research, respond to technological and other developments, reduce undue regulatory burden on industry, and delete obsolete provisions. The Board therefore requests comment on any emerging issues likely to affect the usefulness and accuracy of HMDA data and on any other changes to Regulation C the Board should consider.

By order of the Board of Governors of the Federal Reserve System, June 15, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–14904 Filed 6–18–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 081 0157]

U-Haul International, Inc. and AMERCO; Analysis of Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before July 9, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to"U-Haul AMERCO, File No. 081 0157" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https//public.commentworks.com/ftc/U-HaulAmerco*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https//public.commentworks.com/ftc/U-HaulAmerco*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "U-Haul AMERCO, File No. 081 0157" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Dana Abrahamsen (202-326-2906), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for June 9, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with U-Haul International, Inc. and its parent company AMERCO (collectively referred to as "U-Haul" or "Respondents"). The agreement settles charges that U-Haul violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by inviting its closest competitor in the consumer truck rental industry to join with U-Haul in a collusive scheme to raise rates. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondents that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

U-Haul is the largest consumer truck rental company in the United States. Edward J. Shoen is the Chairman, President and Director of AMERCO, and the Chief Executive Officer and Chairman of U-Haul International, Inc. U-Haul's primary competitors in the truck rental industry are Avis Budget Group, Inc. ("Budget") and Penske Truck Leasing Co., L.P. ("Penske").

A. Private Communications

For several years leading up to 2006, Mr. Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals. In 2006, Mr. Shoen developed a strategy in an attempt to eliminate this competition and thereby secure higher rates. Mr. Shoen instructed U-Haul regional managers to raise rates for truck rentals, and then contact Budget to inform Budget of U-Haul's conditional rate increase and encourage Budget to follow, or U-Haul's rates would be reduced to the original level.

At about the same time, Mr. Shoen also instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, with the purpose of re-enforcing the message that U-Haul had raised its rates, and competitors' rates should be raised to match the increased U-Haul rates.

In late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Mr. Shoen. The complaint includes specific allegations regarding the U-Haul operation in Tampa, Florida.

U-Haul's regional manager for the Tampa area is Robert Magyar. In October 2006, Mr. Magyar received from Mr. Shoen the instructions described above. In response to Mr. Shoen's directive, Mr. Magyar increased U-Haul's rates for one-way truck rentals commencing in the Tampa area. Next, Mr. Magyar telephoned Budget and communicated to Budget representatives that U-Haul had raised its rates in Tampa, and that the new rates could be viewed on the U-Haul web-site.

One year later, in October 2007, Mr. Magyar again contacted several local Budget locations. Mr. Magyar communicated to Budget that U-Haul had increased its one-way truck rental rates, and that Budget should increase its rates as well. In an e-mail message addressed to U-Haul's most senior executives, Mr. Magyar related the conversations, as follows:

> I have also called 3 major Budget locations in Tampa and told them who I am, I spoke about the .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did.

B. Public Communications

In late 2007, Mr. Shoen decided that U-Haul should attempt to lead an increase in rates for one-way truck rentals across the United States. Mr. Shoen understood that this rate increase could be sustained only if Budget followed. On November 19, 2007, Mr. Shoen instructed U-Haul regional managers to raise prices. His expectation was that Budget would follow this rate increase.

However, Budget did not immediately match U-Haul's higher rates. U-Haul instructed its regional managers to maintain the new, higher rates for a while longer, in case Budget should take note and decide to follow.

U-Haul held an earnings conference call on February 7, 2008. Mr. Shoen was aware that Budget representatives would monitor the call. Mr. Shoen opened the earnings conference call with a short statement, noting U-Haul's efforts "to show price leadership."[2] When asked for additional information on industry pricing, Mr. Shoen made the following points:

1.U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same.

2.To date, Budget has not matched U-Haul's higher rates. This is unfortunate for the entire industry.

3. U-Haul will wait a while longer for Budget to respond appropriately, otherwise it will drop its rates.

4. In order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely. U-Haul will tolerate a small price differential, but only a small price differential. Specifically, a 3 to 5 percent price difference is acceptable.

5. For U-Haul, market share is more important than price. U-Haul will not permit Budget to gain market share at U-Haul's expense.

With regard to both the private and public communications, U-Haul acted with the specific intent to facilitate collusion and increase the prices it could charge for truck rentals.

II. Analysis

The term "invitation to collude" describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output. Such invitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate Section 5 of the FTC Act.[3]

If the invitation is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for a criminal investigation. In

[2] A complete transcript of the earnings conference call is annexed to the complaint as Exhibit A.

[3] *In the Matter of Valassis Communications, Inc.*, 141 F.T.C. ___ (C-4160) (2006); *In the Matter of MacDermid, Inc.*, 129 F.T.C. ___ (C-3911) (2000); *In the Matter of Stone Container Corp.*, 125 F.T.C. 853 (1998); *In the Matter of Precision Moulding Co.*, 122 F.T.C. 104 (1996); *In the Matter of YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *In the Matter of A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *In the Matter of Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992). In addition, invitations to collude may be violations of Section 2 of the Sherman Act as acts of attempted monopolization (*United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985)); as well as violations under the federal wire and mail fraud statutes, (*United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990)).

this case, the complaint does not allege that U-Haul and Budget reached an agreement, despite Mr. Magyar's report to his bosses that he privately encouraged Budget to raise its rates "and they did." *See* Complaint Paragraph 19.

Even if no agreement was reached it does not necessarily mean that no competitive harm was done.[4] An unaccepted invitation to collude may facilitate coordinated interaction by disclosing the solicitor's intentions and preferences. For example, in this case Budget learned from Mr. Magyar that if Budget raised its rates U-Haul would not undercut Budget. Thus, the improper communication from U-Haul could have encouraged Budget to raise rates. Similarly, the public statements made by the CEO of U-Haul could have encouraged competitors to raise rates.

Although this case involves particularly egregious conduct, it is possible that less egregious conduct may result in Section 5 liability. It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.

III. The Proposed Consent Order

U-Haul has signed a consent agreement containing the proposed consent order. The proposed consent order consists of seven sections that work together to enjoin U-Haul from inviting collusion and from entering into or implementing a collusive scheme.

Section II, Paragraph A of the proposed consent order enjoins U-Haul from inviting a competitor to divide markets, to allocate customers, or to fix prices. Section II, Paragraph C prohibits U-Haul from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices. Section II, Paragraph B bars U-Haul from discussing rates with its competitors, with a proviso permitting legitimate market research.

The proviso in Section II, Paragraph D prevents the proposed order from interfering with U-Haul's efforts to negotiate prices with prospective customers, and it would permit U-Haul to provide investors with considerable information about company strategy. This proviso also permits U-Haul to communicate publicly any information required by the federal securities laws.

Sections III, IV, V, and VI of the proposed order include several terms that are common to many Commission orders, facilitating the Commission's efforts to monitor respondents' compliance with the order. Section IV, Paragraph A requires a periodic submission to the Commission of *unredacted* copies of certain internal U-Haul documents. This provision is necessary because U-Haul impeded the Federal Trade Commission's investigation of this matter. Specifically, U-Haul submitted to the Commission, in response to a *subpoena duces tecum*, documents authored by Mr. Shoen, from which were redacted many of the sentences quoted in the complaint. In the Commission's view, there was no justification for the redaction. The proposed order should deter repetition of this conduct.

Finally, Section VII provides that the proposed order will expire in 20 years.

By direction of the Commission.

Donald S. Clark,

Secretary.

Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch

The Commission today has entered into a consent agreement with U-Haul and its parent company, AMERCO, resolving the Commission's allegation that they attempted to collude on truck rental prices. The parties have settled an invitation-to-collude case and not a Sherman Antitrust Act Section 1 conspiracy case. Put differently, the complaint in this case alleges an unfair method of competition in violation of Section 5 of the FTC Act that does not also constitute an antitrust violation.

Invitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act,[5] which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct. In contrast to conspiracy claims that would violate Section 1, invitations to collude do not require proof of an agreement; nor do they require proof of an anticompetitive effect. The Commission has not alleged that Respondents entered into an agreement with Budget or any other competitors in violation of Section 1. Today's Commission action is instead based on evidence that Respondents unilaterally attempted to enter into such an agreement. The Commission therefore has reason to believe that Respondents engaged in conduct that is within Section 5's reach.

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[4] The Commission has previously explained that there are several legal and economic reasons to punish firms that invite collusion even when acceptance cannot be proven. First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, the conduct may be harmful and serves no legitimate business purpose. Third, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the intentions or preferences of the party issuing the invitation. *In the Matter of Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order To Aid Public Comment, 71 Fed. Reg. 13976, 13978-79 (Mar. 20, 2006). *See generally* P. Areeda & H. Hovenkamp, VI Antitrust Law ¶1419 (2003).

[5] *In re Valassis Commc'ns, Inc.*, F.T.C. File No. 051-008, 2006 FTC LEXIS 25 (April 19, 2006) (Complaint); *In re MacDermid, Inc.*, F.T.C. File No. 991-0167, 1999 FTC LEXIS 191 (Feb. 4, 2000) (Complaint, Decision and Order); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (June 3, 1998) (Complaint, Decision and Order); *In re Precision Moulding Co.*, 122 F.T.C. 104 (Sept. 3, 1996) (Complaint, Decision and Order); *In re YKK (USA) Inc.*, 116 F.T.C. 628 (July 1, 1993) (Complaint); *In re A.E. Clevite, Inc.*, 116 F.T.C. 389 (June 8, 1993) (Complaint); *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (Nov. 5, 1992) (Complaint).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Preparedness and Response; Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS) is being amended at Chapter AN, Office of Public Health Emergency Preparedness (OPHEP), as last amended at 71 FR 38403–05 dated July 6, 2006. This organizational change is to retitle the OPHEP as the Office of the Assistant Secretary for Preparedness and Response (ASPR), and to realign the functions of ASPR to reflect the changes mandated by the Pandemic and All-Hazards Preparedness Act (Pub. L. 109–417) (PAHPA). The changes are as follows.

I. Under Part A, Chapter AN, "Office of Public Health Emergency Preparedness (AN)," delete in its entirety and replace with the following:

CHAPTER AN: Office of the Assistant Secretary for Preparedness and Response

AN.00 Mission
AN.10 Organization
AN.20 Functions

CERTIFICATE OF SERVICE

I, Charles E. Tompkins, hereby certify pursuant to Fed. R. App. P. 25(d) that, on November 2, 2011, the foregoing **Initial Brief of Plaintiff-Appellant** was filed through the Court's CM/ECF system and served electronically on the following counsel of record:

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