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

REPLY BRIEF OF PLAINTIFF-APPELLANT

Charles E. Tompkins (No. 1148876)
Ian J. McLoughlin (No. 1148877)
Robert E. Ditzion (No. 1128192)
Shapiro Haber & Urmy LLP
53 State Street, Floor 13
Boston, MA 02109
Telephone: (617) 439-3939
Facsimile: (617) 439-0134

Counsel for Plaintiff-Appellant Marcia Mei-Lee Liu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Although Defendants-Appellees AMERCO and U-Haul International, Inc. (collectively, "U-Haul") devote much energy to an often-misleading effort to minimize their wrongful conduct, U-Haul cannot dispute that the Federal Trade Commission ("FTC") deemed U-Haul's effort to collude on price a "particularly egregious" violation of Section 5 of the FTC Act, 15 U.S.C. §45 ("Section 5"), the Federal analog to Mass. Gen. Laws ch. 93A ("93A"). Joint Appendix ("JA") 30-37. This is not surprising: the FTC specifically found that U-Haul's CEO Edward Shoen ("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…." Addendum at 5. Unable to mount a straightforward defense regarding its liability, U-Haul has instead engaged in an ever-shifting effort to devise some argument that supports dismissal. U-Haul has largely (and understandably) abandoned the arguments it presented to the District Court, instead devoting over half its brief to arguments raised for the first time on appeal. None of these new arguments are any more persuasive than their predecessors.

First, U-Haul for the first time suggests that Plaintiff-Appellant Marcia Mei-Lee Liu's ("Liu") injury is not actionable because her claim does not meet the

criteria for an "unfair acts or practices" claim pursuant to Section 2 of 93A. Appellees' Br. at 26, 40-47. This argument fails for the simple reason that Liu alleges that U-Haul "ha[s] engaged *in unfair competition* or unfair or deceptive acts or practices in violation of Mass. G.L. c. 93A §§ 2, 9." JA 56 at ¶ 92 (emphasis added). Because Liu has alleged that U-Haul engaged in "unfair competition," the various doctrines U-Haul describes that may be applicable to "unfair acts or practices" claims are simply inapplicable.

Second, U-Haul for the first time argues that Liu has failed to allege "injury-in-fact" sufficient to confer Article III standing. Appellees' Br. at 47-48. This argument is nothing more than U-Haul's flawed damages argument dressed in constitutional clothing. As discussed in detail in Liu's Initial Brief, Liu alleges that she paid at least 10% more for her truck rentals than she would have in the absence of U-Haul's anticompetitive conduct. *See* JA 53 at ¶ 76. This is more than sufficient to confer constitutional, as well as statutory, standing.

U-Haul next rehashes its arguments below regarding the supposed inadequacy of Liu's econometric analysis and damages allegations. U-Haul's arguments are unpersuasive, overblown, or both. For example, contrary to U-Haul's suggestion, Liu's allegation that the primary input cost in both the rental car and rental truck industry is the cost of the vehicle itself is not merely plausible – it

is self-evident. *See* Appellees' Br. at 36. More fundamentally, however, this Court should reject U-Haul's effort to effectively turn a motion to dismiss into a *Daubert* analysis. Liu's econometric analysis, considered together with the scholarly authority on attempted price-fixing and Shoen's own admission that the very purpose of his collusive efforts was to reduce pricing uncertainty in the market and thereby raise prices, is more than sufficient to render it *plausible* that Liu and the class were damaged by U-Haul's unlawful conduct.

U-Haul's half-hearted final argument is that an invitation to collude is not a violation of Section 5 and thus not a violation of 93A. U-Haul attempts to support this position with the remarkable statement that "Liu neglects to inform the Court" that no invitation to collude case has ever been litigated. *See* Appellees' Br. at 53. This sentence, emblematic of U-Haul's overall approach to this Court, is flatly false. Liu made it perfectly clear in her opening brief that no Article III Court had ever directly addressed the question of whether an invitation to collude violates Section 5. *See* Appellant's Br. at 32 n.17. In any event, U-Haul's contention is irrelevant. While no Federal Court has ever addressed the specific question of whether attempted price-fixing is within the ambit of Section 5, the Supreme Court over 50 years ago held that Section 5 outlaws *incipient violations* of the Sherman Act, 15 U.S.C. § 1, *et seq*. *See FTC v. Brown Shoe Co*., 384 U.S. 316, 321-22

(1966). It is difficult to imagine a more clear-cut "incipient violation" of the Sherman Act than an attempt to fix prices, which even U-Haul concedes would be a violation of the Sherman Act if successful. Appellees' Br. at 54. That is why, prior to this case, no defendant has ever even bothered to challenge the FTC's common-sense position that an effort to fix prices, which would be a criminal offense if successful, constitutes an unfair method of competition in violation of Section 5. U-Haul's contrary position should be summarily rejected, and the District Court's two-page opinion dismissing this action should be reversed.

RESPONSE TO U-HAUL'S STATEMENT OF FACTS

U-Haul repeatedly misstates facts in the Complaint and inaccurately minimizes the FTC's findings, including as follows:

- U-Haul falsely claims that the FTC's Chairman only believed that an invitation to collude "*might* constitute an 'unfair method of competition in violation of Section 5 of the FTC Act.'" Appellees' Br. at 19 (quoting Addendum at 6) (emphasis added). In fact, the Chairman stated that "the complaint in this case alleges an unfair method of competition in violation of Section 5 of the FTC Act.... 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." Addendum at 6.

- U-Haul incorrectly claims that the FTC did not allege that U-Haul representatives nationwide contacted Budget to invite price collusion, but rather only that one U-Haul manager in Tampa, Florida did so. Appellees' Br. at 20. This is wrong. The FTC Complaint specifically states that Shoen instructed U-Haul's "regional managers" and "local U-Haul dealers" to contact Budget, and that "[i]in late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Shoen." JA 10-12 at ¶¶ 13-15, 21. The FTC's reference to one manager in Tampa's contacts with Budget in October 2006 and October 2007 was merely one example of this general conduct. *See* JA 11 at ¶¶ 16-19.

- U-Haul wrongly claims that: "[t]he FTC did *not* find that the alleged conduct harmed consumers" and that rather "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.'" Appellees' Br. at 20 (quoting JA 14 at ¶ 26) (emphasis added by U-Haul). This claim is inaccurate. The FTC never indicated that consumers had not yet been harmed by several years of past illegal conduct. The FTC also did not state that any consumer harm depended

on Budget accepting U-Haul's invitation. In fact, the FTC made it clear that consumers renting from U-Haul paid more for their truck rentals than they would have absent the challenged conduct. *See infra* Section II.A.[1]

[1] U-Haul also refers to facts not contained in the Complaint or the fairly incorporated FTC materials. These facts should not be considered by this Court. For example, U-Haul claims that "[t]he Complaint . . . alleges that if a consumer requested it, U-Haul [dealers] had discretion to match any competitor's rate." Appellees' Br. at 46. This assertion appears nowhere in the Complaint but is apparently based on a statement by Shoen on a February 7, 2008 earnings conference call. *See* Appellees' Br. at 16 (citing JA 24). While the conference call transcript was attached to the FTC Complaint, *see* JA 17-29, neither the FTC Complaint nor Liu's Complaint take any position on the accuracy of Shoen's statement, and it would be inappropriate for the Court to rely on this (unsworn and untested) statement in assessing a motion to dismiss.

ARGUMENT

I. Liu Is Not Foreclosed From Pursuing Her Claim Because She Used The Product At Issue.

U-Haul's first contention is a new one raised for the first time on appeal: that *Rule v. Fort Worth Animal Health, Inc*., 607 F.3d 250 (1st Cir. 2010), forecloses Liu's claim because she actually used the truck for which she overpaid. *See* Appellees' Br. at 27-29. This new argument should be deemed waived.[2] Even if considered, however, the argument should be rejected because it is based on an inaccurate reading of *Rule* that is inconsistent with both controlling SJC precedent and common sense.

Liu agrees, at least for purposes of this appeal, that a claim pursuant to 93A requires a showing of economic damages. *See* Appellant's Br. at 18 n.11. U-Haul's further contention, however, that *Rule* also sets forth a new requirement that a plaintiff proceeding pursuant to 93A "must allege that she did not consume the good or service about which she complains," *see* Appellees' Br. at 29, reads far too much into *Rule*. In *Rule*, the primary issue addressed by the Court was whether a

[2] "[I]t is a virtually ironclad rule that a party may not advance for the first time on appeal … a new argument." *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003). This rule is premised on "important considerations of fairness, judicial economy, and practical wisdom." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995).

plaintiff alleging a deceptive business practice – *not* an unfair method of competition claim – could proceed under 93A when there was no evidence that the plaintiff herself had suffered *any* harm, economic or otherwise. *See* 607 F.3d at 253. The Court concluded such claims were not cognizable. *Id.* *Rule* was thus designed to eliminate claims pursuant to 93A by plaintiffs alleging deception under circumstances where there is no evidence the alleged deception actually injured the complaining plaintiff. *Id.*

This case is entirely distinguishable. Liu alleges that U-Haul engaged in an unfair method of competition that caused her harm because she paid at least 10% more for her truck than she would have in the absence of the anticompetitive conduct. *See, e.g.*, JA 56 at ¶ 94. Unlike the plaintiff in *Rule*, who did not (and could not) allege that she had suffered any harm, Liu alleges that she suffered a very specific harm – paying more for her truck rentals than she would have in the absence of U-Haul's anticompetitive activity. *Id.* This case is thus in line with *Ciardi v. F. Hoffmann-La Roche, Ltd.*, in which the SJC permitted the plaintiffs to pursue claims premised on anticompetitive activity that violated Section 5 and thus 93A. *See* 436 Mass. 53, 59-60, 762 N.E.2d 303, 309 (2002).

Indeed, U-Haul's analysis of *Rule* as creating a new requirement that a consumer must allege "that she did not consume the good or service about which

she complains," Appellees' Br. at 29, would place *Rule* directly at odds with *Ciardi*. In *Ciardi*, the class was defined to include *only* those individuals who had already purchased the vitamins that were the subject of the anticompetitive activity (price-fixing) that was the basis of the plaintiff's complaint. *See* 436 Mass. at 58, 762 N.E.2d at 308 (plaintiff and the class were "indirect purchasers" of "defendants' vitamin products"). Obviously, an interpretation of *Rule* that would pose a direct conflict with controlling SJC precedent must be wrong.

II. Liu Plausibly Alleges Economic Injury.

It is axiomatic that, at the motion to dismiss stage, the allegations of a complaint must be considered *as a whole* to determine the plausibility of the claim. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 8, 14-15 (1st Cir. 2011) ("No single allegation need 'lead to the conclusion' ... of some necessary element, provided that, in sum, the allegations of the complaint make the claim as a whole at least plausible.") (citation omitted). Thus, the question presented is straightforward: given all of the allegations in the Complaint, is it *plausible* that Liu suffered economic harm as a result of U-Haul's unlawful efforts to collude? If the answer to that question is yes, then the decision below must be reversed.

Of course, U-Haul never addresses this question directly. Rather, U-Haul addresses *seriatim* most – but not all – of the considerations that render Liu's

allegation of injury plausible, apparently hoping that this Court will fall into the "trap" of supposing that "if no single item of evidence presented by the plaintiff points unequivocally to" the conclusion that Liu was injured, the case should be dismissed. *Cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002) (Posner, J.) (rejecting defendants' effort to dismember conspiracy allegations at the summary judgment stage). This Court should not fall into such a trap.

Moreover, the Court should take into careful consideration one critical allegation supporting the plausibility of Liu's injury that U-Haul conspicuously fails to mention – the fact that its own Chairman recognized that his invitation to collude was likely to increase prices by making U-Haul's pricing decisions more clear to its supposed competitors. As Shoen stated:

> 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.
>
> * * *

> 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). This quotation makes it crystal clear that the intent of Shoen's invitation to collude was to drive up prices and maintain them at supra-competitive levels – which he was "optimistic" would occur *whether or not Budget explicitly agreed to collude*. *Id.* This admission also effectively forecloses any argument that it is *implausible* that Liu was injured – which is likely why U-Haul wholly ignores the point. In any event, even were Shoen's own statement less compelling, the remainder of Liu's allegations – taken together as they should be – render it more than plausible that she suffered the economic injury that Shoen intended to inflict.[3]

A. The FTC's Enforcement Action Supports Liu's Plausible Allegation Of Injury.

U-Haul first argues that the FTC's allegations do not suggest that Liu's injuries are plausible, because the FTC did not find that U-Haul and Budget actually colluded on price. *See* Appellees' Br. at 29-31. This argument misses the point: Budget and U-Haul actually colluding to raise prices is not pre-condition to

[3] U-Haul also argues that, absent an "injury-in-fact," Liu has no constitutional standing. Appellees' Br. at 47-48. For the same reasons that Liu plausibly alleges economic injury, she also plausibly alleges an "injury-in-fact;" she therefore has standing. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998).

Liu and the class members, defined as purchasers from U-Haul, suffering economic injury. The FTC alleged that U-Haul raised prices *as part of* its attempt to collude with Budget on price. *See, e.g.*, JA 10-13 (describing U-Haul's price increases). This allegation, which is supported by Liu's own economic analysis of pricing in the relevant industry, *see infra* Section II.C, certainly renders it *plausible* that Liu, a customer of U-Haul, paid more than she would have paid for her truck rental in the absence U-Haul's attempt at collusion.

B. The Scholarly Authority Supports Liu's Plausible Allegation Of Injury.

U-Haul's discussion of the scholarly authority regarding damages opens with the remarkable assertion that "Liu claims that the 'overwhelming weight of legal and economic authority' *demonstrates* that she suffered injury." Appellees' Br. at 31 (emphasis added). This misleading sentence both overstates Liu's contention regarding the scholarly authority and wrongly suggests that Liu has to "demonstrate" injury at this stage. Of course Liu is not required to "demonstrate" injury at this stage. Rather, she must merely set forth allegations that render an inference of injury "plausible." Consistent with this burden, Liu never stated that the scholarly authority "demonstrated" that she was injured. Rather, she stated that the FTC's position and her econometric analysis were "*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." *See* Appellant's Br. at 24 (emphasis added).

As set forth in Liu's opening brief, the scholarly authority is clear that an invitation to collude may well cause economic harm even if not accepted by a competitor. *See* Appellant's Br. at 24-25. This is especially likely to occur in markets in which an invitation to collude is likely to "reduce uncertainty" among competitors regarding pricing. *See* Phillip E. Areeda & Herbert Hovenkamp, VI Antitrust Law ("Areeda") ¶ 1419 (2010). U-Haul seizes upon the idea that such an invitation might not cause damage in some situations. *See* Appellees' Br. at 31. This is irrelevant, however, as the market for one-way truck rentals is precisely the sort of market where an effort to collude is likely to increase prices. As Shoen recognized, in the one-way truck rental market, "competitors have a hard time seeing" what U-Haul does with regard to prices. *See supra* page 10. It is thus precisely the sort of market in which even an unaccepted solicitation to collude is likely to result in increased prices by reducing pricing uncertainty among competitors. Areeda, at ¶1419e. This supports Liu's plausible allegation of economic injury.

C. Liu's Preliminary Damages Model Supports Liu's Plausible Allegation Of Injury.

Liu alleges that she and the class paid *at least* 10% more for their one-way truck rentals than they would have paid in the absence of U-Haul's anticompetitive conduct. JA 53 at ¶ 76. Under the circumstances of this case, this specific, non-conclusory allegation of economic injury should by itself be sufficient to withstand a motion to dismiss. Out of abundance of caution, however, Liu also pled the details of the econometric analysis of publicly available pricing data that formed the basis for her specific allegation of injury. *See* JA 48-53 at ¶¶ 50-75. Predictably, of course, U-Haul has taken issue with the model, attempting to dismantle its constituent parts as if this were a *Daubert* inquiry. This approach is ill-founded for several reasons.[4]

First, U-Haul's assertion that "an economic model or theory placed within a complaint is not entitled to a 'presumption of truth'" is simply wrong as a matter of law. Appellees' Br. at 33. An economic allegation is afforded the same treatment as any other allegation – it is presumed accurate unless facially unreasonable. *See Ocasio-Hernández*, 640 F.3d at 12. Here, U-Haul's CEO has admitted his intention to raise prices in the industry by reducing pricing uncertainty, and he

[4] As noted in Liu's opening brief, Courts have uniformly rejected "*Daubert*-style inquir[ies]" in connection with motions to dismiss. *See* Appellant's Br. at 22 n.17 and authorities cited therein.

transmitted to regional managers an instruction to raise U-Haul's prices, which the managers presumably followed. For these reasons, Liu's allegation of economic harm is entirely reasonable and thus entitled to a presumption of truth.

Second, the vast majority of U-Haul's attacks on Liu's model are really attacks upon the specificity or nature of the publicly available data sources on which Liu's analysis, of necessity, was based. *See* Appellees' Br. at 34-38. Essentially, U-Haul's argument is that Liu's model is defective because it is based on publicly available information which is not sufficiently specific. *Id.* Such an attack should be viewed with great skepticism, because, as in most unfair competition cases, the actual data that would permit Liu to develop an economic model addressing U-Haul's purported concerns is in U-Haul's exclusive possession. As a result, U-Haul's argument, if accepted, would create a logically circular pleading standard in which Liu would need information only available through discovery in order to craft allegations sufficient to obtain discovery. This is not and should not be the law. Rather, "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." *In re Plasma-*

Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 1003 n.10 (N.D. Ill. 2011).

In any event, even were the Court to indulge U-Haul in its *Daubert*-style attack, U-Haul's arguments regarding Liu's damages model are unpersuasive. For example, U-Haul's suggestion that there is no support for Liu's allegation that "U-Haul is a significant driver of pricing in the [Truck Rental] industry [Producer Price Index ("PPI")]," is overblown. *See* Appellees' Br. at 34. Liu alleges that U-Haul is the largest competitor in the one-way truck rental business, with a market share of approximately 54%. *See* JA 41 at ¶¶ 18-19. This is more than sufficient to support the inference that U-Haul is a "significant driver of pricing" in the industry. Moreover, although U-Haul is correct that the PPI is based on data voluntarily and anonymously submitted by businesses to the Department of Labor, U-Haul conspicuously stops short of stating that it does not submit such data, as do most large, publicly traded companies. Absent such a statement, the inference that it did submit such data is entirely reasonable.

Similarly, U-Haul's attack on the passenger car rental industry PPI as an appropriate yardstick misses the point of the exercise at this stage. U-Haul quotes from a portion of the Areeda treatise dealing with the criteria to be applied to a yardstick methodology submitted in support of a full-blown damages analysis. *See*

Appellees' Br. at 36. But Liu does not intend to rely on the methodology set forth in the Complaint to actually prove the amount of her damages at trial; it is merely intended to support the conclusion that it is *plausible* that she was injured. For that purpose, the passenger car rental market is an appropriate yardstick: it is self-evident that the primary input costs in both industries (the vehicle and fuel) are similar, and, even though the demand structures of the two industries are somewhat different, they are not so different as to render it *implausible* that Liu suffered damages.

The same can be said of U-Haul's attack on Liu's choice of variables for her regression analysis. It can safely be presumed that, even following discovery and a full analysis of U-Haul's transactional data, the parties' experts will disagree upon the proper variables to be included in Liu's damages analysis regression. The District Court (as the trier of fact) will thus likely eventually be required to evaluate the viability of the various models and determine what damages Liu suffered. This can be a daunting task even where both sides have access to the same data and discovery is complete. But for a court to attempt to determine, pre-discovery, whether, for example, seasonality should have been included as a variable in an analysis regarding the one-way trucking industry, *see* Appellees' Br. at 38, would be folly. Perhaps at the damages phase seasonality will be deemed a

necessary variable, perhaps not – and it is not unlikely that two well-qualified doctors of economics will disagree on the point. But it cannot seriously be argued that failure to account for seasonality renders Liu's regression analysis *implausible*, which is the question currently facing this Court.

D. Liu Adequately Pleads Facts Regarding Her Own Transaction And Damages Which Support Her Plausible Allegation Of Injury.

U-Haul's final argument is that Liu's allegation that she was individually harmed is implausible because it is based on publicly available (and thus by definition class-wide) evidence. *See* Appellees' Br. at 38-39. This argument merits little response. U-Haul's position, if accepted, would effectively foreclose complaints by nearly all plaintiffs alleging any sort of antitrust injury caused by unfair competition, because such allegations are always based on extrapolations of individual injury from class-wide data. It would obviously be error to impose – as did the District Court below – a pleading requirement that would eliminate the ability to pursue claims based on unfair competition, including claims arising from *per se* violations of the antitrust laws such as price-fixing, in which the named plaintiff's allegation of damages is almost always inferred from class-wide evidence. Liu made significant, non-conclusory allegations that the class as a whole was injured, and specifically alleged that she is a typical member of the

class. JA 54 at ¶¶ 81-82. This is more than sufficient to support the plausible inference that she was injured.

III. It Is Legally Irrelevant Whether Liu Could Have Avoided The Harm Alleged In This Unfair Competition Action.

U-Haul for the first time argues, based on a 1980 FTC policy statement ("1980 Statement"), that any complaint alleging "unfairness" under Section 5 (and thus 93A) must include an allegation that the consumer could not reasonably have avoided the injury, and that Liu has failed to plead this required element of her claim. *See* Appellees' Br. at 40-47.[5] The Court should deem this new argument waived for the reasons set forth at 7, n.2, *supra*.[6] Even if considered, however, the argument lacks merit.

---

[5] *See* FTC Policy Statement on Unfairness *appended to In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984), *available at* http://www.ftc.gov/os/decisions/docs/vol104/FTC_VOLUME_DECISION_104_(_JULY_-_DECEMBER_1984)PAGES949_-_1088.pdf. As U-Haul notes, the 1980 Statement is the original source of the "unavoidability" requirement (which was later codified into statute). *See* Appellees' Br. at 40-42; 104 F.T.C. at 1074.

[6] Refusal to consider the argument at this stage is also appropriate because in this case, as in many others involving unfair competition, whether the injury could have been avoided could be determined only following discovery. *Cf.* Appellees' Br. at 43 n.9 (noting that some issues under the test that includes unavoidability should not be addressed on a motion to dismiss "where information concerning market conditions is limited.").

U-Haul's unavoidability argument is inapplicable to this case because this action involves an "unfair method of competition." Section 5 and 93A bar three related, but distinct, types of conduct: (1) "unfair methods of competition"; (2) "unfair acts or practices"; and (3) "deceptive acts or practices."[7] Here, Liu and the FTC have both alleged that U-Haul's attempt to fix prices was an "unfair method of competition." JA 56 at ¶ 92; JA 15 at ¶ 28.[8] The 1980 Statement on which U-Haul relies is clear that the unavoidability requirement does *not* apply to claims involving unfair methods of competition such as this one. *See* 104 F.T.C. at 1072 (noting that the statement explicitly addresses only "unfair . . . acts or practices in or affecting commerce" and not "unfair methods of competition"). Not surprisingly, *none* of U-Haul's authorities apply the unavoidability test to "unfair

[7] *See* 15 U.S.C. § 45(a)(1); Mass. Gen. Laws ch. 93A § 2(a). This allegation is consistent with the FTC's approach in prior attempt-to-collude cases, which have always been deemed to involve "unfair methods of competition." *See* Appellant's Br. at 31-32 and the authorities cited therein.

[8] U-Haul conceded this point at oral argument below. JA 64 ("To state a claim under Chapter 93A a plaintiff must do two things: First, they must show that there's unfair competition or an unfair trade practice – but unfair competition is what is being alleged here....").

methods of competition" such as attempts to fix prices. *See* Appellees' Br. at 40-45, and authorities cited therein.[9]

Nor should that unavoidability doctrine be imported into claims involving unfair methods of competition. The unavoidability requirement arose out of a concern that the FTC should only act when the challenged conduct created an obstacle to the normal consumer protections of the free market. *See* 1980 Statement, 104 F.T.C. at 1074 n.24 (noting that the FTC should look to "whether the acts or practices at issue inhibit the functioning of the competitive market and whether consumers are harmed thereby"); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299-300 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010) ("[T]he last element, that the injury cannot be reasonably avoided by the consumers, represents the Commission's inclination to take corrective action only if traditional market forces fail."). Without the unavoidability requirement, "unfair acts or practices" could encompass undesirable conduct that the free market could otherwise correct by itself. In contrast, "unfair methods of competition" are, by

[9] U-Haul also argues that Liu does not meet the FTC Act's requirement that her injuries be "substantial." Appellees' Br. at 43. This argument must likewise be rejected because, as noted above, the substantiality requirement also originated in the 1980 Statement, *see* 104 F.T.C. at 1073, which, as noted above, applies only to "unfair . . . acts or practices" and not to "unfair methods of competition." Even if the doctrine were applicable, Liu's alleged damages are, contrary to Defendants' allegations, neither speculative nor implausible. *See supra* Section II.

definition, restricted to conduct that directly interferes with the competitive market. There is thus no need for the unavoidability requirement in this context.

Furthermore, there is a well-developed body of antitrust law addressing what types of competition are fair. For this reason, the FTC and the SJC both have made it clear that they look to the antitrust laws for guidance in determining whether an act constitutes an "unfair method of competition." *See* 1980 Statement, 104 F.T.C. at 1072 n.4 (FTC looks to antitrust law in unfair competition cases); *Ciardi*, 436 Mass. at 59, 762 N.E.2d at 309 (looking to federal antitrust law to decide unfair competition claim). It is well-settled under antitrust law that a consumer may recover for overcharges inflicted as a result of a price-fixing cartel regardless of whether the purchasers could have bought the product or service in question from an entity not involved in the cartel; there is no "unavoidability" requirement. *See, e.g.*, *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 351-52 (1982) (finding price-fixing agreement a *per se* violation of the Sherman Act where defendants controlled only 70% of the relevant market); *Ciardi*, 762 N.E.2d at 306 n.8 (denying motion to dismiss 93A price-fixing complaint where defendants controlled only 75% of the vitamin market).[10]

[10] Even were the Court to apply the standard for "unfair acts or practices" rather than that for "unfair methods of competition," it is far from clear that the standard would include any unavoidability requirement. The SJC has ruled specifically and

IV. Liu Can Sustain A Claim Pursuant To 93A Based Upon U-Haul's Illegal Invitation To Collude.

U-Haul's next contention, that Liu cannot pursue a claim for attempted price-fixing under 93A, is wrong as a matter of law, and the cases that U-Haul has cobbled together in support of its contrary position are inapposite. For over 50 years the Supreme Court has recognized that incipient violations of the Sherman Act are barred by Section 5. *See Brown Shoe*, 384 U.S. at 321-22. U-Haul concedes that an attempt to collude on price, "if it were to be accepted, would constitute a violation of Section 1 of the Sherman Act." Appellant's Br. at 54. An attempt to collude on price thus obviously is an incipient violation of the Sherman Act, and therefore within the purview of Section 5. That is precisely why three FTC Commissioners, in assessing U-Haul's conduct, stated that "[i]nvitations to collude are the *quintessential example* of the kind of conduct that should be – and

---

frequently on the meaning of "unfair acts or practices," applying a standard that includes no unavoidability requirement – that "[a]n action is 'unfair' if it is '(1) within the penumbra of a common law, statutory, or other established concept of unfairness; [or] (2) immoral, unethical, oppressive, or unscrupulous." *Gossels v. Fleet Nat'l Bank*, 453 Mass. 366, 373, 902 N.E.2d 370, 378 (2009); *Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126-27, 865 N.E.2d 1091, 1097-98 (2007). Neither the SJC nor the Massachusetts Appeals Court has ever cited to the 1980 Statement to explain what conduct is "unfair" or to explain any element of its own, different standard. Gilleran, Law of Chapter 93A, 52 Mass. Prac. § 4.9 ("[T]he Policy Statement on Unfairness has not yet been applied to Massachusetts 93A cases."); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1924-29 (2000).

has been – challenged as a violation of Section 5 of the Federal Trade Commission Act...." Addendum at 6 (emphasis added).

This analysis is sufficiently straightforward that not one entity charged with attempted price-fixing has ever litigated the question of whether such conduct is within the scope of Section 5, despite two decades of FTC enforcement actions. *See* Appellant's Br. at 31-33. Thus, while U-Haul is correct that this Court will be the first to address the narrow question of whether an effort to collude constitutes a violation of Section 5, the question is not difficult to answer. The SJC and the U.S. Supreme Court's determination that the FTC may prohibit incipient violations of the Sherman Act makes clear the answer is yes.

The analysis supporting Liu's ability to pursue a claim for attempted price-fixing pursuant to 93A is similarly straightforward. As the SJC stated in *Ciardi*, "in analyzing what constitutes unfair methods of competition ... which are not defined in 93A, this Court looks to interpretations by the Federal Trade Commission and Federal Courts of § 5(a)(1) of the Federal Trade Commission Act...." *Ciardi*, 436 Mass. at 59, 762 N.E.2d at 309. The SJC then went on to endorse the enforcement by the FTC of "incipient violations" of the Sherman Act, citing *Brown Shoe*. *Id.* Accordingly, as the District Court assumed, *see*

Addendum at 1, "incipient violations" of the Sherman Act, such as U-Haul's attempted collusion on price, are within the purview of 93A.

V. U-Haul's Conduct Constituted An Illegal Attempt To Collude On Price.

U-Haul's final effort to sustain dismissal is the argument that, contrary to the conclusion of the FTC, U-Haul's conduct does not constitute an invitation to collude on price. U-Haul states: "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." Appellees' Br. at 56. This contention is flatly untrue. Liu specifically alleged in her complaint that:

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

See JA 47-48 at ¶47(d). This non-conclusory allegation was supported by specific references to statements by Shoen. *See id.* Liu also alleged that U-Haul regional managers were instructed to, and did, contact their counterparts at Budget and Penske and tell them that: "(i) U-Haul had raised its rates, and (ii) competitors' rates should now be raised *to match* U-Haul's rates." *See* JA 43 at ¶ 32 (emphasis added). These allegations plainly concern an agreement on "specific pricing terms."

Liu has provided extensive, specific allegations that, if proven, would be more than sufficient to establish that – as the FTC concluded – U-Haul engaged in an unlawful effort to collude on price that damaged Liu and the members of the class. Dismissal of the action was error and should be reversed.

CONCLUSION

For the foregoing reasons, and those presented in Liu's Initial Brief, 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
Charles E. Tompkins (No. 1148876)
Ian J. McLoughlin (No. 1148877)
Robert E. Ditzion (No. 1128192)
Shapiro Haber & Urmy LLP
53 State Street, Floor 13
Boston, MA 02109
Telephone: (617) 439-3939
Facsimile: (617) 439-0134

Counsel for Plaintiff-Appellant
Marcia Mei-Lee Liu

Dated: January 13, 2012

RULE 32(A)(7) CERTIFICATE OF COMPLIANCE

I, Charles E. Tompkins, hereby certify that the Reply Brief of Plaintiff-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,940 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

CERTIFICATE OF SERVICE

I, Charles E. Tompkins, hereby certify pursuant to Fed. R. App. P. 25(d) that, on January 13, 2012, the foregoing **Reply Brief of Plaintiff-Appellant** was filed through the Court's CM/ECF system and served electronically on the following counsel of record:

W. Scott O'Connell
Nixon Peabody LLP
100 Summer St
Boston, MA 02110
soconnell@nixonpeabody.com

W. Daniel Deane
Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
ddeane@nixonpeabody.com

Daniel B. Hauck
G. Patrick Watson
Bryan Cave LLP
1201 W. Peachtree St. NW
One Atlantic Center
14th Floor
Atlanta, GA 30309
daniel.hauck@bryancave.com
patrick.watson@bryancave.com

/s/ Charles E. Tompkins
Charles E. Tompkins