UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Marcia Mei-Lee Liu, individually and on Behalf of a class of all others similarly situated	)	
Plaintiff,	)	
v.	)	**C.A. No.: 10-11221**
AMERCO; U-Haul International, Inc.	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendants AMERCO and U-Haul International, Inc. ("UHI," collectively, "U-Haul"[1] or "Defendants") submit this memorandum in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action because Plaintiff Marcia Mei-Lee Liu fails to allege a plausible claim upon which relief may be granted.

INTRODUCTION

In her Complaint, Plaintiff asks this Court to take an unprecedented and dangerous step in the jurisprudence of Section 5 of the Federal Trade Commission ("FTC ") Act and state statutes based thereon, demanding that this Court be the first to recognize a cause of action based on a mere allegation of an invitation to collude to raise prices. Even giving credence to the Plaintiff's claim of an effort to collude, nowhere does she allege any evidence of an acceptance of the so-called invitation, by Budget or any other entity. No court has ever found that a cause of action for unfair competition can arise from such an invitation alone because, absent acceptance of the invitation, any price increases were, by definition, purely unilateral.

Federal appellate courts reviewing Section 5 of the FTC Act have limited the scope and applicability of its provisions. Those courts have consistently demanded that the Commission's attempts to regulate conduct under Section 5 follow clear and precise guidelines, so that firms can engage in vigorous competition without fear of incurring liability. Those same requirements apply in this case, where Plaintiff seeks to recover under a state statute that, by law, is guided by the courts' interpretations of Section 5.

Even assuming, *arguendo,* that Plaintiff could show that a failed effort to collude is an unfair method of competition under Section 5 or Chapter 93A, the Complaint must still fail

[1] Defendants are referred to jointly as "U-Haul" only to conform with the language employed by Plaintiff in the Complaint and not as an admission that the Defendants constitute a common entity. As set forth more fully in AMERCO's separate Motion to Dismiss for Lack of Personal Jurisdiction, AMERCO is a distinct and separate company from UHI.

because it seeks money damages, yet it presents no plausible claim of injury. Plaintiff cannot plausibly allege injury because, as the Complaint concedes, the alleged invitation to collude was never accepted, and, as the FTC has recognized, only when invitations to collude are accepted are higher prices likely to result. Plaintiff asks this Court to sustain her claim and certify a class action based on nothing more than a rudimentary, illogical and self-contradicting model comparing national truck rental prices with car rental prices. Plaintiff has failed to state a cognizable claim for relief under Massachusetts law and is unable to plausibly allege any injury.

In its landmark *Twombly* decision, the Supreme Court articulated stricter standards for pleading antitrust claims, explaining,"[t]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Yet, Plaintiff asks this Court to venture in the exact opposite direction and create a new cause of action that will spawn future class actions for chimerical damages on the heels of all FTC consent orders relating to invitations to collude. The Court should refrain from embarking upon the uncharted territory necessary to provide relief under Plaintiff's Complaint and dismiss the action.

BACKGROUND

Defendant AMERCO is a holding company that is incorporated and operates exclusively in Nevada. Defendant UHI owns 48 operating subsidiaries, known as marketing companies, throughout the country. Virtually every state has its own operating subsidiary which, in turn, has one or more local divisions, known as Marketing Company Offices ("MCOs"), that are responsible for a specific territory in a state. Presently, there are 124 MCOs throughout the United States.

In the Complaint, Plaintiff attempts to portray U-Haul as having extended an invitation to collude with a single competitor, Budget, on one-way truck rental rates to, from, or within Massachusetts. Plaintiff then advances a confused theory of recovery that implausibly alleges injury yet acknowledges that no anticompetitive agreement was ever reached. The essential elements of the Complaint are summarized below:

- The Complaint alleges that in October, November, and December of 2006, Mr. Shoen of U-Haul, wrote a memorandum containing "two complementary strategies" to increase one-way truck rental prices. U-Haul regional managers were to raise one-way rates, then contact Budget concerning the rate increase "and encourage Budget to follow – lest U-Haul's rates be reduce to the original level." (Compl. ¶27-32.) Where such efforts did not produce the intended result, U-Haul managers were allegedly instructed to lower one-way rates below Budget's rates and inform Budget accordingly. (Compl. ¶29.)

- The Complaint alleges that a regional manager for the Tampa, Florida area, Robert Magyar, increased one-way rental rates commencing in Tampa and contacted some unidentified person at a Budget office in Tampa about the raise. The Complaint acknowledges that Mr. Magyar never invited Budget to collude directly, but instead relies upon the speculative assertion that such an invitation was "implicit in the conversation." (Compl. ¶35.) The Complaint makes a similar assertion concerning Magyar's conduct in late 2007. (Compl. ¶43.)

- The Complaint alleges that on February 7, 2008, Mr. Shoen made statements on an earnings conference call concerning the need to improve industry pricing. The Complaint quotes extensively from Mr. Shoen's responses to questions raised by teleconference participants about pricing strategy. (Compl. ¶¶45, 47.)

- The Complaint alleges, based upon a damage model that compares nationwide rentals of trucks and trailers to passenger car rentals, that between September 2006 and September 2008, class members paid "at least 10% more on average" for one-way truck rentals, than they would have paid absent the conduct alleged in the Complaint, and that this increase "cannot be explained by factors other than the efforts to collude." (Compl. ¶¶70-71.)

The Complaint offers no allegations of conduct by Defendants within or directed to Massachusetts or that affected one-way rental rates to, from, or within Massachusetts.

ARGUMENT

1. Standard for Dismissal Under Rule 12(b)(6).

Federal Rule of Civil Procedure 12(b)(6) provides for a motion to dismiss where the complaint "fails to state a claim upon which relief may be granted." In order to state a claim, a plaintiff must "must set forth [in the complaint] factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some *actionable legal theory*." *Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997) (emphasis added) (internal quotations omitted). As illustrated below, Plaintiff's Complaint must be dismissed because it fails to set out an actionable claim for relief.

2. An Invitation To Collude Is Not a Cause of Action Under FTC Act § 5 Or Massachusetts General Laws Ch. 93A.

No court has ever found an invitation to collude to be a violation of either Section 5 of the FTC Act or Section 2 of Chapter 93A of the Massachusetts General Laws. Plaintiff's attempt to create a new cause of action here is completely without precedent, and, as a consequence, the Complaint presents classic grounds for a motion to dismiss. The Complaint purports to be based upon the Massachusetts' "baby FTC Act," which proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a); *see also id.* § 9 (allowing private litigants to bring claims under Section 2). This statute is patterned directly after Section 5 of the FTC Act. 15 U.S.C. § 45(a). Rather than subject courts to conflicting interpretations of these statutes, the Massachusetts law explicitly requires courts deciding cases brought by private litigants to be guided by FTC interpretations and federal courts interpreting Section 5 of the FTC Act. Mass. Gen. Laws ch. 93A, §2(b); *see, e.g., Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395, 813 N.E.2d 476, 487 (2004).

Because Plaintiff's claim that U-Haul engaged in alleged "efforts to collude" is not a cognizable claim for relief under either Massachusetts law or the FTC Act, the Complaint is ripe for dismissal at the pleadings stage. *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 563, 887 N.E.2d 244, 259 (Mass. 2008) ("[T]he boundaries of what may qualify for consideration as a c. 93A violation is a question of law.") (Internal quotations omitted). As demonstrated below, there is no basis in law for allowing a claim based only upon an alleged "effort to collude" to proceed.

A. <u>An "Effort to Collude" Is Not a Cause of Action Under FTC Act Section 5.</u>

Section 5 of the FTC Act provides that "unfair methods of competition" and "unfair or deceptive practices" are unlawful and authorizes the FTC to pursue actions to terminate acts that violate the statute and to recover civil penalties. Section 5 does not authorize private rights of action or damage claims. *See* 2 Areeda & Hovenkamp, *Antitrust Law* ¶ 302e & n.28 (3d ed.).

No court has ever found that an "effort to collude" constitutes an unfair method of competition giving rise to cause of action under Section 5 of the FTC Act. Because the FTC, which is responsible for bringing Section 5 enforcement actions, has scantly brought *any* cases based purely upon Section 5, the precise contours of the statute's vague language are uncertain. *See E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 136 (2d Cir. 1984) (describing Congress' deliberate use of "vague" language in Section 5). Among the few attempts by the FTC to bring an action based exclusively on the premise of an unfair method of competition, courts have strongly rebuked the Commission for attempting to inflate the scope of conduct covered by Section 5. Those courts have insisted that, in applying Section 5 of the FTC Act, the Commission set forth an objective test against which conduct can be measured.

In *E.I. du Pont de Nemours & Co. v. F.T.C.*, commonly referred to as the *Ethyl* case, the Second Circuit Court of Appeals vacated an FTC order concerning certain business practices that the Commission branded as Section 5 violations. Rather than embrace the opportunity to develop an expansive reading of Section 5, the court recognized the danger of an unfettered approach:

> 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.

Ethyl, 729 F.2d at 137-38. 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.*

Prior to the *Ethyl* case, the Ninth Circuit similarly denied enforcement of an FTC Order based upon Section 5 of the FTC Act where the pricing system adopted by plywood manufacturers was alleged to have constituted an unfair method of competition. *Boise Cascade Corp. v. F.T.C.*, 637 F.2d 573 (9th Cir. 1980). Although the FTC believed the conduct at bar was captured within the statute, the court disagreed and found that mere parallel price increases did not violate Section 5. *Id.* at 577. In the absence of an overtly anticompetitive agreement, the court held, a Section 5 violation requires evidence that the conduct actually had the effect of fixing or stabilizing prices. *Id.*

The court in *Ethyl* echoed this need for readily apparent judging criteria four years later in announcing its own decision:

> 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 139. In the instant case, Plaintiff asks the Court to ignore the federal courts' consistent call for objective criteria to measure conduct against and adopt a view of Section 5 of the FTC Act that has been soundly rejected.

In the absence of any jurisprudence directly addressing the elements of an alleged "effort to collude" claim, this Court should look to existing Section 5 cases for guidance. 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. Under that reasoning, an "effort to collude," such as the one alleged here, 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.

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 FTC Act, 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 Commission 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 recent *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.*, Dkt. No. C-4160, 2006 WL 752214 (FTC Mar. 16, 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 F.T.C. 944, 945 (1992) (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 F.T.C. 628, 646 (1993) ("[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, Plaintiff's allegations here of an "effort to collude" lack any of the hallmarks of an agreement to conspire. All of the discussion about pricing is 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. (Compl. ¶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 Commission.

Although the FTC has obtained consent orders based upon alleged invitations to collude, the Commission has never tested an invitation to collude as a Section 5 violation in court. *See, e.g., In re Valassis Comms., Inc.*, 2006 WL 752214 (consent order based upon invitation to collude); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (same); *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996) (same). U-Haul fully recognizes that the FTC has contended that the actions of U-Haul in this case constituted an invitation to collude in violation of Section 5.[2] However, courts – not the FTC – are the final arbiters of boundaries of Section 5 jurisprudence.

[2] The FTC's contentions were resolved by the Consent Order referenced in the Complaint. (Compl. ¶15.) However, the Consent Order "does not constitute an admission . . . that the law has been violated as alleged . . . or that the facts as alleged . . . are true." Consent Agreement, *In re U-Haul Int'l, Inc. and AMERCO*, Dkt. No. C4294 (F.T.C. July 14, 2010), at 1; *see also* 15 U.S.C. § 16(a).

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 . . . ."). This Circuit has already found that FTC 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).

Although the FTC has recently pursued alleged invitations to collude under Section 5, Plaintiff's claim is not and has never been recognized by any court as a sustainable cause of action. Indeed, in *Ethyl*, the Court expressed concern because "the FTC's rulings and order appear to represent uncertain guesswork rather than workable rules of law." 729 F.2d at 139. The same is true here. This Court should not accept the Plaintiff's invitation to be the first to recognize a private right of action based on a failed effort to collude.

B. An "Effort to Collude" Is Not a Cause of Action Under Chapter 93A of Massachusetts General Laws.

(1) The Alleged "Effort To Collude" Is Not an Unfair Method of Competition.

Section 2(b) of Massachusetts General Laws Chapter 93A instructs courts that are reviewing private claims alleging unfair methods of competition or unfair or deceptive trade acts or practices to "be guided by the interpretations given by the Federal Trade Commission and the Federal Courts" to Section 5 of the FTC Act. *See Aspinall*, 442 Mass. at 395 ("Massachusetts courts, in construing which acts are deceptive, must be guided by interpretations of that term as found in the analogous Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a)(1)."); *see also In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d at 495 n.3 (same).

U-Haul illustrated above why an alleged "effort to collude" does not form a cause of action under Section 5 of the FTC Act. *See* Sec. 2.A, *supra.* Because Section 2 of the Massachusetts statute must be construed in light of FTC Act interpretations, the same Section 5

jurisprudence also precludes a cause of action for an invitation to collude under state law. This result is especially appropriate, where, as here, Plaintiff seeks to explore unprecedented territory under state law. *See Gill v. Gulfstream Park Racing Assn., Inc.*, 399 F.3d 391, 402 (1st Cir. 2005) ("A federal court sitting in diversity jurisdiction cannot be expected to create new doctrines expanding state law.").

(2) "Efforts To Collude" Cannot Cause Injury Necessary To Support an Action Under Chapter 93A.

Most importantly, the Massachusetts statute, unlike Section 5, requires that a plaintiff seeking relief under Chapter 93A have suffered an injury in order to state a claim. Mass. Gen. Laws ch. 93A, § 9. As recognized by the Massachusetts Supreme Judicial Court, "the Legislature, in enacting and amending G.L. c. 93A, § 9, did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery." *Aspinall*, 442 Mass. at 400-01 (quoting lower court's opinion); *see also Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 27 (1997) (conduct must cause substantial injury, in addition to two other requirements, to be "unfair" pursuant to Massachusetts law); *Mass. Farm Bur. Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 730, 532 N.E. 2d 660 (1989) ("In the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery."); *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 850, 443 N.E. 2d 1308 (1983) ("plaintiff must show . . . a causal connection between the deception and the loss").

The requirement to show harm underscores the fundamental nature of the problem with Plaintiff's claim: an alleged "effort to collude" does not produce an injury. Absent an agreement with a competitor, U-Haul simply engaged in a unilateral effort to improve pricing.

In this and other matters involving alleged invitations to collude, the FTC has specifically concluded that harm to consumers is only possible if the alleged invitation to collude is accepted. Compl. ¶26, *In re U-Haul Int'l, Inc. and AMERCO* ("U-Haul's invitations to collude, *if accepted by Budget*, would likely result in higher one-way truck rental rates and reduced output.") (Emphasis added); s*ee also* Compl. ¶15, *In re Valassis Comms., Inc.*, 2006 WL 752214, at *3 ("Valassis' invitation to collude, if accepted by News America would likely have resulted in higher [coupon booklet] prices and reduced output."); Compl. ¶7, *In re Stone Container Corp.*, 125 F.T.C. at 854 (1998) ("[t]he invitation, if accepted was likely to result in higher prices, reduced output, and injury to consumers").

It follows that no court has ever sustained a private action for damages based on an alleged "effort to collude." Plaintiff is alleging only an attempt to collude and fix prices that never ripened into an agreement in restraint of trade that would have violated Section 1 of the Sherman Act. But even accepting those allegations as true, Plaintiff has no more a claim than a driver, who, on his daily commute, narrowly avoids an accident. Even if the driver believes another is at fault, the "near miss" caused no injury. Similarly, a failed effort to collude could not have resulted in illegally inflated prices and, likewise, could not have caused Plaintiff injury.[3]

Moreover, in this very case, FTC Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch issued a joint statement concerning UHI and AMERCO's FTC Consent Order emphasizing that Defendants' conduct was "challenged as a violation of Section 5 of the

[3] Not surprisingly, private, follow-on litigation to FTC enforcement actions of alleged invitations to collude have not sought recovery under the various state "baby FTC Acts," since, logically, an unaccepted invitation to collude does not result in higher prices or injury. Instead, those plaintiffs have been forced to illustrate an *actual* conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1, which Plaintiff cannot do here. *See, e.g.*, *In re Linerboard Antitrust Litig.*, MDL No. 1261 (E.D. Pa.) (private litigants converting invitation to collude from FTC enforcement action, *In re Stone Container Corp.*, into a horizontal conspiracy claim).

Federal Trade Commission Act, which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct." Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, *In re U-Haul Int'l, Inc. and AMERCO*, FTC File No. 081-0157 (June 9, 2010). In other words, this damages action is precisely the type of case that the FTC does not want and does not believe should be brought. This Court should reject Plaintiff's invitation to create a new cause of action that is contrary to law, logic, and the desires of the FTC.

3. The Complaint Fails To Allege a Plausible Claim For Relief And Should Be Dismissed.

Even accepting Plaintiff's unprecedented belief that an invitation to collude could create a valid cause of action under Massachusetts law, the allegations found in the Complaint do not suffice to form a plausible claim. Taken together, the Complaint is nothing more than an attempt to loop together a series of disparate elements to create a superficial impression of wrongdoing by U-Haul. There is no plausible connection between the statements made by a U-Haul executive in response to questions raised during an earnings teleconference, out-of-context communications taken from a Tampa-based regional manager, and the rates offered by U-Haul for one-way truck rentals. Plaintiff's desire to puzzle together an invitation to collude out of these incongruent pieces cannot satisfy the plausibility requirement under the Supreme Court's recent *Twombly* decision.

A. *Twombly* And *Iqbal* Require the Complaint To Contain Plausible, Non-Conclusory Allegations.

A complaint must be dismissed unless it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this plausibility requirement, a plaintiff must plead factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotations omitted); s*ee also Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (complaint must answer basic questions about the basis for the cause of action, such as who, what, where, and when). In attempting to set forth a plausible claim, a plaintiff cannot rely on allegations that are merely conclusory. *Iqbal*, 129 S. Ct. at 1940-41 (2009). Courts are instructed to separate factual allegations from "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. After reviewing the remaining allegations, a court must consider plaintiff's theory against the "obvious alternative explanation" for the alleged conduct to determine whether the complaint sets forth a plausible claim. *Iqbal*, 129 S. Ct. at 1951-52.

The Complaint here is rife with unsupported and conclusory speculation. First, Plaintiff conjectures that "[a]cting together, U-Haul and Budget could profitably impose higher prices upon consumers." (Compl. ¶20.) This statement not only fails to allege any fact, but it suggests a conspiracy between U-Haul and Budget that is nowhere alleged in the complaint.[4] Plaintiff next claims that in late 2006, "U-Haul representatives across the country contacted Budget and invited price collusion as instructed by Shoen." (Compl. ¶33.) This allegation is without any factual support. Apart from the allegations that Magyar contacted some unnamed person in the local Tampa office of Budget, the Complaint provides no information to suggest that any U-Haul

[4] As further evidence of the incongruous nature of this Complaint, Plaintiff alleges that Budget "participated in the effort to artificially inflate the price of one-way truck rentals," but never explains Budget's alleged participation. (Compl. ¶10.)

representatives anywhere ever contacted anyone at Budget anywhere. Third, the Complaint references a conversation between Mr. Magyar and an unnamed "Budget representatives" and then purports to divine the intent of that conversation by offering the conclusory allegation that an invitation to collude was "[i]mplicit in the conversation." (Compl. ¶35.) Lastly, the Complaint states that a supposed increase in prices of one-way truck rentals "cannot be explained by factors other than the efforts to collude." (Compl. ¶71.) Again, Plaintiff's statement here is purely conclusory and fails to account for innumerable variables that impact the one-way truck rental market, as discussed below. All of these allegations fall squarely within the Supreme Court's prohibition on conclusory allegations and are not entitled to the presumption of truth. When the conclusory allegations are taken away, the Complaint cannot withstand a motion to dismiss.

B. Plaintiff's Remaining Allegations Do Not Set Forth a Plausible Claim That U-Haul Extended an Invitation To Collude.

As a set out above, because no such claim has ever been litigated, the elements of an invitation to collude offense have never been defined. Courts reviewing the FTC's application of Section 5 have concluded that an objective test is required to assess potentially infringing conduct. *See* Section 2.A, *supra*. The danger of an invitation to collude arises solely from the possibility of such an invitation being accepted by a competitor and forming an anticompetitive agreement. Thus, an invitation – as a precursor to an unlawful agreement – must be sufficiently specific as to allow a competitor to understand and accept the terms of the offer. In the *Valassis* case, for example, the FTC investigated an invitation to collude allegedly made by Valassis to News America, which, together with Valassis, controlled the entire market for the coupon booklets regularly distributed in Sunday newspapers across the country. *See* Analysis to Aid Public Comment, *In re Valassis Comms., Inc.*, 2006 WL 752214, at *24. During an earnings

conference call, the president and CEO opened the call by proposing a price floor of $6.00 per page and $3.90 per half page and that it would monitor News America's response for "concrete evidence" of immediate reciprocity. *Id.* at *24-25. Similarly, in another invitation-to-collude matter, two representatives of an axle products manufacturer actually visited a competitor's headquarters, promised not to sell certain axle products below a specified price, and explained that "there was no need for the two companies to compete on price." *In re Quality Trailer Prods. Corp.*, 115 F.T.C. at 945. In these cases, the terms that were necessary to form an agreement were clearly described by the party seeking collusion.

The specificity of the alleged invitation to collude found in the Complaint bears no resemblance to the invitations to collude extended in *Valassis* and *Quality Trailer Products*. The purported invitation by U-Haul to Budget is simply too vague to constitute a legal offer. Indeed, according to the Complaint, U-Haul never even proposed any specific prices to be charged or rate floors. Plaintiff alleges that the invitations to collude are shown by: (1) internal UHI memoranda distributed in late 2006 and again in late 2007 discussing its strategy for getting prices up; and (2) statements by AMERCO Chairman Joe Shoen on an earnings call in February of 2008.

(1) Internal UHI Memoranda

Plaintiff quotes selectively from several isolated, internal communications to create the illusion of an invitation to collude with Budget, orchestrated by Mr. Shoen. But the memoranda actually reveal an independent effort by U-Haul to increase transactions and improve its own pricing. For example, in November 2007, Mr. Shoen urged regional managers to set higher rates for one-way truck rentals, then counseled, "Budget will come up. Let them." (Compl. ¶41.) Far from "inviting" Budget to collude, the Complaint at most shows that U-Haul was simply

adjusting its own behavior. Any adjustment by Budget was nothing more than conscious parallelism, which does not violate any antitrust laws and which the Commission itself admits does not cross into Section 5 liability. *Ethyl*, 729 F.2d at 139 (quoting FTC's opinion that "Section 5 should not prohibit oligopolistic pricing alone, even supracompetitive parallel prices, in the absence of specific conduct which promotes such a result").

In attempting to show that anyone at U-Haul took any actions with respect to these memoranda, Plaintiff relies exclusively on the involvement of Mr. Magyar, the regional manager for the Tampa, Florida area. The only alleged communication to competitors occurred far down the chain of command and involved only one region's operations. That alleged isolated Tampa communication involved nothing more than telling unknown people with unknown authority at Budget that a U-Haul MCO had raised particular rates; that information likely was available to anyone checking the company's Internet site or calling the reservations line. The communication did not share confidential pricing strategy. Moreover, the communication did not include any threats of a price war if the Budget locations did not raise their prices. The communication also did not indicate any price floor or levels the MCO intended to maintain. *Contra In re Stone Container Corp.*, 125 F.T.C. 853 (high level executives participated in communication); *In re Precision Moulding Co.*, 122 F.T.C. 104 (supplier's president told competitor's executive that prices were too low and threatened price war if competitor did not raise prices); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944 (two executives visited competitor's headquarters and committed not to sell below a specified price). Most importantly to this case, there is absolutely no connection between what happened in a local office in Tampa, Florida and one-way truck rentals to, from, or within Massachusetts.

(2) Statements by Mr. Shoen During February 7, 2008 Earnings Call

The second prong of U-Haul's supposed invitation to collude was statements made by AMERCO Chairman Joe Shoen on Feb. 7, 2008 in response to questions posed during a routine earnings call. But the statements upon which Plaintiffs rely were not part of a planned presentation, but rather responses to questions. Moreover, they were far too general to possibly give rise to a claim here.

Managers at public companies already face a daunting challenge while speaking on earnings calls: trying to balance an obligation to provide full disclosure to the business community with business confidentiality concerns – all against a backdrop of securities and antitrust law. At best, Plaintiff alleges that Mr. Shoen failed to strike the right balance during a single call, which neither creates an invitation to collude nor occasions a claim for damages.

The SEC requires that management review past performance and "[d]escribe any known trends or uncertainties that . . . the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). This requirement for candid discussion by management extends not only to pertinent information about the company itself, but about the industry as a whole. SEC Release 33-8350 (managers should also discuss "economic or industry-wide factors relevant to the company"). Accordingly, the SEC effectively mandates discussion of industry pricing trends, especially where they are expected to have a material impact on performance.

In *Valassis*, the FTC specifically concluded that the statements during an earnings call "provided information that would not ordinarily have been disclosed to the securities community." *See* Analysis to Aid Public Comment, *In re Valassis Comms., Inc.*, 2006 WL 752214, at *25. But no such allegation is present against U-Haul here. Indeed, such an

allegation is impossible because, unlike the CEO in *Valassis* who *opened* his earning conference call with an invitation to collude, Mr. Shoen made statements only *in response* to questions by teleconference participants. As alleged in the Complaint, Mr. Shoen gave comments "[w]hen asked for additional information on industry pricing." (Compl. ¶47.) If Mr. Shoen intended to extend an invitation to collude during the conference call, then he, like Valassis' CEO, would have begun his remarks with such an invitation. Plaintiff's claim that Mr. Shoen was offering Budget an invitation to collude is not plausible compared to the "obvious, alternative explanation" that Mr. Shoen was simply addressing the legitimate concerns about industry pricing raised by investors.[5]

Further, the complicated nature of U-Haul's pricing structure makes it totally impractical that Mr. Shoen could have made an invitation to collude on an earnings call. As quoted in the complaint, the pricing matrix of U-Hauls rate structure is "vast." (Compl. ¶47(b).) Unlike *Valassis*, which involved just a two-product market, it is not plausible for Mr. Shoen to have extended an invitation to collude on the huge array of rates offered by U-Haul, which vary depending upon the office or location handling the rental, the trip origin and destination, fleet distribution needs, and truck model.

C. Plaintiff Cannot Plausibly Show That She Suffered Any Injury.

(1) Without an Agreement, Plaintiff Cannot Show That She Paid Supracompetitive Prices.

Essential to stating a claim under Chapter 93A is a plausible allegation showing that the plaintiff suffered injury due to defendant's conduct. *Aspinall*, 442 Mass. at 400-01 ("[T]he

[5] Creating liability based on a corporate executive's spontaneous, nonspecific statements about industry pricing made in response to questions from investors also raises serious First Amendment concerns and risks chilling legitimate commercial speech. *See, e.g., Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("commercial speech, like other varieties, is protected" under the First Amendment).

Legislature, in enacting and amending G.L. c. 93A, § 9, did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery.") But Plaintiff cannot plausibly allege any loss because there is no showing that U-Haul and Budget ever agreed to raise prices of one-way rentals. The Complaint repeatedly emphasizes that U-Haul engaged in an "effort to collude" but no more. Without ensuing agreement by Budget to raise prices, Plaintiff has alleged nothing more than a unilateral price increase by U-Haul. Consequently, even if cases involving invitations to collude are appropriate for FTC enforcement actions to enjoin future conduct, they are not suitable for private, treble damages actions, since these "incipient" antitrust violations have caused no injury. *See, e.g.*, Analysis to Aid Public Comment, *In re Valassis Comms., Inc.*, 2006 WL 752214, at *25 ("Valassis' invitation to collude, if accepted by News America would likely have resulted in higher [coupon booklet] prices and reduced output."); Compl. ¶7, *In re Stone Container Corp.*, 125 F.T.C. at 854 (1998) ("[t]he invitation, if accepted was likely to result in higher prices, reduced output, and injury to consumers"). In these cases, as in the case at hand, the FTC sensibly takes the position that the invitation to collude itself did not cause any harm to consumers.

Plaintiff, by contrast, asks this Court to accept that U-Haul's purported invitation has caused harm to her. Yet Plaintiff freely acknowledges that any alleged price increases experienced by the industry "were not caused by U-Haul's price increases alone" but rather caused by increases by the whole industry. (Compl. ¶72.) In other words, even though previous allegations make clear that Budget "had not taken notice of, and had not matched, U-Haul's higher rates" (Compl. ¶47(b)), Plaintiff nevertheless concludes that competitors like Budget must

have raised their rates, too.[6, 7] That conclusion is not supported by any of the other allegations in the Complaint and is merely an inference drawn from Plaintiff's model, which, as discussed below, is wholly inadequate to show any harm to consumers.

(2) Plaintiff's Damage Model Fails To Plausibly Illustrate Any Injury.

The Complaint attempts to sidestep the difficulty of explaining how injury can arise out of an unaccepted invitation to collude by offering a crude and implausible damages model that purports to show a "substantial increase" prices of one-way truck rentals rates compared to passenger car rental rates during the "alleged attempted conspiracy period." (Compl. ¶68; Fig. 2.) Yet Plaintiff's self-serving model, illustrated in Figure 2, suffers from multiple defects in both conception and analysis. First, the whole model rests on the entirely conclusory statement that the "[p]assenger car rental industry pricing … serves as a reasonable yardstick" to measure one-way truck rentals against. (Compl. ¶66.) There obviously are myriad differences between passenger car rentals and one-way truck rentals that render them unsuitable for such comparison.[8] Moreover, the price index charted on the graph is staggeringly over-inclusive. It contains not just "one-way truck rentals," to, from, or within Massachusetts; it incorporates any rentals for *all* types of "trucks, truck tractors, buses, or semi-trailers" across the United States. (Compl. ¶53.) Plaintiff's assertion that this price index is a "reasonable proxy for prices in the

[6] Plaintiff also quotes U-Haul's own statements that acknowledge Budget did not raise prices. (*See* Compl. ¶47(b)) ("Budget appears to be continuing to undercut as their sole pricing strategy . . . .").

[7] Moreover, as explained in Section 2.A, *supra*, parallel conduct alone is *not* sufficient to violate Section 5 of the FTC Act. *Ethyl*, 729 F.2d at 139-40.

[8] Plaintiff also has failed to plausibly allege that either one-way truck rentals or passenger car rentals comprise valid markets, much less that they should be expected to behave similarly. For this reason alone, Plaintiff's damages model should be rejected.

one-way truck rental market" is blatantly conclusory and not entitled to the assumption of truth. (Compl. ¶54.)

Second, although the model in Figure 2 purports to illustrate a significant price gap between passenger car rentals and one-way truck rentals during the "alleged attempted conspiracy period," sizable price variation also occurred in 2004 and 2005. Looking more closely, almost all of these "gaps" occur during the summer months, which logically are generally the most popular months for moving and, hence, for one-way truck rentals. This view provides a more plausible, alternative explanation for higher prices than Plaintiff's far-fetched theory. Moreover, there is no effort in the Complaint to match the changes in prices of truck rentals to the actions Plaintiff alleged have caused those changes.[9] Thus, the results of the model lend no plausibility to Plaintiff's claim.

Third, although Plaintiff has alleged that the initial acts constituting the invitation to collude occurred in October through December 2006, (Compl. ¶¶31-32), she claims that, based on her damage model, the "damaging effects of the unlawful activity alleged herein began in approximately September 2006." (Compl. ¶57.) A damage model that that purports to show that an invitation to collude had a retroactive effect is not plausible.

Finally, Plaintiff's graph of PPI for truck prices undercuts her theory of injury. (Compl. ¶56; Fig. 1.) Plaintiff initially makes much of the fact that the PPI supposedly increased 46.1% during the September 2006 – September 2008 time period. (Compl. ¶59.)[10] Yet the same graph

[9] For example, Plaintiff relies heavily on Mr. Shoen's statements during the February 2008 earnings call, but Figures 1 and 2 clearly show that truck prices had reached a low point in around November 2007 and the increase in prices was already well underway *before* February 2008.

[10] The fragility of Plaintiff's argument is evidenced by the fact that had Plaintiff's chosen to end the damages period a month or so later, the selected period would have shown virtually no increase in prices. Plaintiff contends that the ending date of its damages period was triggered by "the global financial crisis and ensuing recession" in

also clearly shows that prices had been steadily rising during the six years preceding Plaintiff's alleged damage period. And, tellingly, Plaintiff does not mention, much less explain, why prices in the year-and-a-half *after* the alleged injury period remained at levels very similar to, if not higher than, those existing from September 2006 through September 2008.

Plaintiff simply cannot rely on generalized pricing graphs and an illogical model to show that she or anyone else in Massachusetts suffered injury due to an alleged failed effort to collude. And, without a plausible allegation of injury, her claim must fail.[11]

CONCLUSION

In light of the significant deficiencies present throughout the Complaint, this action should be dismissed for failing state a claim against the Defendants.

Respectfully submitted,

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approximately September 2008. (Compl. ¶51.) But that ending date is clearly arbitrary and was chosen solely to maximize the supposed "damages."

[11] Plaintiff's lack of injury also raises a question of standing. Standing under Article III requires a plaintiff to allege an injury, fairly traceable to the defendants' conduct, that a court can redress. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 384-85 (1st Cir. 2000).

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Dated: September 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 17, 2010.

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