**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| **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.** | ) | **HEARING REQUESTED** |
| **Defendants.** | ) | |

**DEFENDANTS' REPLY IN SUPPORT OF ITS**
**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendants AMERCO and U-Haul International, Inc.(collectively, "U-Haul" or "Defendants") submit this reply memorandum in support of their motion to Dismiss for Failure to State a Claim.

## Introduction

Plaintiff's response brief expounds at great length to convince this Court that this action is no more remarkable than any other brought under Mass. Gen. L. 93A § 2. Plaintiff is quick to embrace the FTC's allegations[1] against U-Haul, but conspicuously avoids acknowledging the simple but critical point raised at the outset of U-Haul's brief: 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. Although the FTC, without the review of a court, brought an enforcement action against U-Haul on the theory of an invitation to collude, Plaintiff

[1] It bears repeating that the FTC's contentions against U-Haul were resolved by a Consent Order that by its terms: "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) Yet it is upon this Consent Order and related Complaint that the entirety of Plaintiff's allegations are based.

is the first ever to attempt to piggyback on that theory to seek private damages under a state's "baby FTC Act."

The reason that the claim is so novel is precisely the reason that it must be dismissed: Plaintiff cannot show that she was injured by the alleged invitation to collude. As Plaintiff herself admits, she must allege a ***plausible*** injury caused by the supposed invitation to collude to survive a motion to dismiss. But Plaintiff cannot do so here. She concedes that only two sources exist to show that she suffered any injury, neither of which are sufficient: (1) "scholarly authority" cited in the brief that injury may be ***theoretically*** possible due to an invitation to collude (Br. at 18, 19); and (2) a damages model which is wholly unfit for the purpose offered by Plaintiff. In other words, nothing in the Complaint plausibly alleges that she suffered injury as a result of U-Haul's alleged actions. Without a plausible showing of injury, Plaintiff's claim must fail.

**1. The Alleged "Effort To Collude" Is Not a Viable Cause of Action Under Chapter 93A of the Massachusetts General Laws.**

Despite a plain opportunity to address the concerns raised by U-Haul in permitting a vague and unprecedented cause of action to go forward, Plaintiff instead seeks to ride the coattails of the FTC's action without addressing these issues. U-Haul has argued that no action for an alleged invitation to collude has ever been brought forth in the courts, and Plaintiff fails to show otherwise. Further, the previous enforcement actions brought by the FTC on the theory of an invitation to collude are easily distinguishable from the facts of this case. *See, e.g., In re Valassis Comms., Inc.*, No. C-4160, 2006 WL 752214 (FTC Mar. 16, 2006) (competitor discussed specific prices for products on analyst call); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 104 (1996) (competitor offered to set a specific price floor during personal visit to

headquarters). Despite these concerns, Plaintiff urges this Court to press forward with a private claim for damages based exclusively on the FTC's action.

But without an understanding of what elements constitute an invitation to collude and, hence, an unfair trade practice or method of competition, there are few guideposts from which to proceed here. These are precisely the circumstances under which the courts have rebuked FTC action in prior cases. Where the FTC brought Section 5 claims in the past, the lack of such guideposts has been fatal to its claim. *See E.I. du Pont de Nemours & Co. v. F.T.C. ("Ethyl")*, 729 F.2d 128, 137-38 (2d Cir. 1984) (refusing Section 5 enforcement and holding that a "line must [] be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition"); *Boise Cascade Corp. v. F.T.C.*, 637 F.2d 573, 582 (9th Cir. 1980) (refusing to enforce Section 5 violation that would "blur the distinction between guilty and innocent commercial behavior"). Plaintiff correctly acknowledges that *Ethyl* and *Boise Cascade* are not invitation to collude cases, but promptly ignores the import of those cases here. Namely, courts have not allowed the FTC to prosecute cases that exploit the "elusive" and ill-defined nature of Section 5. *Ethyl*, 729 F.2d at 137-38. Plaintiff hopes to do exactly that with this case and should not be permitted to do so.

**2. <u>The Complaint Fails To Plausibly Allege an Injury.</u>**

Although Plaintiff argues that U-Haul's conduct fits within the hazy criteria of Section 5 of the FTC Act or Chapter 93A of the Massachusetts General Laws, the Complaint is ripe for dismissal because it does not plausibly allege an injury suffered by the Plaintiff. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A plaintiff must plead facts sufficient to "raise a right to relief above the speculative level." *Id.* at 555. Facts that "are merely consistent" with a defendant's liability "stop[] short of the line between possibility and plausibility of relief."

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Where, as here, an "obvious alternative explanation" exists that contradicts a plaintiff's claim, the plaintiff cannot survive a motion to dismiss. *Twombly*, 550 U.S. at 566-67.

The most glaring deficiency in the Complaint is total lack of plausible allegations of injury resulting from the alleged illegal behavior. A plaintiff who cannot show that she suffered harm cannot prevail on a claim under Chapter 93A. *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 400-01 (2004). Plaintiff alleges that she paid inflated prices for one-way truck rentals to, from and within Massachusetts. (Compl. ¶¶2-5.) As alleged in the Complaint, Plaintiff's injury was purportedly caused by the internal distribution of several memos by U-Haul, statements made by Mr. Shoen during a publicly-accessible earnings call in early 2008, and conduct by a single regional manager in Tampa, Florida that allegedly involved contacting a single competitor, also in Tampa. (Compl. ¶¶31-37, 40-44, 47-48.) But none of these allegations even remotely explain how prices of one-way truck rentals to, from and within Massachusetts were affected or how Plaintiff suffered any injury resulting from this alleged conduct. Without the allegations necessary to link U-Haul's actions to an injury in Massachusetts, Plaintiff's claim to have overpaid for one-way truck rentals to, from, and within Massachusetts is simply speculation.

In addition, Plaintiff uses these bare facts to stretch out a two-year "alleged attempted conspiracy period." Prior to Plaintiff's first truck rental, the only allegedly wrongful act by U-Haul – distributing memoranda to its regional managers encouraging them to contact Budget – occurred in late 2006, almost one year ***before*** Plaintiff ever rented a U-Haul truck. (Compl. ¶¶2, 31-32.) Yet, the Complaint even admits that the alleged "anti-competitive effects" dissipated by

the time Plaintiff rented a truck from U-Haul, in October, 2007. (Compl. ¶39) (anti-competitive effects of the first effort to collude in late 2006 were "beginning to fade" in fall of 2007).

Further, all of the allegations related to a supposed attempt by U-Haul to raise its prices. But Plaintiff does not allege any conduct by Budget or any other competitor that supports an inference of injury as described in the Complaint. Even though Plaintiff alleges that U-Haul's competitors must have adopted price increases (Compl. ¶¶72), Plaintiff makes no specific factual allegations on this critical issue. Instead, Plaintiff speculates that "[a]cting together, U-Haul and Budget could profitably impose higher prices upon consumers." (Compl. ¶20.) But this is not even a statement of fact, and hence it is not entitled to the presumption of truth.

This failure to make allegations about Budget is not surprising. Apart from her grossly deficient damages model, discussed in Section 2.B, *infra*, Plaintiff brings absolutely no new factual information to this case. The facts of Plaintiff's entire Complaint are lifted directly out of the FTC complaint and related documents. Because the FTC never alleged that Budget or another competitor responded to U-Haul in any fashion, neither can Plaintiff. In its supporting analysis to the U-Haul complaint, the FTC merely ruminated that competitive harm was possible and then suggested hypothetical scenarios – all of which required competitors to take actions that Plaintiff never alleges they took. Analysis, *In re U-Haul Int'l, Inc. and AMERCO*, No. C4294 (F.T.C. July 14, 2010), at 4. The actual complaint filed against U-Haul by the FTC makes no attempt to allege that a competitive injury occurred. *Id.*, Compl. ¶26 (invitations, "*if accepted by Budget*, would likely result in higher one-way truck rental rates and reduced output"). Plaintiff asks this Court to believe that she can look at the same information as the FTC and – *plausibly*, not possibly – conclude that she suffered injury.

Because Plaintiff lacks factual averments concerning injury, Plaintiff argues that its allegation of injury is plausible because (1) "scholarly authority" renders it so; and (2) its damage model supports that conclusion. Neither of these arguments hold merit.

**A. Plaintiff's "scholarly authority" is irrelevant here.**

Rather than allege facts explaining how Plaintiff suffered injury, Plaintiff substitutes theoretical speculation that bears no connection to the facts of this case. As the *Boise Cascade* court cautioned, "a theoretical possibility is not evidence that an anticompetitive price is being charged." 637 F.2d at 579.

The "scholarly authority" relied upon by Plaintiff is rife with equivocation. For example, the Corporate Counsel's Antitrust Deskbook advises that "the invitation [to collude] *still might cause* the competitor to react in a way that affects competition." (Br. at 18) (emphasis added). The seminal Areeda and Hovenkamp treatise notes that an invitation to collude "may reduce . . . uncertainty" among the competitors. (*Id.*) Thus, the injury described by Plaintiff is nothing more than a possibility of harm. The Supreme Court, however, crafted the pleading standard to demand that plaintiffs state a *plausible* claim and rejected the notion that a mere possibility of an entitlement to relief is sufficient to withstand a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949 (plausibility standard "asks for more than a sheer possibility that the defendant has acted unlawfully").

Second, Plaintiff never alleges that Budget or any other competitor engaged in any conduct to create the harm on which Plaintiff's expert authorities opine. In the passages cited by Plaintiff, the antitrust authorities specifically discuss how alleged invitations to collude *could* cause rivals to alter their behavior and facilitate "tacit coordination." (Br. at 18.) But these allegations are completely absent from Plaintiffs' Complaint. Nowhere does Plaintiff identify

and allege a change in behavior or facilitating action taken by competitors. Plaintiff's closest pass at making this required allegation comes in the form of an inference based on her flawed damages model. Plaintiff contends that "it is more likely than not" that price increases for one-way truck rentals were caused by increases made by both U-Haul and competitors. (Compl. ¶72.) As stated in its earlier brief, this nonfactual, equivocating and conclusory allegation is not entitled to the presumption of truth. Without an allegation that a competitor reacted to U-Haul's alleged conduct, Plaintiff's reliance on "scholarly authority" is useless.

Lastly, none of Plaintiff's cited authorities state that an invitation to collude creates the type of harm that gives rise to a claim under Chapter 93A. Instead, they simply acknowledge the possibility that such invitations may "reduce uncertainty" or cause "competitive harm." (Br. at 18). But Chapter 93A only prohibits unfair practices and unfair methods of competition – not any practice that may negatively effect competition. "Lessening of competition is not the substantial equivalent of 'unfair methods' of competition." *Ethyl*, 729 F.2d at 138. Thus, even accepting that all of the authority cited by Plaintiff applies here, Plaintiff cannot plausibly show that the harm she complains of satisfies the injury requirement under Chapter 93A.

**B. Plaintiff's damages model cannot plausibly show that she suffered injury.**

Plaintiff contends in her brief that the damages model was only offered to provide "reassurance" to the Court about the plausibility of injury. But, in fact, the damages model is the *sole possible source* of the plausibility of injury alleged in the Complaint. Plaintiff repeatedly deflects criticism of its model by saying that critiques are "premature" at this stage. To the contrary, an analysis of the damages model is not premature if it goes directly to the question of whether Plaintiff has alleged a plausible claim for relief. Such analysis is required by *Twombly*. An in-depth assessment of the model is not necessary, but a plaintiff cannot simply put forth a

damages model and expect both the Court and the parties to accept it uncritically. Just as conclusory allegations are not entitled to the presumption of truth, a conclusory damages model cannot be, either. This is especially true where, as here, the damages model is the only source supporting an allegation of injury in the Complaint.

U-Haul has identified numerous, substantial flaws and shortcomings with the model that render Plaintiff's allegations of injury implausible but which Plaintiff refused to address in its response. Indeed, although Plaintiff's entire allegation of injury rests upon the findings of this damages model, Plaintiff spends only a page of her brief discussing the model and hardly mounts a defense at all. None of U-Haul's substantive concerns are even addressed, including:

- why the nationwide "passenger car rental industry" is a "reasonable yardstick" to measure one-way truck rentals to, from and within Massachusetts against (Compl. ¶¶66);
- how the alleged damages period could begin in September 2006 when the first allegation of any action by U-Haul purporting to be an invitation to collude did not occur until October 2006 (Compl. ¶¶31-32, 57);
- why the model shows a similar gap between passenger car rentals and one-way truck rentals in 2004 and 2005, which was before the "alleged attempted conspiracy period;"
- why the model conveniently ends the alleged damages period just before a significant price drop;[2]

[2] The Complaint alleges that the ending date was triggered by "the global financial crisis and ensuing recession" in September 2008. (Compl. ¶51.) This not only presumes that one-way truck rental prices are a leading indicator of global financial markets, but also does not explain why the alleged invitation to collude stopped producing anticompetitive effects.

- why prices for one-way truck rentals after the alleged damages period remained at levels similar to, or in some cases higher than, prices *during* the alleged conspiracy period.

In summary, Plaintiff offers a damages model to meets its pleading burden, yet is unwilling to defend it. Unable to allege non-conclusory facts in support of injury, Plaintiff hopes that the presence of the model alone will allow her to survive a motion to dismiss and force U-Haul to engage in costly discovery. Plaintiff's desired outcome reverses the express line of authority that demands a plaintiff show a "reasonable likelihood" of constructing a claim based on the events described in the complaint *before* launching into discovery. *Twombly*, 550 U.S. at 559. Given the lack of supporting allegations and the numerous defects in the model's approach, Plaintiff's damages model lacks the "heft" to create plausibility and thus falls well short of demonstrating "reasonable likelihood" that she suffered injury. *Id.*

## Conclusion

For the reasons set forth above, Plaintiff's case should be dismissed for failing to state a claim.

## Request for Oral Argument

Because this case presents novel issues of law, U-Haul believes that the Court may benefit from hearing oral argument on U-Haul's motion to dismiss for failure to state a claim and, pursuant to Local Rule 7.1(e), hereby requests the same.

Respectfully submitted,

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Dated: November 5, 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 November 5, 2010.

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