No. 11-2053

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiff-Appellant,

v.

AMERCO; U-HAUL INTERNATIONAL INC.,

Defendants-Appellees.

Appeal From The United States District Court
for the District of Massachusetts
Civil Action No. 10-11221-GAO

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28(a)(1), Defendants-Appellees state as follows:

1. The full name of the defendants-appellees represented in this case are:

   AMERCO Incorporated, ("AMERCO") and

   U-Haul International, Incorporated ("UHI")

2. UHI is owned by AMERCO.

3. AMERCO is a publicly traded company.

s/ G. Patrick Watson

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellant asks this Court to depart from Massachusetts law in two ways. First, she asks the Court to overlook the injury requirements of Sections 9 and 2 of Massachusetts General Law Chapter 93A, and of Article III of the Constitution. Second, she asks the Court to recognize, for the first time, that an “invitation to collude” is an unfair practice that is actionable under Section 2. Oral argument may be helpful to explore Appellant’s standing to bring suit and the implications of being the first court to hold that an “invitation to collude” is an unfair practice.

GLOSSARY

Abbreviations

Defendant-Appellee AMERCO .... AMERCO

Defendant-Appellee U-Haul International Inc. ....UHI

Federal Trade Commission ....FTC or Commission

Federal Trade Commission Act,
15 U.S.C. 45, *et seq*. .... FTCA

Massachusetts Consumer Protection Act,
Mass. Gen. L. c. 93A .... MCPA

Plaintiff-Appellant Marcia Mei-Lee Liu.. Liu

U.S. Bureau of Labor Statistics Producer Price Index ....PPI

United States District Court for the
District of Massachusetts .... District Court

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STATEMENT OF ISSUES

(1) Does the Complaint sufficiently allege injury for which damages can be sought under Section 9 of the MCPA?

(2) Does the Complaint sufficiently allege injury to state a claim for unfairness under Section 2 of the MCPA?

(3) Does the Complaint sufficiently allege injury-in-fact to satisfy Article III standing requirements?

(4) Does an unaccepted "invitation to collude" constitute an unfair practice under the MCPA, and, if so, does the Complaint set forth a cognizable such claim here?

STATEMENT OF THE CASE

I. Nature of Case.

On June 9, 2010, the FTC announced that it had conducted an investigation of UHI and its parent company, AMERCO. According to the FTC's Chairman, the Commission felt that it had "reason to believe" that the companies had "unilaterally attempted to enter . . . an agreement" with Avis Budget Group, Inc. ("Budget") to set self-moving truck rental prices. (Add. at 6.) The Chairman made clear that the Commission did not believe that an actual agreement had been formed. (Add. at 6) (emphasis added.) Instead, the Commission alleged that "if accepted by Budget, [the agreement] would likely result in higher one-way truck rental rates and reduced output." (JA000014 at ¶ 26) (emphasis added.)

On July 14, 2010, the FTC finalized a settlement with AMERCO and UHI under which the companies agreed, without admitting that the law had been violated or acceding to the FTC's characterization of the facts, that they would not solicit price increases from competitors. (JA000030-36.)

The day after the final settlement was announced, Liu filed a complaint (the "Complaint") against AMERCO and UHI in the District Court.[1] (JA000038.) Liu

[1] The FTC announced the final settlement on July 20, 2010. *FTC Approves Final Order Settling Charges That U-Haul Invited Its Main Competitor to Fix Truck Rental Prices* (July 20, 2010), http://www.ftc.gov/opa/2010/07/uhaul.shtm. [hereinafter "FTC Announcement"]. Liu filed her Complaint on July 21, 2010. (JA000038.)

makes no effort to hide the fact that the Complaint is based only upon the FTC's allegations and Liu's self-described "econometric analysis of publicly available pricing data to support her damages allegations." (Appellant's Br. at 14.)

II. Course of Proceedings.

On September 17, 2010, AMERCO and UHI jointly moved the District Court to dismiss the Complaint based upon the following main arguments:

(1) An "invitation to collude" does not constitute a violation of Section 5 of the FTCA;

(2) Even if it did, the Complaint does not state a claim, as the MCPA requires proof of injury to competition; and

(3) Even if an unaccepted invitation to collude theoretically could cause injury to competition, Liu did not plausibly allege that she was injured by Defendants' actions.

(JA000004 at Dkt. Nos. 12-13.) The District Court heard oral argument on the motion on August 10, 2011. (JA000058-102.)

III. Disposition Below.

On August 22, 2011, the District Court dismissed the Complaint holding that "[e]ven 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." (Add. at 1.) The District Court added that Liu had failed to "set forth any facts about her own transactions." (*Id.*) As an example, the District Court noted that Liu had not even alleged "what she paid for her one-way truck rentals or what available competitors' rates were at the time." (*Id*.)

According to the District Court,

> 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.

(Add. at 1-2.)

Liu chose not to amend the Complaint, and, instead, filed this appeal. (Appellant's Br. at 6.)

STATEMENT OF FACTS

Defendant AMERCO is a holding company that owns, among other things, UHI. UHI itself owns 48 subsidiaries (the "Marketing Companies"). Marketing Companies are separately incorporated entities that have the exclusive right to rent trucks, trailers, and other moving equipment that bear the "U-Haul" trademark within a specific geographic territory, which is often the size of a state. Trucks are rented either directly by the Marketing Company or through a network of dealers authorized by the Marketing Company.

Marketing Companies price truck rentals based upon a number of factors including the demand for a specific model or size of truck, along a specific route, and for a specified rental period. (JA000023) In situations in which a Marketing Company's rental rate is above that of a competitor, the Marketing Company has the discretion to match the competitor's rate. (JA000024.)

According to the FTC's draft complaint, AMERCO and UHI believed that Budget was offering rates "in some markets" that were below those offered for U-Haul vehicles and that were, in fact, below Budget's own cost of providing a rental. (JA000010 at ¶ 13.) In response, in October or November of 2006, AMERCO and UHI allegedly recommended that Marketing Companies unilaterally set their own rates either at a "fair rate or . . . down below the competitor," and that Marketing Companies communicate any rate changes to Budget. (JA000010 at ¶ 13.)

The FTC alleged that as a result of that suggestion, in October of 2007 Robert Magyar, a regional manager for the Marketing Company responsible for the Tampa, Florida area, contacted a Budget employee in Tampa, told him that Magyar had increased the one-way truck rental rate for U-Haul's rented in Tampa, and suggested that the Tampa location of "Budget should increase its rates as well." (JA000011 at ¶ 19.)

Liu does not allege that she rented a vehicle from Tampa. Rather, in October of 2007, Liu reserved a one-way truck rental from Manhattan, New York to Boston, Massachusetts using the U-Haul website. (JA000039 at ¶¶ 2, 4.) She alleges, however, that on November 19, 2007, the month after Liu reserved her truck, AMERCO and UHI "attempt[ed] to lead an increase in rates for one-way truck rentals across the United States." (JA000012, at ¶¶ 20-21.) The attempt allegedly consisted of asking Marketing Companies to set rates that reflected their actual costs, and to signal those rates to their Budget counterparts. According to the FTC, AMERCO and UHI advised the Marketing Companies to "[s]top setting MCO [regional] rates based on Budget's rate. Set the correct rate . . . . Budget will come up. Let them." (JA000012 at ¶ 21.)

The FTC alleged that the attempt was ineffective and "Budget did not immediately match U-Haul's higher rates." (JA000012 at ¶ 22.) Indeed, the Chairman of the FTC went out of his way to make clear that the FTC did not believe that "Budget or any other competitors" ever agreed with AMERCO or UHI to raise prices. (Add. at 6.)

According to the FTC, on February 7, 2008, Edward J. Shoen, Chairman of AMERCO and UHI, was frustrated at Budget's refusal to raise prices and stated in response to a question posed during a public earnings teleconference that "[t]o date, Budget has not taken notice of, and has not matched, U-Haul's higher rates." (JA000013 at ¶¶ 22-24(b); JA000046 at ¶¶ 45-47(b).) The FTC alleged that during the teleconference Shoen invited Budget to raise their rates. (JA000013-14 at ¶¶ 24(c)-(d); JA000047 at ¶¶ 47(c)-(d).) Neither the FTC, nor Liu, allege that Budget or any other competitor <u>ever</u> agreed to raise prices.

Six months after the earnings teleconference, in August of 2008, Liu again visited the U-Haul website. This time she reserved a one-way truck rental for transit within Massachusetts. (JA000039 at ¶¶ 3-4.)

On June 9, 2010, the FTC publicly announced its investigation of AMERCO and UHI and disclosed that the parties had reached a settlement without any admission by the companies that any laws had been violated, or that the FTC's factual allegations were true. The FTC did not allege that Budget – or any provider of trucks that compete with U-Haul vehicles – raised their rates in response to the alleged invitations to collude. Instead, the FTC made clear that "[e]ach and all of U-Haul's invitations to collude, <u>if accepted by Budget</u>, would likely result in higher one-way truck rental rates and reduced output." (JA000014 at ¶ 26) (emphasis added). When explaining the FTC's investigation, the FTC's Chairman took the position that an unrequited "invitation to collude," while not a violation of the Sherman Act, might constitute an "unfair method of competition in violation of Section 5 of the FTC Act." (Add. at 6.)

On July 14, 2010, the agreement was approved and a consent order was entered under which AMERCO and UHI agreed to cease and desist from "attempting" to enter into an agreement with a competitor to stabilize prices. (JA000033 at ¶ II(C).) The day after the final settlement was announced, Liu filed the Complaint. (FTC Announcement, supra, n.1.) While Liu states that the allegations contained within her Complaint are based upon "the FTC's allegations regarding U-Haul's conduct" (Appellant's Br. at 14), her brief contains several misstatements of the FTC's allegations:

Liu Characterization	Document Cited
". . . in late 2006, U-Haul representatives nationwide contacted Budget and invited price collusion." (Appellant's Br. at 8.) (emphasis added)	The FTC Complaint does not allege that in 2006 U-Haul representatives "nationwide" contacted Budget. The FTC's complaint refers only to communications from Robert Magyar "U-Haul's regional manager for the Tampa, Florida area." (JA000011 at ¶¶ 15-16.)
In late 2007, Shoen instructed regional managers to invite Budget to raise prices and "[t]hese instructions were carried out." (Appellant's Br. at 8-9, citing JA 44-45 at ¶¶ 37-44.)	The FTC did not allege that Shoen instructed managers in late 2007 to invite Budget to raise their prices. The FTC's complaint alleges that on November 19, 2007, Shoen "instructed U-Haul regional managers to raise prices" and to "[s]top setting MCO [regional] rates based on Budget's rate." (JA000012 at ¶ 21.) The FTC did not state that any regional manager, other than Robert Magyar in Florida, communicated with Budget. (JA000011-12 at ¶¶19-22.)
The FTC "must have found that the alleged conduct likely harmed consumers in order to proceed with its complaint against U-Haul." (Appellant's Br. at 20-21.)	The FTC did not find that the alleged conduct harmed consumers. To the contrary, the FTC made clear that they were acting based upon the possibility of prospective or incipient harm as "[e]ach and all of U-Haul's invitations to collude, if accepted by Budget, would likely result in higher one-way truck rental rates and reduced output." (JA000014 at ¶ 26) (emphasis added.)

Liu also included within her Complaint what she describes as a "detailed econometric analysis." (Appellant's Br. at 20.) The analysis to which she refers consists of a comparison of two categories of the U.S. Bureau of Labor Statistics Producer Price Index ("PPI"). (JA000049 at ¶ 53, JA000051-52 at ¶¶ 63, 67-68.) Liu alleges that a comparison of the PPI for the truck rental industries with the PPI for the passenger car rental industry shows that prices for trucks were higher during what she characterizes as the "alleged attempted conspiracy period" and that "[t]he increase in prices cannot be explained by factors other than the efforts to collude." (JA000052-53 at ¶¶ 68, 71.) Based on that assumption, she alleges that "it is more likely than not that" individuals "who purchased one-way truck rentals from Defendants for transportation to, from or within the Commonwealth of Massachusetts" during the alleged class period "paid at least 10% more on average for one-way truck rentals . . . than they would have paid absent the unlawful conduct."[2] (JA000052-54 at ¶¶ 70, 78.)

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[2] Although Liu does not provide any information in her Complaint concerning how she created her "detailed econometric analysis," in her brief Liu states that her "economic allegations" were based on information created by an unidentified "expert retained by Plaintiff's counsel." (Appellant's Br. at 10.)

SUMMARY OF THE ARGUMENT

The District Court dismissed the Complaint because Liu failed to allege <u>any</u> facts that could plausibly show injury. Although Liu asks this Court to reverse the District Court's holding, her brief conspicuously lacks any discussion, whatsoever, of the injury required under the MCPA or under Article III. Indeed, she fails to cite a single case that discusses the type of injury that is required to bring a claim for damages under Section 9 of the MCPA, the type of injury that is required to allege that a practice is "unfair" under Section 2 of the MCPA, or the type of injury needed in order to demonstrate that a case and controversy exists. The reason for the omission is simple: Liu's "injury" fails on its face to satisfy the requirements of the statute or the Constitution.

Section 9 of the MCPA requires proof of an actual injury. This Court has held that Section 9 only permits a person who has yet to use a purchased service, or who has received a service that is different in kind from what she bargained for, to bring a claim for damages. In this case, Liu admits that she received <u>precisely the service that she paid for</u>, and that she used that service <u>more then two years ago</u>. As a result, the injury that she alleges – an overpayment in price – is simply not the type of injury for which damages can be sought under Section 9. Even if the type of injury alleged here could be recovered under Section 9, Liu has failed to plausibly allege that she suffered any actual injury. Although Liu points repeatedly to her self-described "econometric analysis," that analysis consists of nothing more then a rudimentary comparison of two market indexes. Her assertion that the model reflects actual damages that she, or anyone else, incurred requires a series of speculative assumptions about the nature of the "Truck Rental PPI" index, the "Passenger Care Rental PPI" index, and her statistical comparison of the two. This sort of rank speculation fails to make a plausible allegation that she has suffered injury sufficient to satisfy the MCPA, or even the injury-in-fact required by Article III.

Even if Liu's alleged injury met the requirements of Section 9 (which it does not), it does not meet the FTC's consumer injury test applicable under Section 2 of the MCPA. In order for a consumer to have suffered injury as a result of an "unfair practice," the FTC, whose enforcement informs the interpretation of Section 2 as a matter of law, requires that the consumer "could not reasonably have avoided" the injury, and that the injury be "substantial." Liu does not claim that her alleged injury was unavoidable, nor would such a claim be plausible. Liu could have avoided any increase in U-Haul prices by simply renting a truck from Budget or any other provider. Indeed, neither the FTC nor Liu allege that any of U-Haul's competitors ever agreed to raise prices. To the contrary, the invitation to collude was purportedly motivated by the very fact that Budget, one of U-Haul's main competitors, had "not taken notice of, and ha[d] not matched, U-Haul's higher rates."

Finally, although not decided by the District Court, Liu asks this Court to render an opinion that an invitation to collude constitutes an actionable unfair practice under either the FTCA or the MCPA. No court has ever found that an invitation to collude is actionable under either statute. Such a holding would create patent uncertainty in the business community concerning the type of unilateral pricing decisions that are, and are not, prohibited. Liu provides no justification for deciding an issue that was not decided by the District Court, or for recognizing a theory that has never been recognized by the Massachusetts Supreme Judicial Court, or for that matter any other state or federal court.

ARGUMENT

Prefatory Note: The Applicable Legal Standard

This Court reviews an "order of dismissal for failure to state a claim *de novo*." *Haley v. City of Boston*, 657 F.3d 39, 47 (1st Cir. 2011).

While Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiff provide only "a short and plain statement of the claim," the statement must "possess enough heft 'to show that the pleader is entitled to relief.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Simply put, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A complaint that fails to "nudge[] their claims across the line from conceivable to plausible" warrants dismissal. *Id.*

When evaluating whether a plaintiff has stated a plausible claim, a court should ignore "mere 'labels and conclusions'" or "formulaic recitation[s] of the elements of a cause of action." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 8 (1st Cir. 2011) *citing Twombly*, 550 U.S. at 556. In addition, a court may consider "documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice." *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008) *citing In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003). If an allegation in the complaint contradicts the materials which it purports to rely upon, it is well-settled that the "exhibit trumps the allegations." *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163

F.3d 449, 454 (7th Cir. 1998). As this Court stated in *Clorox v. Proctor & Gamble,* "were the rule otherwise, a plaintiff could maintain a claim . . . by excising an isolated statement from a document and importing it into the complaint . . . ." 228 F.3d 24, 32 (1st Cir. 2000) *citing Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996).

I. THE DISTRICT COURT CORRECTLY RULED THAT THE COMPLAINT DID NOT ADEQUATELY ALLEGE INJURY.

The Complaint alleges a single cause of action – that "Defendants' attempt to collude was an unfair business practice in violation of Mass. Gen. L. c. 93A," a statute which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices." (Appellant's Br. at 5, 33 *citing* Mass. G. L. c. 93A, § 2(a).)

The MCPA includes two injury requirements: First, a private plaintiff that seeks to recover damages must allege injury sufficient to satisfy MCPA Section 9. Second, any plaintiff (whether the state or a private party) that alleges "unfairness" as the basis for their claim must satisfy the separate injury requirements of MCPA Section 2. In addition to the requirements of the MCPA, in order to proceed in federal court a plaintiff must allege sufficient "injury-in-fact" to satisfy the requirements of Article III of the Constitution.

The District Court correctly found that Liu failed to allege "any facts" about her injury. (Add. at 1.) As a result of that failure, she has not plausibly alleged the type of injury required to bring a claim under the MCPA or to proceed in federal court.[3]

A. Liu failed to plausibly allege the injury required by MCPA Section 9.

1. Liu was not injured because she received the benefit of her purchase and did not suffer an actual injury.

As this Court recognized in *Rule v. Ft. Dodge Animal Health, Inc.*, 607 F.3d 250, 253, 255 (1st Cir. 2010), the "statutory injury requirement" that section 9 of the MCPA imposes on private litigants who seek to recover damages under the MCPA requires a showing of actual "economic injury."

The plaintiff in *Rule* alleged that a manufacturer of canine heartworm medication had failed to disclose the risk of an adverse reaction from medication that she had previously purchased and administered. *Id.* at 251. The plaintiff did

[3] In a footnote, Liu suggests that it was improper for the District Court to decide on a motion to dismiss whether she adequately alleged "antitrust injury." (Appellant's Br. at 29.) This is patently incorrect. As a preliminary matter, the issue of "antitrust injury" was not decided by the District Court as the term "antitrust injury" generally refers to the type of injury required to bring an antitrust claim under the Sherman and Clayton Acts, not an unfairness claim under the MCPA or FTC Act. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534-46 (1983) (describing antitrust injury). Nonetheless even if antitrust injury were at issue, the Supreme Court has made abundantly clear that Sherman and Clayton Act complaints <u>should</u> be dismissed if a plaintiff fails to adequately allege antitrust injury. *Id.* (upholding dismissal). *See also Lipin v. Ellis*, Case No. 07-2511, 2008 U.S. App. LEXIS 28002 (1st Cir. 2008) (upholding dismissal of antitrust claims for failure to adequately allege antitrust injury); *Serpa Corp. v. McWayne, Inc.*, 199 F.3d 6, 10-11 (1st Cir. 1999) (upholding dismissal of antitrust claims for failure to adequately allege injury and describing six-factor test for evaluating such injury).

not allege that her dogs had suffered any bad effects from the medicine. *Id.* Instead, she alleged that the manufacturer's failure to disclose caused her to pay more then she otherwise would and sought to recover the overcharge – *i.e.*, the difference between the price that she paid, and the price that the product "would have been worth had safety risks been adequately disclosed" – under the MCPA. *Id.* After conducting an extensive review of the MCPA cases decided by the Massachusetts Supreme Judicial Court, the district court dismissed the complaint stating:

> While consumer protection statutes may be designed to have a broad reach, Chapter 93A was not "mean[t] to authorize purely vicarious suits by self-constituted private attorneys-general." *Leardi [v. Brown]*, 394 Mass. [151,] at 161, 474 N.E.2d 1094 (1985) (internal quotation omitted). It is necessary for a private plaintiff to show that the defendants' deceptive act caused some form of compensable loss. See *Hershenow [v. Enterprise Rent-A-Car Co.*, 445 Mass. 790,] at 802, 840 N.E.2d 526 [(2006)]. In this case, I find that Rule has not demonstrated any such loss, whether economic or otherwise. Like the plaintiffs in *Hershenow* – and unlike the plaintiffs in *Iannacchino [v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008)*]* – Rule has already received the full benefit of the bargain she anticipated when she purchased ProHeart®6: i.e., Luke remained free from heartworm for the promised period of protection, and neither Rule nor her dog suffered any adverse effects from the product.

Rule v. Fort Dodge Animal Health, Inc., 604 F.Supp.2d 288, 304 (D. Mass. 2009).

This Court affirmed, concluding that in order for a consumer to allege that she suffered an "overpayment" compensable under Section 9, she must allege that she did not consume the good or service about which she complains:

> . . . Rule, as already explained, <u>used up her purchases, neither holds nor sold anything of reduced value, faced no continuing risk and suffered no harm</u> . . . [c]onduct like that attributed to Wyeth needs to be deterred, but not necessarily by those who bought the drug but were not injured. The state has the authority to seek heavy sanctions . . . even without injury . . . .

Rule, 607 F.3d at 254-55 (emphasis added).

As in *Rule*, Liu "neither holds nor sold anything of reduced value." *Id.* Instead she is attempting to recover for what she claims was an overcharge of a product that she already used, despite the fact that she thought the product was worth the price that she paid, and she received exactly what she paid for. *See also Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790 (2006) (holding that a renter of a passenger car cannot recover an alleged overcharge where "no loss" occurred for purposes of Section 9 as the consumer received the rental that she paid for, and at the price to which she agreed). This is precisely the type of "injury" for which damages are not available under the MCPA. As a result, dismissal was proper.

2. The allegations in the FTC's draft complaint do not support a claim of injury.

In this novel action, Liu is alleging that she was damaged by U-Haul's <u>unaccepted</u> invitation to its competitors to collude and increase prices. Liu states that the FTC "must have found that the alleged conduct likely harmed consumers in order to proceed with its complaint against U-Haul." (Appellant's Br. at 20-21.) Liu asserts that 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." (Appellant's Br. at 23.)

Liu critically misstates the FTC. Specifically, the FTC did not allege that consumers were "likely harm<u>ed</u>;" the FTC's allegations focused solely on possible future harm stating that "U-Haul's invitations to collude, <u>if accepted by Budget</u>, would likely result in higher one-way truck rental rates and reduced output." (JA000009 at ¶10, JA000014 at ¶26) (emphasis added). The FTC also made <u>no</u> allegation (and none is made by Liu) that Budget and U-Haul ever acted together in the past. Simply put, Liu's repeated contention that the FTC determined that harm has already occurred is baseless. (Appellant's Br. at 4, 15, 20.)

The FTC's focus on the possibility of future harm is consistent with its mission under the FTCA. Pursuant to the FTCA, the FTC is permitted to seek an injunction if a "practice . . . <u>is likely to cause</u> substantial injury" in the future. 15 U.S.C. § 45(n) (emphasis added). As a result, when the FTC seeks an injunction or an agreement to prevent a <u>future</u> invitation to collude, it acts "to halt potentially anticompetitive practices and mergers in their incipiency." Opinion of the

Commission, *In re Coca-Cola Co.*, 117 FTC 795, 1994 FTC LEXIS 327, at *202 (1994).

Here, of course, Liu is not seeking injunctive relief premised on a likelihood of future injury – she is seeking compensation premised on an allegation of past harm. As a result she, unlike the FTC, has the burden of showing that AMERCO and UHI's past conduct created harm and that she suffered injury as a result.

3. The "scholarly authority" cited by Liu does not suggest injury.

Liu claims that the "the overwhelming weight of legal and economic authority" demonstrates that she suffered injury. (Appellant's Br. at 24-26.) The "scholarly authority" upon which she so heavily relies is rife with equivocation. For example, the Corporate Counsel's Antitrust Deskbook advises that "the invitation [to collude] still <u>might cause</u> the competitor to react in a way that affects competition." (Appellant's Br. at 25) (emphasis added). The seminal Areeda and Hovenkamp treatise notes that an invitation to collude "<u>may</u> reduce . . . uncertainty" among the competitors. (*Id.*) (emphasis added). Thus, the injury described by Plaintiff is nothing more than a possibility of harm. The Supreme Court, however, crafted the pleading standard to demand that plaintiffs state a <u>plausible</u> claim and rejected the notion that a mere possibility of an entitlement to relief is sufficient to withstand a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S.

662, 129 S.Ct. 1937, 1949 (2009) (plausibility standard "asks for more than a sheer possibility that the defendant has acted unlawfully").

Critically, Liu never alleges that Budget or any other competitor engaged in any conduct to create the harm on which her authorities opine. In the passages cited by Liu, the antitrust authorities specifically discuss how alleged invitations to collude <u>could</u> cause rivals to alter their behavior and facilitate "tacit coordination." But these allegations are completely absent from her Complaint. Nowhere does Liu identify and allege a specific change in behavior or facilitating action taken by competitors. Liu merely speculates that "it is more likely than not" that price increases for one-way truck rentals were caused by increases made by both U-Haul and competitors. (JA000053 at ¶72.) However, this nonfactual, equivocating and conclusory allegation is not entitled to the presumption of truth. Without a factual allegation that a competitor joined in U-Haul's alleged conduct, or even altered their pricing in any way, Plaintiff's reliance on "scholarly authority" is useless.

4. Liu's damage model fails to plausibly allege that she suffered actual harm.

Liu criticizes the District Court's determination that "[w]hether [Liu] overpaid, and whether such overpayment was caused by U-Haul[] . . . is left entirely to conjecture." (Add. at 1-2.) Her only argument, however, is that she included a "detailed econometric analysis" of pricing data in the Complaint, which concludes that the "increase in prices cannot be explained by factors other than the efforts to collude," and the assertion that her conclusion is entitled to "a presumption of truth." (Appellant's Br. at 12, 20.)[4] Contrary to Liu's assertion, an economic model or theory placed within a complaint is not entitled to a "presumption of truth." (Appellant's Br. at 20.) The Supreme Court rejected this argument when it evaluated the economic theory alleged in *Twombly*. The Court made clear that in the context of a motion to dismiss, an economic theory must be "plausible on its face" and not founded upon speculative assumptions. 550 U.S. at 570.

Liu's "econometric analysis" consists of a comparison of two PPI's created by the Department of Labor: the PPI for "truck rental, without drivers" and the PPI for the "rental passenger car industry." (Appellant's Br. at 10-11.) The only explanation provided by Liu concerning why she included these two indices in the Complaint is a summary statement that the industries have "similar cost structures and similar (although not identical) demand features." (Appellant's Br. at 11.) As

[4] Although Liu relies on her model extensively in the Complaint and her brief, she seeks to deflect any discussion of its obvious flaws. Liu contends that a motion to dismiss "is not the appropriate stage" for evaluating whether her econometric analysis is plausible and suggests that any analysis concerning the plausibility of her model be deferred until after discovery as part of a *Daubert* analysis. (Appellant's Br. at 21 n.12.) This, of course, directly contradicts *Twombly*'s holding that a district court should insist that economics included within a pleading be plausible "before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 559.

described below, Liu provides only speculation upon speculation as support for these cornerstones of her economic model.

a. The "Truck Rental PPI" is not a plausible proxy for U-Haul rental rates.

Liu alleges that "Truck Rental PPI is a reasonable proxy" for U-Haul's prices and that "[a]ccording to the 2002 Census, U-Haul is a significant driver of pricing in the industry PPI." (JA000049 at ¶ 54.) Liu does not cite or quote an actual census report, and her allegation appears to be based upon nothing but speculation. Specifically:

- Liu does not allege facts that show that any U-Haul data was submitted to the Labor Department (let alone data about one-way truck rentals to, or from, Massachusetts over a ten year period) or was otherwise included in the Truck Rental PPI.[5]

- According to the Complaint, the Labor Department aggregates information from at least <u>four different rental industries</u> when computing the Truck Rental PPI – *i.e.*, companies that rent "trucks, truck tractors, buses, or semi-trailers." (JA000049 at ¶ 53) (emphasis added). AMERCO and UHI are <u>not</u> involved in

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[5] The PPI reflects only data that is voluntarily submitted by businesses to the Department of Labor. Bureau of Labor Statistics, *BLS Handbook of Methods* Ch. 14, p. 5 (2011), *available at* http://stats.bls.gov/opub/hom/pdf/homch14.pdf. Liu does not allege that AMERCO or UHI <u>ever</u> submitted data to the Department of Labor. Furthermore, any suggestion that the companies submitted data is nothing more then speculation as the Department of Labor does not identify which companies contribute data to a PPI and "has publication criteria that prevent the inadvertent revelation of a respondent's identity to the public through movements in a published index." *Id.* at 6; *See generally* Bureau of Labor Statistics, Report to the Office of Mgmt. and Budget on Implementation of The Confidential Info. Protection and Statistical Efficiency Act of 2002: Calendar Year 2010 *available at* http://www.bls.gov/bls/cipseareport.pdf.

three of these industries – truck tractors, buses, or semi-trailers – and Liu does not allege that the self-moving truck rental industry dominates the other industries such that a price change in U-Haul branded vehicles would have a direct and noticeable impact on the PPI.

- The Truck Rental PPI captures information on all truck rentals, not just the one-way truck rentals that are the focus of the Complaint. Liu does not allege what portion of truck rentals are one-way or what effect one-way truck rental prices would haves on the index.

In short, in order for the Truck Rental PPI to have any relevance to her alleged injury Liu asks the court to speculate that the index includes prices charged by U-Haul, that those prices relate to rentals in Massachusetts, that those prices relate to one-way rentals, that such data was included within the PPI for a ten-year period, and that any change in the price of U-Haul rentals would drive a change in the index despite the fact that the index aggregates information from several unrelated transportation industries. "[W]ithout some further factual enhancement," Liu's reliance on the Truck Rental PPI "stops short of the line between possibility and plausibility." *Twombly*, 550 U.S. at 558.

b. The "Passenger Car Rental PPI" Is Not A Plausible Economic Yardstick.

Liu alleges that the PPI for standard "Passenger Car Rentals" is an appropriate yardstick to the rental truck industry as the industries have "similar cost structures and similar (although not identical) demand features." (Appellant's Br. at 11.) Yardstick models are used primarily when a company alleges that they lost profit as a result of a competitor's conduct. Vol. 2, Phillip E. Areeda, Herbert Hovenkamp, II, & Roger D. Blair, *Antitrust Law* at ¶ 391(f) (2000, Aspen Law & Business, 2d ed.) (hereinafter "Areeda & Hovenkamp"). As the academic authorities cited by Liu explain:

> The central idea behind the yardstick approach is to find a firm that is comparable in all important respects to the plaintiff. The economic performance of the yardstick firm is then used as an estimate of the performance that the plaintiff would have experienced "but for" the antitrust violation.

Id. In order for a yardstick model to be viable (let alone plausible), the two companies that it tracks "must be comparable . . . in all important respects: product(s) offered, structure of the firm, management, geographic market, and so on." *Id*.

Liu's assertion that the PPI for Standard Passenger Car Rentals is an appropriate yardstick is based upon nothing but speculation and thus implausible. Specifically:

- Liu does not allege that the companies that rent passenger cars are similar to those that rent moving trucks <u>either in number, in size, in organization, in distribution method, or in management.</u>

- Liu does not allege any facts to support her assertion that the "primary input cost in the two industries is the cost of the vehicle itself," or that passenger car vehicle costs and truck vehicle costs rise and fall together. (JA000051 at ¶ 64.)

- Liu does not allege any facts to support her assertion that the demand for passenger cars rises and falls with the demand for

> self-moving trucks, nor is the assertion plausible. To the contrary, common sense indicates the conditions that effect demand for rental cars (*e.g.*, business trips, vacations, etc.) have no bearing on self-moving truck rentals. Conversely, the type of conditions which effect self-moving truck rentals (*e.g.*, increases in home sales) certainly have no bearing on passenger car rentals.

c. Liu's comparison between the Truck Rental PPI and the Passenger Car Rental PPI is not plausible.

Liu alleges that "multiple regression analysis" shows with "statistically significant results" that "80 percent of the variation in the prices in the Truck Rental industry [PPI]" are explained by her econometric model. (JA000052-53, at ¶¶ 69, 70.) She further asserts that "[t]he increase in prices cannot be explained by factors other than the efforts to collude" and thus her model shows that "it is more likely than not that members of the class paid at least 10% more on average for one-way truck rentals." (JA000052-53, at ¶¶ 70, 71.) These are exactly the kind of conclusory allegations that *Twombly* instructs courts to disregard.

Regression analysis refers to a technique under which an economist "identif[ies] the most important economic and demographic factors that <u>theoretically</u> influence" price and attempts to account for the impact of those factors. Areeda & Hovenkamp at ¶ 393 (emphasis in original). As the authorities cited by Liu make clear, regression models incorrectly suggest an anticompetitive effect where none exists if "an important explanatory variable has been left out of the model." Areeda & Hovenkamp at ¶ 393g2. While the Supreme Court has recognized that a probative regression model need not include "all measurable variables," it should "account[] for the major factors." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). Similarly, following *Twombly*, district courts have dismissed complaints that allege "statistically significant" data without providing "actual facts" to explain how the plaintiff concluded that the data was statistically significant. *Nance v. New York City Dep't of Education*, Case No. 09-cv-2786, 2011 WL 2837491, at *3 (E.D.N.Y. 2011).

Liu provided the District Court with no information concerning her "regression model." Specifically, while Liu alleges that she performed "regression analysis," she does not account for <u>any</u> independent variables when conducting the analysis (*e.g.*, seasonality, commodity prices, credit rates, vehicle acquisition costs, etc.). Rather than accounting for the obvious differences between the two indexes, she makes the conclusory allegation – which serves as the lynchpin of her entire claim for damages – that the differences between the indexes are entirely attributable to the alleged "invitation to collude."

d. Liu's model does not suggest that she suffered injury.

Even if Liu's econometric model were plausible (which it is not), it does nothing to save her deficient injury allegations. Liu states that her model concludes that putative class members paid more for their rentals "on average." (JA000052-53 at ¶ 70.) It does <u>not</u> purport to indicate who within the putative class paid a competitive market rate for their rental, who paid more for their rental, and who paid less for their rental. More specifically, it does not indicate whether Liu herself paid more, paid less, or paid the same as the average truck renter.[6] The District Court specifically noted this deficiency holding that Liu's allegation that there was a "price-raising effect generally on the national market" did nothing to suggest that "she was in fact harmed by those general phenomena." (Add. at 1.)

Courts applying *Twombly* have rejected attempts to "us[e] a single statistic, without any connection to plaintiff's individual experience" to demonstrate that a plaintiff is plausibly entitled to relief. *Stevens v. JPMorgan Chase*, Case No. C-09-03116-SI, 2010 WL 329963, at *8 (N.D. Cal. 2010). Liu "does not set forth any facts about her own transactions," leaving the court to speculate concerning every aspect of her transactions including "what she paid for her one-way truck rentals." (Add. at 1.) Simply put, with regard to her own injury, Liu has offered "merely speculative harms." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) *citing* 1980 FTC Unfairness Statement, at 1073.

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[6] Also, the model inexplicably begins the damages period in September 2006, despite the fact that the first action of the alleged "invitation to collude" did not occur until October 2006. (Compare JA000042-44 at ¶¶ 31-35, with JA000052 ¶70.)

B. Liu failed to allege the type of injury necessary to state a claim for "unfairness" under MCPA Section 2.

Even if Liu satisfied Section 9's requirements, she has failed to allege the type of injury required to state a claim of "unfairness" under Section 2(a). Liu alleges that AMERCO and UHI committed an "unfair business practice," and that she suffered consumer injury as a result of that practice. (Appellant's Br. at 5, 18, 20, 23 n.14.) To determine whether a practice is "unfair" under Section 2, Massachusetts courts look to "(1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 243 (1st Cir. 2005) *quoting PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915, 917 (Mass. 1975).[7]

With regard to the third element, in 1980 the Commission introduced a three-part test to determine whether a practice "causes substantial injury to consumers." FTC Policy Statement on Unfairness *appended to In re Int'l*

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[7] This test is modeled upon the FTC's 1964 definition of an unfair practice as one that (1) "offends public policy," (2) is "immoral, unethical, oppressive, or unscrupulous," and (3) "causes substantial injury to consumers." 29 Fed. Reg. 8325, 8355 (1964) (commonly referred to as the "Cigarette Rule"). *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (referring in *dicta* to 1964 standard).

Harvester Co., 104 FTC 949, 1070-73 (1984) (stating that "not . . . every consumer injury is legally 'unfair'"). In 1982, the Commission reiterated that the three-part consumer injury test applies to "any decision concerning an act or practice alleged to be unfair" and recommended that Congress codify the requirement to help "consumers and sellers to understand the bounds of acceptable behavior." FTC's Letter to Senate Subcommittee on Bill to Restrict Agency's Jurisdiction Over Professionals and Unfair Acts or Practices, 42 Antitrust & Trade Reg. Rep. (BNA) 568 (Mar. 11, 1982) [hereinafter "*FTC Letter to Senate*"]. Congress eventually codified the test in 1994. Federal Trade Commission Act Amendments of 1994, 103 Pub. Law 312 (Aug. 26, 1994) *codified at* 15 U.S.C. § 45(n). Since then, as former Chairman of the FTC Timothy Muris has stated, courts and the Commission "have ratified the consumer injury test as the only standard for determining whether a challenged practice is unfair." Timothy J. Muris and J. Howard Beales, III, *The Limits of Unfairness Under the Federal Trade Commission Act*, 134 (Ass'n of Nat'l Advertisers) (1991) [hereinafter *Limits of Unfairness*] (emphasis in original). *See generally* J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L. J. 1057, 1063-67 (2005) [hereinafter *Brightening the Lines*] (general history of FTC's interpretation of "unfairness"). Courts in this Circuit have applied the three-part consumer injury test to both the "unfair practice" prohibition found within the FTCA, and in Section 2 of the MCPA. *FTC v. Direct Mktg. Concepts, Inc.*, 569 F.Supp.2d 285, 299 (D. Mass. 2008) (applying three-part test to alleged violation of FTCA); *United Cos. Lending Corp. v. Sargeant*, 20 F.Supp.2d 192, 200 (D. Mass. 1998) (applying three-part test to alleged violation of MCPA).[8]

According to the three-part consumer injury test, "(1) the injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition produced by the practice; and (3) the injury must be an injury that consumers could not reasonably have avoided." *FTC Letter to Senate*, supra.

Although Liu disagrees with the District Court's conclusion that she "failed to plausibly allege an injury," she makes no attempt to explain how her injury satisfies the three-part consumer injury test; instead, she ignores the test

[8] The three-part consumer injury test has also been applied to the consumer protection statutes of other states that, like the MCPA, prohibit unfair practices and are interpreted consistently with the FTC Act. *Kilgore v. Keybank, Nat'l Assoc.*, 712 F.Supp.2d 939, 951 (N.D. Cal. 2010) (applying three-part consumer injury test to California Unfair Competition Law); *Rudel Machinery Co. v. Giddings & Lewis*, 68 F.Supp.2d 118, 129 n.19 (D. Conn. 1999) (applying three-part consumer injury test to Connecticut Unfair Trade Practices Act); *Tungate v. MacLean-Stevens Studios*, 714 A.2d 792, 797 (Me. 1998) (Applying three-part consumer injury test to Maine Unfair Trade Practices Act); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116-117 n.11 (Ct. App. Tenn. 2005) (applying three-part consumer injury test to Tennessee Consumer Protection Act); *Millennium Communs. & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256, 1263-64 (Ct. App. Fl. 2000) (applying three-part consumer injury test to Florida Deceptive and Unfair Trade Practices Act).

completely. The reason is simple – the injury that she alleges, on its face, simply fails the test.[9]

1. Liu's alleged harm is speculative.

In order to satisfy the consumer injury test's requirement that her alleged injury be "substantial" her injury must be more then "merely speculative." *Am. Fin. Servs. Ass'n*, 767 F.2d at 972 (citation omitted). As set out in Section I.A.4, Liu's allegations of injury are based on an implausible damages theory and are entirely speculative.

2. Liu was able to avoid the alleged injury.

In order for an alleged practice to be actionable as "unfair," the consumer injury test requires that a plaintiff "could not reasonably have avoided" the alleged harm. *FTC Letter to Senate*, supra. The "reasonable avoidance requirement is central to an unfairness analysis" as "there is no injury if consumers are receiving what they bargained for." *Limits of Unfairness*, *supra*, at 131, 132-33.[10]

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[9] Although the injury that Liu alleges fails each of the three requirements that make up the consumer injury test, the second requirement involves a balancing of competitive effects that may be premature in the context of a motion to dismiss where information concerning market conditions is limited. As a result, AMERCO and UHI have focused on Liu's failure to explain how her injury plausibly satisfies the first prong (*i.e.*, substantial harm), and the third prong (*i.e.*, the inability of a consumer to avoid the injury).

[10] Timothy Muris was former Chairman of the FTC (2001 and 2004), former Director of the FTC's Bureau of Competition (1983-1985), and former Director of the FTC's Bureau of Consumer Protection (1981-1983). J. Howard Beales was the former Director of the FTC's Bureau of Consumer Protection (2001-2004).

An injury is inherently "avoidable" if the consumer can simply purchase the product from a different retailer. *Kremers v. Coca-Cola Co.*, 712 F.Supp.2d 759, 773 (S.D. Ill. 2010) (holding that plaintiff who alleged that Coke's marketing was unfair under Illinois's consumer protection statute "easily could have avoided [the injury], by, for example, simply drinking a different soft drink or other beverage."); *Tudor v. Jewel Food Stores, Inc.*, 288 Ill.App.3d 207, 210, 681 N.E.2d 6, 8 (App. Ct. Ill. 1997) (dismissing unfairness claim where plaintiff failed to allege that she "had no alternative but to pay" the alleged overcharge). Not surprisingly, the FTC considers whether a consumer has the ability to "survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." *In re Int'l Harvester*, 104 FTC at 1074. For an injury to be unavoidable (and thus actionable as unfair), a defendant must "unreasonably create[] or take[] advantage of an obstacle" that prevents the consumer from choosing other available alternatives. *Id.*

Several Circuits have considered the type of obstacles that prevent a consumer from choosing among available alternatives. For example in *American Financial Services Association*, the D.C. Circuit evaluated a challenge brought by an association of finance companies against an FTC rule that prevented creditors from including within loan agreements a provision that allowed the creditors "to seize and sell the debtor's household goods upon default without a judgment or court order." 767 F.2d at 964. When evaluating whether the consumer injury at issue – the repossession of the property without due process – was unavoidable, the D.C. Circuit examined whether consumers could "shop and bargain over alternative remedial provisions" in their loan agreements. *Id.* at 976.

The Commission asserted, and the D.C. Circuit agreed, that shopping for alternative remedy provisions in a credit contract was simply not plausible as "most creditors rely on standardized form contracts . . . presented on a take it or leave it basis." *Id.* at 976-77. Furthermore, "contracts offered by creditors of a given class in local areas are often substantially identical," and "[c]onsumers' ability to shop and bargain is further constricted by the fine print and technical language used in the contracts." *Id.* at 976-77. The D.C. Circuit concluded that the various "aspects of the credit transaction combine to prevent consumers from making meaningful efforts to search, compare, and bargain over remedial provisions." *Id.* at 977; *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1193-94 (10th Cir. 2009) (applying unavoidable injury requirement under three-part consumer injury test and holding that avoidance was impossible where defendant hacked into telephone systems to obtain consumers' protected telephone records); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988) (applying unavoidable injury requirement under three-part consumer injury test and holding that avoidance was impossible where company unilaterally breached contract).

Liu makes absolutely no attempt to explain how her alleged injury was unavoidable. Instead she suggests, without any explanation, that the question of whether she could have obtained service at a lower price from a competitor is somehow irrelevant, stating that "it makes no difference whether Budget actually did raise its prices." (Appellant's Br. at 15, 23.)

Liu ignores the unavoidable injury test for one simple reason. Nothing in the Complaint suggests that Liu was prevented, in any way, from searching for alternate rental companies, comparing rates, or negotiating her rate with U-Haul. Nor is such an assumption plausible. Liu admits that there were at least two national competitors to U-Haul branded vehicles – Budget and Penske. (JA000046-47 at ¶ 47(b)). There is no suggestion in the Complaint that Budget and Penske's prices increased as a result of AMERCO and UHI's alleged conduct. Quite the opposite, the Complaint alleges that AMERCO and UHI's motivation for inviting collusion was precisely the fact that "Budget had <u>not</u> taken notice of, and had <u>not</u> matched, U-Haul's higher prices." (JA000046, ¶ 47(b)) (emphasis added). The Complaint also alleges that if a consumer requested it, U-Haul Marketing Companies had discretion to match any competitor's rate.

As Liu failed to allege any facts that indicate that the prices charged to rent a U-Haul vehicle were unavoidable, the District Court correctly dismissed the Complaint.

C. Liu failed to allege injury-in-fact sufficient to confer standing under Article III.

Article III of the Constitution limits federal-court jurisdiction to adjudicating "actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). In order for a case or controversy to exist, a plaintiff must allege an "injury-in-fact" which is "concrete and particularized." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011). The injury-in-fact cannot be based upon injury which is either "conjectural or hypothetical." *Id. quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As discussed above, the economic model that Liu included within the Complaint fails to allege anything but speculation that consumers, on average, were injured. Specifically, it does not provide a plausible explanation for (1) its use of the "Truck Rental PPI" (*supra* at I.A.4.a.), (2) its use of the "Passenger Car Rental PPI" as an economic yardstick (*supra* at I.A.4.b), (3) its comparison of the two indexes (*supra* at I.A.4.c). In addition, even if it showed that the average consumer was injured, it provides no indication whatsoever that <u>Liu</u> herself suffered injury. (*supra* at I.A.4.d.) As the District Court correctly noted, Liu simply fails to "set forth any facts about her own transactions" and the question of "[w]hether she overpaid, and whether such overpayment was caused by U-Haul[] . . . is left entirely to conjecture." (Add. at 1-2.) Neither "conjectural" nor "hypothetical" speculation "suffices to support standing" under Article III. *DaimlerChrysler Corp.*, 547 U.S. at 344.

II. EVEN IF LIU ADEQUATELY ALLEGED INJURY (WHICH SHE DID NOT), LIU CANNOT SUSTAIN A CLAIM BASED UPON AN INVITATION TO COLLUDE.

As Liu explained in her brief, the trial court focused on the lack of injury alleged by Liu and did not reach the issue of whether an "invitation to collude" is a viable cause of action under Chapter 93A or Section 5 of the FTC Act. (Appellant's Br. at 16-17.) As a result, the issue is not germane to this appeal. Nevertheless, Liu asks this Court to exercise its discretion and determine not only the scope of Section 5 and the authority of the FTC – which is not a party to this case – but also whether the grounds supporting the FTC's prophylactic enforcement extend to a private plaintiff's claim for damages. In the event the Court accepts Liu's invitation, U-Haul addresses this issue here.

A. Courts have rejected impractical enforcement of Section 5 and have never recognized an "invitation to collude" as a cause of action.

In her brief, Liu trumpets the "unbroken chain of consistent FTC enforcement positions for nearly twenty years that invitations to collude constitute an unfair method of competition." (Appellant's Br. at 31). However, none of those cases have been challenged in court. The fact that the FTC has chosen over the years to challenge efforts to collude under Section 5 is not determinative of whether that type of conduct or, more particularly, the allegations against U-Haul, properly fall within the prohibitions of Section 5. Given the FTC's checkered history of enforcement actions when operating at the fringe of its Section 5 authority, extreme scrutiny is warranted before allowing a *private* litigant seeking treble damages and attorney's fees to proceed upon nothing more than the FTC's untested theory of liability.

The FTC's interpretation of what is "unfair" in this context has changed dramatically over time. Between 1938 and 1964, the agency did not ascribe any independent meaning to the term, and made no attempt to distinguish between practices that were "'unfair' on the one hand and 'deceptive' on the other." J. Howard Beales III, FTC, *The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection*, (2007) [hereinafter *Use of Unfairness Authority*] *available at* http://www.ftc.gov/speeches/beales/unfair0603.shtm; Matthew A. Edwards, *The FTC and New Paternalism*, 60 Admin. L. Rev. 323, 338 (2008). When the FTC began challenging practices as independently "unfair," the FTC's "newly found theories of unfairness" were widely criticized. *Use of Unfairness Authority*, *supra*. Indeed, the former FTC Director of Consumer Protection has referred to many of the FTC's attempts to characterize business practice as "unfair" as having "no empirical basis," "based entirely upon the individual Commissioner's personal values," and leading to "many absurd and harmful results." *Use of Unfairness Authority*, *supra*. The "breadth, overreaching, and lack of focus" of the FTC's interpretation of unfairness raised such serious concerns that in 1979 Congress responded by "shut[t]ing down the FTC for several days" and, in 1980, ultimately passing "legislation preventing the FTC from using unfairness" in certain contexts. *Use of Unfairness Authority*, *supra*, *citing* FTC Improvements Act, Pub. L. No. 96-252 (May 1980).

Following Congress's rebuke of the FTC for exceeding its authority to define commercial practices as "unfair," the FTC has brought relatively few cases in court which are premised solely on an allegation that a defendant has committed an unfair practice. *Brightening the Lines*, *supra*, at 1066-67 (providing overview of unfairness enforcement actions). With regard to those cases which have been brought, courts have rejected attempts by the Commission to inflate the scope of conduct covered by Section 5.

For instance, in *Boise Cascade Corp. v. FTC*, the Ninth Circuit reviewed the Commission's determination that manufacturers of plywood had committed an "unfair" act by using a uniform metric (delivered price from the West coast) when quoting prices to customers. 637 F.2d 573, 578 (9th Cir. 1980). The court noted that the Commission had already "concluded that proof of the 'extreme artificiality' of the West Cost freight pricing method was sufficient to establish an unfair method of competition," and acknowledged that the Commission should be afforded some deference as a specialized government agency, but held that it is the responsibility of courts, not the FTC, "to interpret section 5" of the FTCA, and to "assur[e] that administrative agencies stay within reasonable bounds." *Id.* at 577, 578, 581. The circuit reversed the Commission's interpretation of "unfairness" suggesting that in order for a practice to be "unfair" there must, at a minimum, be an allegation that the practice caused market prices to stabilize:

> . . . in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices. Without such effect, a mere showing of parallel action will not establish a section 5 violation.

Id. at 577.

The Second Circuit similarly questioned the FTC's expansive use of unfairness in *E.I. du Pont de Nemours & Co. v. FTC* (the *Ethyl* case). 729 F.2d 128 (1984). In *Ethyl*, the FTC contended that manufacturers of gasoline additives had, among other things, committed an "unfair" practice by giving each other "advance notice of price increases." *Id.* at 130. In a holding that squares remarkably with the facts of this case, the court rejected the Commission's attempt to prove an "unfair" method of competition merely by labeling one company's price change in an oligopolistic market as a "signal" or by arbitrarily defining prices as "supracompetitive." *Id.* at 139. "To hold so," the court reasoned, "would be to condemn any such price increase or moves, however independent." *Id.* In addition to vacating the Commission's order, the court expressed skepticism concerning the Commission's practice of labeling activities as "unfair:"

> The term "unfair" is an elusive concept, often dependent upon the eye of the beholder. A line must therefore be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition. Lessening of competition is not the substantial equivalent of "unfair methods" of competition.
> …
> In view of this patent uncertainty [about Section 5 enforcement] the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.

Ethyl, 729 F.2d at 137-39. *See FTC v. Texaco, Inc.*, 393 U.S. 223, 226 (1968) (stating that "the ultimate responsibility for the construction of this statute rests with the courts . . . .").[11]

In the instant case, Liu cites eight instances in which the FTC has alleged that an invitation to collude is an "unfair practice" and characterizes these events as an "unbroken chain of consistent FTC enforcement positions for nearly twenty years that invitations to collude constitute an unfair method of competition."

[11] Although the MCPA directs courts to consider the FTC's actions, such actions are "ordinarily instructive rather than conclusive." *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 497 (1st Cir. 2009), *as amended on reh'g in part* (May 5, 2009).

(Appellant's Br. at 31.) Liu neglects to inform the Court that none of these actions were ever litigated. Rather, each involved a settlement, like the one here, in which the defendant paid no fines, or civil penalties, and resolved the investigation without an admission, let alone a judicial determination, that any law had been violated. *See In re Valassis Comms, Inc.*, Dkt. No. C-4160, 2006 WL 1367833 (FTC Apr. 19, 2006) (consent agreement with no admission of fault, and no payment of fines); *In re Stone Container Corp.*, 125 FTC 853 (1998) (consent agreement with no admission of fault, and no payment of fines); *In re Precision Moulding Co., Inc.*, 122 FTC 104 (1996) (consent agreement with no admission of fault, and no payment of fines); *In re YKK (U.S.A.) Inc.*, 116 FTC 628, 629-30 (1993) (consent agreement with no admission of fault, and no payment of fines); *In re AE Clevite, Inc.*, 116 FTC 389, 391 (1993) (consent agreement with no admission of fault, and no payment of fines); *In re Quality Trailer Products Corp.*, 115 FTC 944 (1992) (consent agreement with no admission of fault, and no payment of fines).[12] Liu fails to point the court to a single case, either under the FTCA or a state consumer protection act, in which a court has held that an

[12] Two of the enforcement actions cited by Liu involved companies that were alleged to have actually entered into an anticompetitive agreement. *In re FMC Corp.*, 133 FTC 815 (2002) (complaint alleged that defendants had entered into a market allocation agreement); *In re MacDermid, Inc.*, Dkt No. C-3911, 2000 WL 195669 (FTC Feb. 4, 2000) (complaint alleged that defendants had entered into anticompetitive merger agreement).

invitation to collude constitutes an unfair practice. Far from being within the mainline of Section 5 jurisprudence, Liu asks the Court to break new ground.

B. The "invitation to collude" alleged here fails to plausibly state a claim for relief.

Even accepting that an "invitation to collude" comprises a cause of action, Courts construing FTCA Section 5 demanded clarity about the type of conduct that violates the law. Courts are justifiably concerned about imposing liability using undefined or ambiguous criteria, which would create a chilling effect on legitimate business conduct. In *Ethyl*, the court reversed the Commission's decision finding a violation of Section 5, stating that the test applied by the Commission in that case, "even if qualified by the requirement that the conduct be 'analogous' to an antitrust violation, is so vague as to permit arbitrary or undue government interference" with companies' reasonable freedom of action. 729 F.2d at 137.

In the absence of any case law directly addressing the elements of an alleged "effort to collude" claim, this Court must fashion its own test. Given that an "effort to collude" is most analogous to an attempt to conspire that was not accepted, but, if it were to be accepted, would constitute a violation of Section 1 of the Sherman Act, an analysis consistent with the Sherman Act would be useful here.

Proving a violation of Section 1 requires a plaintiff establish the existence of an agreement between two or more separate entities that unreasonably restrains trade. Generally speaking, a plaintiff must prove that the parties reached a meeting of the minds – "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). To constitute a violation under Section 5 of the FTCA, the invitation needs to contain the essential ingredients of an agreement: first, the invitation must be sufficiently specific to permit identification of the terms of the scheme to which the recipient is invited to commit and a conclusion that the intent of the communicator was to induce such an agreement; second, the invitation must offer the promise of reciprocity to ensure that the agreement is beneficial for both sides.

On those occasions where the FTC has taken action upon an alleged invitation to collude, it has generally utilized these criteria, which provide clear and precise guideposts for assessing conduct – as required by federal courts. In the *Valassis* case, for example, Valassis shared the market for coupon booklets distributed in Sunday newspapers roughly equally with competitor News America. *In re Valassis Comms., Inc.*, 2006 WL 752214 (FTC Mar. 14, 2006). When the company began discussing pricing changes during a public teleconference, the FTC was plainly swayed by the degree of specificity shared by Valassis. *See* Analysis to Aid Public Comment, *In re Valassis Comms., Inc.*, 2006 WL 752214, at *25 (noting that Valassis "described with precision the terms of its invitation to collude" by announcing that company would charge $6.00 per page and $3.90 per half-page for existing News America customers); *see also* Compl. ¶4, *In re Quality Trailer Prods. Corp.*, 115 FTC at 945 (respondent assured competitor it "would not sell certain axle products below a specified price"). Likewise, the FTC has taken action where the evidence of reciprocity is apparent in the invitation. *See* Compl. ¶15, *In re MacDermid, Inc. and Polyfibron Tech. Inc.*, FTC Dkt. No. C3911, 2000 FTC LEXIS 35, at *10 (2000) (Polyfibron invited competitor to agree that Polyfibron would not compete in Japan in exchange for competitor not competing in North America); Concurring Statement of Commissioner Yao, *In re YKK (U.S.A.), Inc.*, 116 FTC at 646 ("[T]his offer of a quid pro quo . . . is described in explicit detail in a document written by YKK's lawyer.").

In contrast to those cases, Liu's allegations here of an "effort to collude" lack any of the hallmarks of an agreement to conspire. All of the discussion about pricing was presented in highly generalized terms. Specific pricing terms concerning rates for one-way truck rentals are completely absent from the U-Haul statements alleged in the Complaint, making it impossible for U-Haul and any competitor to have reached an agreement. Further, the allegations only serve to illustrate that U-Haul sought to raise prices in the market – not to collude with others – and an acknowledgement that if its efforts failed, it would have to return to lower prices to escape loss of market share. (JA000048, at ¶47(e)) ("U-Haul would not permit Budget to gain market share at U-Haul's expense.") This is classic behavior expected in an oligopolistic market. At most, then, U-Haul is alleged to have unilaterally raised its prices for one-way truck rentals in order to improve pricing in an oligopolistic market, which is precisely the type of conduct that Second Circuit forbade the FTC from pursuing in *Ethyl*. 729 F.2d at 139. In other words, this case embodies the very fears that federal courts harbored in rejecting similar enforcement actions by the FTC. For that reason, regardless of whether an effort to collude can fall within the proscriptions of Section 5, the allegations of the FTC against U-Haul were insufficient to state such a claim.

CONCLUSION

For the foregoing reasons, AMERCO and UHI respectfully request that the Court affirm the decision below.

Respectfully submitted,
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