UNITED STATES DISTRICT COURT
DISTRICT OF MASACHUSETTS

Marcia Mei-Lee Liu, individually and on behalf of a class of all others similarly situated,

Plaintiff,

v.

AMERCO; U-HAUL International, Inc.,

Defendants.

C.A. No.: 10-11221

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

F.T.C. Complaints and Consent Orders

Treatises

I. INTRODUCTION

In order to survive a motion to dismiss, a party alleging a violation of Mass. Gen. L. 93A § 2 must plausibly allege: (1) that the defendant committed an unfair or deceptive act or practice in the conduct of trade or commerce; (2) injury; and (3) a causal connection between the injury and the defendant's unfair or deceptive practice. *See, e.g.*, *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 797 (2006); *Pruell v. Caritas Christi*, 2010 WL 3789318, at *3 (D.Mass. September 27, 2010) (O'Toole, J.) (discussing plausibility requirement at dismissal stage). The *only* issue properly before this Court is thus whether Plaintiff has adduced *plausible* allegations of each of the above elements. Plaintiff's allegation that Defendants (collectively, "U-Haul") committed an unfair business practice is premised on an explicit finding by the Federal Trade Commission ("FTC") that U-Haul did so, and Plaintiff's allegation that U-Haul's conduct damaged her and the putative class is premised on a detailed economic model analyzing truck rental pricing during the period of U-Haul's alleged unlawful conduct. Plaintiff has thus plausibly alleged a violation of chapter 93A.

Defendants ignore this straightforward analysis, and instead advance three ill-founded arguments they contend support dismissal of Plaintiff's claim. First, U-Haul invites this Court to entirely ignore twenty years of unbroken FTC precedent, and instead decide, as a matter of first impression and without the benefit of any evidentiary record, that an invitation to collude is not actionable under Section 5 of the FTC Act. Given U-Haul's conduct in this case, its effort to obtain such unprecedented blanket approval for similar conduct is understandable. But the FTC's position that efforts to collude constitute an unfair business practice (undisturbed by Congress for over two decades) is based on sound economic and legal reasoning. This Court need not, and certainly should not at this stage, become the first Court in the country to overturn

a two decades–old enforcement position of the agency specifically empowered by Congress to delineate the scope of Section 5 of the FTC Act.

Second, U-Haul argues that this Court should deem implausible the FTC's factual conclusion, supported by significant evidence, that U-Haul did in fact attempt to collude on prices. 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" of the FTC Act, which, like Mass. Gen. L. 93A, prohibits unfair business practices. *See* Defendants' Memorandum In Support of Their Joint Motion to Dismiss for Failure to State a Claim ("Br."), at 9. *See also* Mass. Gen. L. 93A § 2 ("93A") (proscribing "unfair methods of competition" and directing that Courts be guided by the FTC Act when determining what actions constitute "unfair" competition). This Court is required as a matter of law to give "great weight" to the FTC's conclusions. *FTC v. Texaco, Inc.*, 393 U.S. 223, 226 (1968). This requirement forecloses dismissal of Plaintiff's claims either on the grounds that it is implausible that U-Haul engaged in the alleged conduct or that the conduct was not an unfair business practice. While this Court certainly is entitled to eventually reach a conclusion different than the FTC's, it would be completely inconsistent with affording FTC conclusions "great weight" to reach such a conclusion prior to any discovery into the factual or legal predicate for the FTC's position. Tellingly, although U-Haul cites cases in which courts eventually reached conclusions at odds with the FTC, *not one* of those cases involved an invitation to collude, and *not one* was resolved by dismissal. This Court should not be the first to simply substitute its own judgment for the FTC's without permitting any factual inquiry into the basis for the FTC's position.

Third, U-Haul contends that this Court should decide, prior to any discovery, that U-Haul's unfair effort to collude on prices could not have damaged the Plaintiff or the putative

class. This argument is premised entirely on U-Haul's oft-repeated but never supported contention that an invitation to collude cannot inflict economic damage unless the invitation is accepted. U-Haul's failure to cite any authority is unsurprising, because Defendants' position is flatly wrong as a matter of basic economic theory. *See infra* at 17-18, and authorities cited therein.[1] Perhaps in recognition of this reality, U-Haul's final effort is to take issue with Plaintiff's damages model. This argument is both incorrect and premature. Plaintiff's damages model, which was of necessity based only on publicly available information rather than on U-Haul's own data, plainly is sufficiently detailed to render it *plausible* that U-Haul's unfair conduct damaged Plaintiff and the class. That is all that is required. Each element of Plaintiff's claim thus is plausibly alleged, rendering dismissal inappropriate.

II. STATEMENT OF FACTS

The following facts, which the FTC concluded were sufficient to support a finding that U-Haul engaged in anticompetitive conduct in violation of Section 5 of the FTC Act, must be taken as true for purposes of this motion:

- U-Haul is the largest competitor in the one-way truck rental business in the country. Budget is its next largest competitor. Together, they account for 70% of one-way truck rental transactions and could therefore together profitably impose higher prices on consumers. Class Action Complaint ("CAC") ¶¶ 17-20.

[1] Courts should be especially wary of seemingly "common sense" conclusions regarding economic issues, because such conclusions often turn out to be wrong. For example, the fact that competitors often offer identical prices for similar goods frequently is taken as "common sense" evidence of price-fixing. As the Supreme Court has stated, however, identical pricing may simply evidence well-informed competition. The "common sense" argument that an invitation to collude on prices cannot cause harm absent acceptance of the invitation is of a similar vein. The overwhelming weight of economic scholarship has concluded that an invitation to fix prices, even if not explicitly accepted, likely will increase prices in the market as a whole, because such invitations reduce competitors' uncertainty regarding the inviting parties' future pricing intentions, thus making increases in price less risky, and more likely. *See infra* at 17-18 (discussing this issue in detail).

- Up to and including 2006, U-Haul's CEO Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates. *Id*. ¶ 25.

- In 2006, Shoen developed two complementary strategies to eliminate competition and increase rates. First, he instructed regional managers to raise rates and then contact Budget, inform them of the increase and encourage Budget to follow, lest U-Haul reduce rates back to the original level. Second, alternatively, if Budget would not follow, the U-Haul regional manager would lower his rates below Budget's. A series of internal memoranda document this scheme. *Id*. ¶¶ 27-32.

- Accordingly, in late 2006, U-Haul representatives contacted Budget and invited price collusion, including in Tampa, Florida. *Id*. ¶¶ 33-38.

- While these efforts succeeded in raising rates from about September 2006 to September 2007, when rates dropped again, Shoen again instructed regional managers (including in Tampa) to invite Budget to raise prices, which is reflected in U-Haul documents. Rates rose again. *Id*. ¶¶ 39-44.

- U-Haul continued to invite Budget to collude on prices, including on its earnings call on February 7, 2008, which Shoen knew Budget would monitor. Shoen conveyed the following: (1) U-Haul was acting as the industry price leader; it had recently raised rates and competitors should follow; (2) Budget had not matched U-Haul's rates, which was unfortunate for the entire industry; (3) U-Haul would wait a while for Budget to raise rates; and (4) in order to prevent U-Haul from dropping its rates, Budget did not have to match U-Haul's rates exactly; U-Haul would tolerate a small price differential of 3 to 5 %. *Id*. ¶¶ 45-47.

In addition, the following facts, drawn from expert analysis undertaken by an economist engaged by Plaintiff, through counsel, must be taken as true:

- U-Haul's invitation to collude with competitors increased prices in truck rentals from September 2006 to at least September 2008. *Id*. ¶¶ 48-51.

- The increase in the price of truck rentals during the relevant period exceeded the price for any comparable rentals, suggesting that such increases were attributable to U-Haul's misconduct. A comparison of the Producer Price Index ("PPI") for truck rentals to the PPI for passenger car rentals (a reasonable yardstick against which the effects of U-Haul's unlawful conduct on the price for one-way truck rentals may be measured) demonstrates there was a substantial increase in the cost of one-way truck rentals compared to passenger car rentals during the relevant time. Multiple regression analysis reveals that from September 2006 to September 2008, the overcharge resulting from U-Haul's misconduct exceeded 10%. ¶¶ 52-77.

III. ARGUMENT

A. In Order To Avoid Dismissal Plaintiff Needs Merely To State A Plausible Claim That She Is Entitled To Relief.

This Court just weeks ago reaffirmed that, "[w]hile *Twombly* and *Iqbal* reformed the Rule 12(b)(6) pleading standard . . . these cases left intact the long-standing fundamentals of notice pleading." *Pruell*, 2010 WL 3789318, at *3 (citing *Sec. & Exch. Comm'n v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010)). Under these standards, a complaint need only "contain a 'short and plain statement of the claim showing that the pleader is entitled to relief,'" *Pruell*, 2010 WL 3783918, at *1, *quoting* Fed. R. Civ. P. 8(a)(2). That is sufficient to give "'the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.*, quoting *Twombly*. While a complaint "must contain enough facts to show that it is 'plausible,' rather than merely speculative, that the pleader is entitled to relief . . . pleading specific evidence or detailed factual allegations beyond what is needed to make the claim plausible is not required." *Id.*

In any event, when considering the plausibility of a claim for damages arising from alleged anticompetitive activity, the allegations should be viewed as a whole rather than dismembered and viewed separately. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962). Defendants expend much effort attempting to explain away individual allegations in the Complaint, in the hopes that by focusing the Court on each tree, the Court will fail to see the forest for what it is – a complaint that, taken as a whole, plausibly alleges anticompetitive activity that injured Plaintiff and the class.

For example, Defendants spend a page providing their alternate interpretation of the specifically pled "isolated Tampa communication" identified in Plaintiff's Complaint, *see* Br. at 17, and another page attempting to dispute Plaintiff's specific allegations regarding a public statement made by U-Haul's CEO (which the FTC concluded constituted an invitation to

collude) by discussing the "daunting challenge" facing managers on earnings calls. *Id.* at 18. While U-Haul is free to undertake such explanatory efforts at trial, it would be entirely inappropriate for this Court to weigh such arguments now. *Cf. Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) (denying motion to dismiss Sherman Act claim and finding that "Defendants' attempt to parse the complaint and argue that none of the allegations (i.e., quoted public statements, parallel capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy is contrary to the Supreme Court's admonition [in *Continental Ore*].").

Here, as set forth below, the Complaint plausibly alleges that (1) U-Haul invited collusion, which (2) constituted an unfair business practice in violation of chapter 93A that (3) caused Plaintiff and other putative class members harm.

B. The Complaint Plausibly Alleges That U-Haul Invited Collusion.

U-Haul's half-hearted effort (tellingly begun on p. 13 of U-Haul's 23-page memorandum) to argue that Plaintiff's Complaint does not set forth sufficient facts to render it *plausible* that this Court would agree with the FTC that U-Haul invited its largest competitor to collude is entirely unpersuasive. The Complaint contains significant detail regarding the nature of the alleged anticompetitive activity, including references to specific instances of conduct deemed unlawful by the FTC. See CAC at ¶¶ 25-49. Defendants' contention that the complaint is "rife with unsupported and conclusory speculation," Br. at 14, thus is simply wishful thinking. To the contrary, many of the factual allegations regarding the character and effect of U-Haul's conduct are based on factual conclusions reached by the FTC and a pre-filing analysis of

publicly available market data undertaken by an expert economist retained by Plaintiff. Taken as a whole, these allegations are more than adequate to plausibly allege anticompetitive activity.[2]

For example, U-Haul takes issue with Plaintiff's allegation that "together, U-Haul and Budget could profitably impose higher prices upon consumers." Br. at 14. This allegation, however, simply states the obvious fact, confirmed by Plaintiff's economist and a host of case law and academic literature, that where two entities control 70% of the market, they have the market power to increase prices if acting collusively. *See e.g.*, *Standard Iron*, 639 F. Supp. 2d at 899 (denying motion to dismiss Sherman Act claim where Defendants controlled over 70% of relevant market, giving them power to inflate prices). U-Haul similarly takes issue with Plaintiff's allegation that in late 2006 "U-Haul representatives across the country contacted Budget and invited price collusion as instructed by Shoen." Br. at 14. This non-conclusory allegation is based both on the results of the investigation conducted by the FTC and the entirely plausible inference that U-Haul managers actually did what their CEO instructed them to do. *See In re U-Haul Int'l, Inc.*, Dkt. No. C-4294, 2010 WL 2966779 (F.T.C. July 14, 2010). Lastly, and as discussed in greater detail below, while U-Haul apparently disputes Plaintiff's economist's conclusion that the price increases that occurred around the time of the alleged anticompetitive conduct were likely the result of the conduct alleged, Br. at 15, Plaintiff's allegation on this point is wholly plausible, and adjudication of U-Haul's attacks on Plaintiff's expert analysis would be premature at this stage.

[2] Moreover, dismissal of this action prior to discovery would be especially inappropriate in light of the FTC's conclusion that U-Haul actively interfered with the FTC's efforts to uncover the facts regarding U-Haul's conduct. *See* Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re U-Haul Int'l, Inc.*, FTC File No. 081-0157, at 5 (June 9, 2010) ("FTC's U-Haul Analysis") ("Section IV, Paragraph A [of the Consent Order] requires a periodic submission to the Commission of unredacted copies of certain internal U-Haul documents. This provision is necessary because U-Haul impeded the [FTC]'s investigation of this matter.").

C. The Complaint Plausibly Alleges That U-Haul's Invitation To Collude Was An Unfair Business Practice In Violation of 93A.

Chapter 93A prohibits all "unfair or deceptive acts or practices in the conduct of any trade or commerce." M.G.L. c. 93A § 2(a). The statute also provides a private right of action[3] to consumers injured by another person's use of such practices. *Id.* § 9. *See also Kattar v. Demoulas*, 433 Mass. 1, 12-13 (2000) (noting that chapter 93A creates new causes of action not previously recognized by common law). A party alleging a violation of chapter 93A must establish: (1) that the defendant committed an unfair or deceptive act or practice in the conduct of trade or commerce; (2) injury; and (3) a causal connection between the injury and the defendant's unfair or deceptive practice. *See e.g.*, *Hershenow*, 445 Mass. at 797 (2006). The Complaint more than adequately pleads these elements.

1. The FTC Has Long Concluded That Invitations To Collude Are Unfair Business Practices That Violate Section 5 of the FTC Act.

Section 5(a)(1) of the FTC Act declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *Id.* For almost twenty years the FTC consistently has concluded that invitations to collude – including U-Haul's – constitute an unfair method of competition. *See In re U-Haul*, 2010 WL 2966779 (invitation to collude on prices and raise rates); *In re Valassis Comm's, Inc.*, Dkt. No. C-4160, 2006 WL 1367833 (F.T.C. Apr. 19, 2006) (invitation to collude by allocating customers and fixing prices deemed unlawful); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998) (invitation "to join a coordinated price increase" deemed unlawful); *In re Precision Moulding*

[3] U-Haul confusingly argues that an invitation to collude is not a "cause of action" under chapter 93A or section 5 of the FTC Act, without explaining whether U-Haul means that Plaintiff does not have a private right of action or that Plaintiff has no claim, or some combination of both. Br. 4. While U-Haul is correct that there is no private right of action under the FTC Act, that point is irrelevant because there is a private right of action under section 9 of chapter 93A.

Co., Inc., 122 F.T.C. 104, 105-06 (1996) (invitation to fix and raise prices deemed unlawful); *In re YKK (U.S.A.) Inc.*, 116 F.T.C. 628, 629-30 (1993) (invitation to fix prices deemed unlawful); *In re AE Clevite, Inc.*, 116 F.T.C. 389, 391 (1993) (invitation to refrain from competition in pricing deemed unlawful); *In re Quality Trailer Prod. Corp.*, 115 F.T.C. 944, 945 (1992) (invitation to fix prices deemed unlawful). *See also In re FMC Corp.*, 133 F.T.C. 815, 821 (2002); *In re MacDermid, Inc. et al*, Dkt No. C-3911, 2000 WL 195669 (F.T.C. Feb. 4, 2000). Indeed, in a statement made in connection with the FTC's consent order regarding U-Haul, three commissioners stated that "[i]nvitations to collude are the *quintessential example* of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act…." Statement of Chairman Leibowitz, Commissioner Kovacic and Commissioner Rosch, *In re U-Haul Int'l, Inc. et al*, FTC File No. 081-0157 (June 9, 2010) (emphasis added).[4]

Two of the FTC's prior attempted collusion cases are particularly instructive. In *Valassis*, the FTC charged a company with violating section 5 under similar circumstances. Valassis unsuccessfully tried to increase its prices, but when its competitor News America did not follow suit, it was then forced to reduce prices. Valassis then allegedly used its quarterly conference call with securities analysts, to which it knew that News America would be listening, to communicate an invitation to collude by proposing that the two companies cease competing for one another's customers. *Valassis*, 2006 WL 1367833. This conduct was deemed unlawful.

[4] U-Haul points out that this statement also noted that FTC challenges to invitations to collude pursuant to section 5 "may limit follow-on private treble damage litigation from Commission action." Br. at 12-13. Read in context, this statement merely points out that a challenge pursuant to section 5 of the FTC Act would not necessarily give rise to a private treble damages action pursuant to section 1 of the Sherman Act.

Similarly, in *Stone Container*, Stone Container announced a price increase, and when its competitors did not follow its move it was forced to reduce prices. Stone Container then communicated to its competitors – publicly and privately – its intention to reduce production and drawn down inventory levels which it believed would support a price increase. *Stone Container*, 125 F.T.C. at 854.

Here, U-Haul similarly increased prices, which its competitor did not match, so that it then publicly and privately invited its competitor to do so. As the FTC has stated, the facts here are even more egregious than other cases:

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

FTC's U-Haul Analysis at 4. Under these circumstances, Plaintiffs have at the very least stated a plausible claim.

2. Massachusetts Law Directs This Court to Rely on Interpretations of Section 5 of the FTC Act to Define Conduct That Violates 93A.

As Defendants admit, Br. at 4, chapter 93A expressly directs courts to be guided by both FTC and federal court interpretations of the FTC Act when considering whether business practices are "unfair." M.G.L. c. 93A § 2(b) ("It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under section… nine… the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act…."); *Boos v. Abbott Labs*, 925 F.Supp. 49, 56 (D.Mass. 1996) ("Chapter 93A is a 'mini-F.T.C.' act, the prohibitions of which are specifically keyed to interpretations of Section 5 of the [FTC] Act.").

Accordingly, a long line of Massachusetts authority has relied on FTC complaints and consent decrees interpreting the FTC Act to determine what conduct is "unfair" under chapter 93A. *See e.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 496 (1st Cir. 2009) (relying on FTC complaints and consent decrees and vacating dismissal of chapter 93A claim); *Schubach v. Household Finance Corp.*, 375 Mass. 133, 135 (1978) (relying on FTC complaints and consent decrees and affirming decision denying motion to dismiss chapter 93A claim). Indeed, the First Circuit has explicitly held that:

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

TJX, 564 F.3d at 497.

U-Haul boldly cites *TJX*, focusing on a single clause stating that FTC interpretations are "ordinarily instructive rather than conclusive." Br. at 10. U-Haul's selective quotation is misleading, and Plaintiff encourages the Court to study the *TJX* case closely in deciding U-Haul's motion. There is simply no way the case can be read to support U-Haul's position here. On the contrary, in *TJX*, the First Circuit *reversed* a district court's dismissal of a chapter 93A claim, in part because the district court did not give FTC complaints and consent orders due weight in determining what conduct was "unfair." *Id.* Defendants' invitation for this Court to make the same mistake should be rejected.

3. The Cases Defendants Rely On Do Not Disturb The Conclusion That An Invitation to Collude Violates Section 5 of the FTC Act and 93A.

Despite the FTC's clear position that invitations to collude are an unfair business practice, U-Haul argues that Plaintiff has no "actionable legal theory" because some courts have decided, invariably following discovery, that certain alleged misconduct *other than invitations to collude* did not violate Section 5. Br. at 1-2, 4-7, 9-10, 12-13, 15. But even if those cases were

not entirely distinguishable (and they are) the fact that some other courts have – following discovery – eventually reached a conclusion contrary to that of the FTC is irrelevant to the question of whether Plaintiff's claim should be dismissed. The FTC has firmly taken the position that U-Haul's alleged invitation to collude *did* violate section 5, and the Supreme Court has mandated that this position is entitled to "great weight." *Texaco, Inc.*, 393 U.S. at 226 ("While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight."); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 369 (1965) ("[W]e give great weight to the Commission's conclusion.").[5]

The Supreme Court's command that this Court give "great weight" to the FTC's conclusions reflects the Court's conclusion that Section 5 reflects deliberate Congressional intent to confer upon the FTC broad power to challenge new and evolving forms of anticompetitive conduct not already prohibited by the common law or the Sherman Act. *See e.g., FTC v. Keppel & Bros.*, 291 U.S. 304, 310-12 (1934); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Atlantic Ref. Co* , 381 U.S. at 369; *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) ("The 'unfair methods of competition' which are condemned by Section 5(a) of the Act, are not confined to those that

[5] U-Haul suggests that the FTC's position with regard to Defendants' conduct should not be afforded deference because U-Haul entered into a consent decree rather than litigating the case in court. *See* Br. at 9-10. But it is black letter law that the mere fact that U-Haul made the tactical decision to settle the FTC Complaint rather than press the merits of its own defense has no bearing on whether the FTC's position is entitled to deference. *See FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (FTC "construction is entitled to great weight…even though it was applied in cases settled by consent rather than in litigation."). Any other approach would be nonsensical, as it would permit litigants to undermine the FTC's authority simply by settling actions rather than litigating them to conclusion.

were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business."); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466 (1941); *Keppel & Bros.*, 291 U.S. at 310-12.[6]

The Massachusetts legislature explicitly made clear that it wishes Mass. Gen. L. 93A to outlaw the same sorts of conduct deemed unlawful by the FTC, and took the additional step of empowering private plaintiffs to seek remedies for unfair business practices that, like this one, cause injury. Summary dismissal of an action plausibly alleging damages premised on an FTC finding of an unfair business practice thus would be directly contrary to the legislative intent of 93A, and would amount to little more than a decision by this Court to substitute its judgment for that of the Massachusetts legislature with regard to what conduct potentially constitutes an unfair business practice. Obviously this Court should not undertake such an approach.

The two decisions on which U-Haul relies almost exclusively, *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2nd Cir. 1984) (the "*Ethyl*" case) and *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980), do not disturb this straightforward analysis because both are wholly inapposite. First, *neither case arose in the context of a motion to dismiss*. In both cases, the court was reviewing an FTC order made after detailed findings of fact by an administrative law judge, on a complete evidentiary record, after trial. *Ethyl*, 729 F.2d at 130; *Boise Cascade*, 637 F.2d at 573-74. This differing procedural posture by itself renders both cases entirely unhelpful to the Court's present analysis. Both cases stand for the obvious proposition that this Court has the authority, following discovery and the presentation of evidence, to reach a decision

[6] These cases demonstrate the irrelevance of U-Haul's arguments that Plaintiff's allegations would not establish a violation of the Sherman Act. Br. 7-8. Of course they would not. That is why Plaintiff did not sue U-Haul for violating the Sherman Act.

contrary to that reached by the FTC. But that is wholly irrelevant to the question presented here, which is whether it is appropriate for this Court to dismiss as "implausible" factual and legal conclusions reached by an expert body specifically empowered by Congress and the Massachusetts legislature to define the conduct that constitutes an unfair or anticompetitive business practice.

Second, each case is distinguishable on its facts because, although both cases involved Section 5 of the FTC Act, *neither case involved an invitation to collude*. In *Ethyl*, the FTC claimed that four leading producers and sellers of lead antiknock gasoline additives violated the FTC Act through their unilateral adoption of practices that allegedly had the effect of facilitating parallel prices. 729 F.2d at 130. The court reversed the FTC's order finding liability because the court decided, after reviewing the evidence presented at trial, that the practices at issue were adopted independently and unilaterally, were not restrictive or predatory, and were not adopted to restrain competition, but rather for legitimate business reasons. *Id.* at 140. *Ethyl* thus had nothing to do with conduct such as the invitation to collude on prices alleged here.

Neither did *Boise Cascade*. There, the FTC challenged several members of the plywood industry's adoption and maintenance of a delivered pricing system which used an artificial pricing formula. 637 F.2d at 573-74. Under the formula, customers were charged prices based on an artificial "West Coast" freight factor, even if the manufacturers were located in the south. The FTC alleged that this practice inhibited competition over the freight factor in the price of southern plywood. *Id.* at 574-75. The court reversed the FTC's finding of liability because it determined, after a review of a full trial record, that there was no evidence of overt agreement to utilize a pricing system to avoid price competition, and no evidence that the challenged pricing system actually had the effect of fixing or stabilizing prices. *Id.* As in *Ethyl*, the court

emphasized that the practice at issue had existed for some time and had developed for legitimate reasons. *Id.* Moreover, *Boise Cascade* was careful to confine its ruling to situations involving the "well-forged" law of delivered pricing under the Sherman Act, which is distinct from attempted price fixing. 637 F.2d at 582.

In addition, and contrary to Defendants' suggestion, neither *Ethyl* nor *Boise Cascade* challenged the Supreme Court's long-standing holding that conduct not governed by the Sherman Act may be treated as an unfair method of competition. In fact, the Supreme Court has expressly reaffirmed that teaching *since* the *Ethyl* and *Boise Cascade* decisions. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons ...."). The Supreme Court's view that the scope of the FTC Act is broad, along with the distinctions between *Ethyl* and *Boise Cascade* and the invitation to collude context, explain why the FTC has had no difficulty in declaring invitations to collude illegal since those cases were decided.[7]

Finally, even if *Ethyl* and *Boise Cascade* applied to invitations to collude, which they do not, Plaintiff would still state a viable claim. *Ethyl*, for example, indicated that an unfair method of competition would have to have "at least some indicia of oppressiveness. . . such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct." *Ethyl*, 729 F.2d at 139. Here, the Complaint alleges *both* anticompetitive purpose *and* the absence of an independent legitimate business reason for U-Haul's conduct. For example, the Complaint describes various

[7] In addition, *Ethyl* itself expressly acknowledged that the FTC's "interpretation of § 5 is entitled to great weight, and its power to declare trade practices unfair is broad…." 729 F.2d at 136.

internal U-Haul memoranda which specifically evince U-Haul's CEO's conscious decision to try to induce Budget to increase prices. CAC ¶¶ 31-32, 41. In addition, the Complaint details a number of specific comments made by U-Haul's CEO on a conference call, which U-Haul knew its competitors would listen to, including that: vigorous price competition was hurting U-Haul and its competitors; higher prices would help everyone; and U-Haul would at least temporarily maintain higher rates in an effort to "stabilize" the market. *Id.* ¶ 46. He also specifically suggested a 3 to 5 % price differential was acceptable to U-Haul. *Id.* ¶ 47. There was no legitimate business reason for these communications.[8]

D. The Complaint States A Claim That U-Haul Caused Plaintiff Injury.

The Complaint adequately alleges that U-Haul's unfair business practices caused Plaintiff injury because she paid higher prices for one-way truck rentals than she would have absent U-Haul's invitation to collude. *Id.*, ¶¶ 48, 50-77. A plaintiff proceeding under section 9 of chapter 93A must establish "injury," which courts have interpreted to mean "an invasion of a legally protected interest." *Aspinall v. Philip Morris Co., Inc.*, 442 Mass. 381, 401 (2004). The plaintiff must also demonstrate a causal connection between the unfair or deceptive act and an adverse consequence or loss. *See Hershenow*, 445 Mass. at 800, 801 n. 21.[9] U-Haul advances two misplaced arguments in favor of its position that Plaintiff's allegations of injury are implausible.

[8] The FTC has noted that U-Haul's conduct here was "particularly egregious." FTC's U-Haul Analysis at 4. There is thus no danger that the sky will fall if the Court recognizes Plaintiff has stated a claim here. *Compare* Br. at 2 ("Plaintiff asks this Court to… 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."). Each case must be judged on its own facts and, assuming her allegations are true, Plaintiff has alleged a plausible claim that U-Haul engaged in unfair trade practices here, notwithstanding what may or may not happen in future cases.

[9] Where a plaintiff proceeding under section 9 cannot quantify a specific amount of actual damages, but can establish a cognizable loss caused by an unfair or deceptive act, the plaintiff is entitled to recover minimum statutory damages of $25.

First, U-Haul contends that invitations to collude cannot cause injury unless they are accepted. Second, U-Haul contests the accuracy of Plaintiff's initial damages model. The first argument is wrong, and the second is both wrong and premature.

1. Invitations to Collude Can Cause Injury Even If Not Accepted.

As recognized by the FTC and other legal and economic experts in the antitrust field, an invitation to collude may well cause anticompetitive harm even if it is not accepted. In the context of this very matter, the FTC stated as follows:

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

FTC's U-Haul Analysis at 4. The FTC further provided a number of other reasons to punish firms that invite collusion, even where acceptance cannot be proven, including because "the conduct may be harmful and serves no legitimate business purpose" and because "even an unaccepted solicitation may facilitate coordinated interaction by disclosing the intentions or preferences of the party issuing the invitation." *Id.* at 4, n. 3. Thus, U-Haul's statement that "the FTC has specifically concluded that harm to consumers is only possible if the invitation to collude is accepted" is simply wrong. Br. at 12. On the contrary, the FTC has concluded that invitations to collude may very well cause competitive harm even if they are *not* accepted.[10]

[10] Indeed, the FTC was required to reach this conclusion to deem invitations to collude illegal. Section 5 of the FTC Act provides that the FTC "shall have no authority under this section … to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers…." 15 U.S.C. § 45(n).

The FTC's analysis is consistent with the overwhelming weight of legal and economic expert authority. *See e.g.*, P. Areeda & H. Hovenkamp, VI Antitrust Law ¶ 1419a (2010) ("[T]he solicitation to engage in illegal collaboration is itself dangerous to competition because it can facilitate undesirable coordination, whether or not we can prove a conspiracy in any particular case."); ¶ 1419d ("[A] solicitation to raise prices in concert may reduce… uncertainty, either by setting a target price or by raising confidence that rivals will follow."); ¶ 1419e ("Though unaccepted, a solicitation can facilitate tacit coordination. It informs the solictee(s) that the solicitor would be likely to follow upward price leadership in the future and perhaps even the amount or character of an acceptable increase…. In short, the enemy of tacit coordination is uncertainty about rivals' prospective conduct, and the unaccepted solicitation reduces that uncertainty."); Corporate Counsel's Antitrust Deskbook § 12:12 (2009) ("Thus, a failed invitation to collude can very well be successful because it implies so much, competitively speaking. While a competitor rejects the offer, the invitation still might cause the competitor to react in a way that affects competition. The competitor rejecting the invitation might take certain actions with respect to pricing that it would not have taken had it not received the invitation to fix prices."); S. DeSanti, 63 Antitrust L.J. 93, 105-07 (1994) (cataloging various ways in which an invitation to collude results in competitive harm).[11] U-Haul's repeated assertions that invitations to collude cannot cause harm absent acceptance, none of which are supported by any citation, *see, e.g*. Br. at 2, should be ignored.

[11] The foregoing expert analysis directly rebuts U-Haul's unsupported averment that a claim for unfair competition cannot arise from an invitation to collude alone because, "absent acceptance of the invitation, any price increases were, by definition, purely unilateral." Br. 1.

2. Plaintiff's Damages Model Plausibly Alleges That U-Haul's Invitation to Collude Caused Damage to the Class.

U-Haul's final effort to obtain dismissal is premised upon an obviously premature effort to discredit Plaintiff's initial damages model. *See* Br. at 19-23. During the course of counsel's investigation into this matter, Plaintiff retained an expert economist specifically to analyze the question of whether U-Haul's alleged conduct here caused harm to consumers by increasing prices. Of necessity this preliminary analysis was based only on publicly available information, and is subject to revision once Plaintiff has obtained U-Haul's actual pricing data during discovery. But even this preliminary analysis, which utilized a well-accepted benchmarking technique and regression analysis, indicates that, as the academic authority cited above would predict, U-Haul's conduct did in fact cause damage to Plaintiff and the class. CAC, at ¶¶ 50-77.

Predictably, U-Haul takes issue with Plaintiff's analysis, arguing that certain variables used in the regression were inappropriate and that the benchmark used (passenger car rentals) is flawed. Br. at 22-23. This Court should not permit U-Haul to effectively transform its motion to dismiss into a *Daubert* challenge of Plaintiff's expert evidence. All that is required at this stage is that it be deemed "plausible" that Defendants' conduct caused economic harm. Given the scholarly authority cited above, such a conclusion would be plausible even in the absence of *any* effort by Plaintiff to analyze or quantify damages. Nevertheless, Plaintiff undertook the analysis reflected in the Complaint to afford the Court reassurance that it is plausible that U-Haul's conduct caused damages here. U-Haul's predictable disagreements with the economic analysis of Plaintiff's expert are wholly insufficient to render it "implausible" that U-Haul's contact inflicted economic harm. They should thus be afforded no weight at this stage.

IV. CONCLUSION

For the reasons set forth above, this Court should deny Defendants' motion to dismiss.

Respectfully submitted,

MARCIA MEI-LEE LIU,

By her attorneys,

/s/ Charles E. Tompkins

Charles E. Tompkins (BBO #)
Ian J. McLoughlin (BBO #647203)
SHAPIRO HABER & URMY LLP
53 State Street
Boston, MA 02109
Tel: (617) 439-3939
Fax: (617) 439-0134
ctompkins@shulaw.com
imcloughin@shulaw.com

Counsel for Plaintiff and the Class

Dated: October 22, 2010

CERTIFICATE OF SERVICE

I, Charles E. Tompkins, hereby certify that on the 22nd of October, 2010, I served the foregoing through the CM/ECF system, which will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

/s/ Charles E. Tompkins
Charles E. Tompkins