No. 20-1492

United States Court of Appeals for the Second Circuit

Hawaii Sheet Metal Workers Annuity Fund, et al.,

Plaintiffs-Appellants,

v.

Intercontinental Exchange, Inc., et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK , NO. 19-CV-00439-GDB

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE BANK POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, amici state that neither has a parent corporation and that no publicly held corporation owns 10% of either of their stock.

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INTEREST OF AMICI[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community—including those that concern pleading standards. *See, e.g.*, Br. of Chamber of Commerce of the United States of America et al., as *Amici Curiae* in Support of Petitioner, *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (U.S. Aug. 25, 2006); Br. of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Defendants-Appellees, *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, No. 15-14160-AA (11th Cir. June 29, 2018). In this case, plaintiffs contend that this Court should adopt a pleading standard that is inconsistent with the standards set by the

[1] No party's counsel authored this brief. No party, party's counsel, or person other than amici curiae, their members, or their counsel provided money for the brief's preparation or submission. All parties have consented to the filing of this brief.

Supreme Court and this Court by effectively immunizing statistical allegations from judicial scrutiny at the motion to dismiss phase. Adopting such a standard would expose the Chamber's members to burdensome discovery in meritless cases.

This is an issue that has broad significance across the Chamber's membership, and the Chamber thus has a strong interest in this case. The Chamber participates solely on this pleading issue and expresses no view on the current LIBOR benchmark. As the Chamber has previously noted, in light of efforts to transition away from LIBOR, the Chamber is committed to supporting a smooth transition. *See* U.S. Chamber of Commerce, *Quick Take: Your Primer on LIBOR Transition*, https://www.uschamber.com/series/above-the-fold/quick-take-your-primer-libor-transition (June 6, 2019).

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth. BPI has a strong interest in the outcome of this litigation, particularly in the rejection of plaintiffs' attempt to lower the pleading standards because if adopted, it would subject BPI's members to great risk of substantial and unwarranted discovery costs.

INTRODUCTION

"Facts are stubborn things, but statistics . . . [a]s Mark Twain's saying suggests . . . must be consulted cautiously" because they are "pliable." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 205 (2d Cir. 2020). Litigants can, at times, abuse statistics' "pliable" nature in an effort to manufacture an apparent inference of unlawful conduct that facts cannot plausibly support. *See id.* Here, the district court properly applied well established pleading standards in holding that plaintiffs' statistical analyses were too threadbare and much too "dubious" to plausibly support a claim that defendants conspired to manipulate a financial benchmark called ICE LIBOR. *In re ICE LIBOR Antitrust Litig.*, 2020 WL 1467354, at *6 (S.D.N.Y. Mar. 26, 2020). This Court should likewise reject plaintiffs' statistical analyses, for several reasons.

First, although plaintiffs claim that they immunized their pleading against a motion to dismiss by resting their claim on statistical analyses, this Court—along with several other Courts of Appeals—has held that statistics must be "consulted cautiously" even at the "early juncture" of a case, including on a motion to dismiss. *NTT Data*, 975 F.3d at 205, 210. Indeed, judiciously scrutinizing statistical analyses at the pleading stage is critical because litigants often "dress up" conclusory allegations "in more persuasive-sounding statistical jargon" in the hopes that courts might be "fooled by the numbers." *United States ex rel. Customs*

Fraud Investigations, LLC. v. Victaulic Co., 839 F.3d 242, 269 (3d Cir. 2016) (Fuentes, J., concurring in part, dissenting in part). Whether plaintiffs choose to dress their allegations in words or statistics, this Court should not create an exception from the full rigors of the plausibility standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Second, plaintiffs fail to clear this Court's settled standards for deploying statistical analyses to buttress complaints. Plaintiffs ask the Court to draw an inference of collusive conduct from the statistical equivalent of "conclusory and unsupported assertion[s]." *NTT Data*, 975 F.3d at 211. And plaintiffs impermissibly use "apples to study oranges" while relying upon cherry-picked data, all in the hope that no judge will look at them closely on a motion to dismiss. *See id.* This pleading tactic has lately become in vogue in this circuit. In order to avoid opening the dam to a steady stream of plaintiffs seeking a ticket to discovery based upon illusory statistical flotsam, this Court should hold facially deficient statistics to the same scrutiny as other factual pleadings.

Third, a contrary conclusion would have serious negative consequences because discovery in class actions—particularly antitrust class actions—is exceedingly costly. *Twombly*, 550 U.S. at 558-59 n.16. Those costs "create irrevocable . . . harm" to defendants "[w]hen a district court . . . misappl[ies] the *Twombly* standard [and] allows a complex case of extremely dubious merit to

proceed." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010) (Posner, J.). The mere threat of discovery expenses "push[es] cost-conscious defendants to settle even anemic cases before reaching [merits] proceedings." *Twombly*, 550 U.S. at 558-59 n.16. The cost and distraction of meritless litigation can also have the perverse effect of deterring innovation. Accordingly, this Court should hold that statistical analyses that do not plausibly support an inference of unlawful conduct are insufficient to state a claim and affirm the district court's faithful application of those principles.

ARGUMENT

I. STATISTICAL ANALYSES ARE SUBJECT TO THE SAME PLAUSIBILITY TEST AS ALL OTHER FACTUAL ALLEGATIONS

Complaints are not excused from the plausibility standard merely because they rely upon numbers instead of words. To have "facial plausibility," a complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint relying upon statistics is no different: "statistics must plausibly suggest" that the defendants are liable for the alleged unlawful conduct, *NTT Data*, 975 F.3d at 210, because "[s]tatistical studies" are not "magic," *Victaulic*, 839 F.3d at 270. Nevertheless, litigants sometimes take advantage of the pliability of statistics by "dress[ing] up" conclusory allegations "in more persuasive-sounding statistical jargon," *id.* at 270,

apparently in the hopes of exploiting the adage that "if you want to get people to believe something . . . just stick a number on it. Even the silliest absurdities seem plausible the moment they are expressed in numerical terms." Charles Seife, *Proofiness: How You're Being Fooled by the Numbers*, 8 (2010).

Instead of giving these superficially numerical—but substantively conclusory—allegations a free pass at the motion to dismiss stage, several Courts of Appeals, including this one, have grown increasingly concerned about their potential to erode the plausibility standard. For instance, this Court has demanded scrutiny of the relationship between the disparate statistics being compared by "artful" pleadings: "[I]t would make little sense to judge a hospital's physician-hiring policies by looking at the effect those policies have on a population of high school graduates; most members of that group will be ineligible for the job . . . because they lack a medical degree." *NTT Data*, 975 F.3d at 210. Likewise, in explaining the shortcomings of statistics to meet the plaintiff's pleading burden, the Fifth Circuit offered the following analogy: "Taking a United States resident at random, there is a 99.83% chance that she will be from somewhere other than Wyoming. Does this high statistical likelihood alone . . . mean that she can avail herself of diversity jurisdiction in a suit against a Wyoming resident? Surely not." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 497 (5th Cir. 2005).

The threat of being "fooled by the numbers," *Victaulic*, 839 F.3d at 262, at the pleading stage is more than merely hypothetical, and other courts have also carefully analyzed statistics in the context of motions to dismiss. For example, in *United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, 816 F. App'x 892 (5th Cir. 2020), the panel held that statistics purportedly showing that the defendant submitted medical reimbursement claims at a higher clip than its peers were insufficient to state a claim under the False Claims Act because they could well mean that the defendant was "simply ahead of the healthcare industry in following" the requisite submission guidelines, *id.* at 897. Similarly, in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, 707 F.3d 451 (4th Cir. 2013), the plaintiff alleged that a pharmaceutical company submitted false claims because statistics showed that the majority of prescriptions issued by physicians were at a dosage level that was consistent with unapproved uses, *id.* at 458. But the Fourth Circuit resisted "draw[ing] an implausible inference linking general statistics" to alleged false prescriptions for unapproved uses because the prescriptions could "have been submitted for other approved use[s] . . . ." *Id.* at 459.

Of course, courts have also recognized that in appropriate circumstances, probative statistics can assist plaintiffs in stating a claim. Indeed, this Court's opinion in *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), is

illustrative of the circumstances in which statistics can help fortify a complaint against a motion to dismiss. There, the "vast majority of allegations follow[ed] directly from evidence collected in governmental investigations," including "numerous . . . emails, communications, and documents." *Id.* at 766-67. In addition to that direct evidence, plaintiffs also alleged indirect evidence of a conspiracy by alleging "parallelism . . . accompanied by plus factors." *Id.* at 782. In light of that direct and indirect evidence, this Court held that the plaintiffs' statistics "further support[ed] an inference of conspiracy." *Id.* Thus, circumstantial statistical analyses can offer support to plaintiffs when they enhance factual allegations plausibly supporting the plaintiff's claim. But where, as here, facially conclusory statistics are doing nearly all of the work in plaintiffs' pleadings, courts must carefully scrutinize the plausibility of the inferences being drawn from those numbers.

II. THE DISTRICT COURT CORRECTLY DECLINED TO RELY ON PLAINTIFFS' STATISTICS

Applying the foregoing principles, this Court should affirm the district court's opinion because it properly applied the plausibility standard in holding that plaintiffs' statistical analyses are far too uninformative to plausibly state a claim. Affirmance is also warranted because plaintiffs' statistical analyses contain facial defects, including obvious inapposite comparisons and cherry-picked data. A contrary holding would create an unprecedented lower pleading bar for plaintiffs

whose case rests on the hope that district courts will "punt" because "[t]he job of assessing statistical studies is not easy . . . ." Edward K. Cheng, *Fighting Legal Innumeracy*, 17 Green Bag 2d 271, 275-76 (2014). Accordingly, this Court should affirm the district court's opinion by rejecting plaintiffs' implausible inferences from their statistical analyses.

Bereft of any allegations of direct or indirect evidence plausibly suggesting an antitrust conspiracy, plaintiffs here argue that their statistical analyses are sufficient to show a collusive agreement to set a financial benchmark. (ECF No. 166 at 43-46 ("Appellants' Br.").) The statistics on which they rely purportedly show that this benchmark's performance deviated from certain other financial benchmarks. (*Id.*) After the district court found these allegations too thin to support an inference of conspiracy, plaintiffs complain that critiques of "statistically derived pleadings" are too "'fact-bound . . . for resolution on the pleadings.'" (*Id.* at 44 (citation omitted).)

Plaintiffs' arguments flout the standards this Court has adopted for assessing statistical analyses at the pleading stage. As an initial matter, plaintiffs ask their statistical analyses to carry the full weight of adequately stating a claim—here, plausibly inferring a conspiracy to manipulate a financial benchmark. But plaintiffs' reliance upon *Gelboim* only highlights their pleading's shortcomings because the statistical analyses in *Gelboim* played only a minor supporting role by

providing "further support" to alleged direct and indirect evidence of a conspiracy. *Id.* at 782.

Nor do the pleading standards obligate the district court to blindly accept plaintiffs' statistical analyses. To the contrary, this Court has emphasized that, in order to guard against the potential misuse of statistics, courts must "cautiously" probe any facial defects at the motion to dismiss stage. *See NTT Data*, 975 F.3d at 211. For example, plaintiffs cannot "force their way into discovery" by "making "conclusory statistical inferences" about relationships between distinct metrics. *Id.* at 212. Rather than relying upon "unsupported assertion[s]" that statistical deviations "are so stark" that they indicate unlawful conduct, plaintiffs must allege facts "explain[ing] why their chosen . . . statistics are in fact" plausibly suggestive of unlawful conduct. *Id.* at 211-12.

Additionally, plaintiffs cannot make unwarranted inferences from statistics by "relying on apples to study oranges." *Id.* at 211. In other words, without considering whether there are "confounding variable[s]" for which plaintiffs did not control, plaintiffs could be, for example, "apply[ing] national height averages to certain subgroups of the population, say NBA players or horse-racing jockeys," and then presuming that the "stark" differences plausibly suggest unlawful conduct. *Id.*; *see also Victaulic*, 839 F.3d at 269 ("If I were to assume that the judges of the Third Circuit comprise an accurate cross-section of the U.S.

population, I would then be able to conclude that a startlingly high proportion of the general public has a law degree. But of course, it would be frivolous to make that assumption . . . .").

The district court here appropriately applied those standards in holding that plaintiffs' statistical analyses do not support an inference of collusive conduct. For starters, the district court below recognized that, like the *NTT Data* plaintiffs' attempt to "rely on conclusory statistical inferences to force their way into discovery," 975 F.3d at 212, plaintiffs' statistical analyses here are too conclusory "because they simply assert that there should be certain, specific relationships between ICE LIBOR and other financial metrics, but do not cite to any empirical or academic sources to support these assertions." *In re ICE LIBOR Antitrust Litig.*, 2020 WL 1467354, at *6. The court also correctly held that plaintiffs' statistics failed to support a plausible inference of collusion because, rather than suggesting that ICE LIBOR behaved anomalously, plaintiffs "do not at any point . . . actually indicate what they believe the ICE LIBOR rate should have been at the time." *Id.*; *see also NTT Data*, 975 F.3d at 212 (instructing that plaintiffs should provide "allegations to explain why their chosen . . . statistics are" indicative of unlawful conduct).

Additionally, as defendants demonstrate, plaintiffs' statistical analyses are rife with indications they are "relying on apples to study oranges." *NTT Data*, 975

F.3d at 211. For instance, plaintiffs invite this Court to infer a conspiracy based solely upon apparent deviations between financial indices, yet these indices "assess different financial products, with different maturities, trading in different markets." (Appellees' Br. at 39.) Plaintiffs provide no indication that they have controlled for these "confounding variable[s]," as they must. *Id.* at 211; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 916 (D.C. Cir. 2015) (dismissing claim predicated on statistics due to "[p]laintiffs' failure to account for" several variables).

Plaintiffs' statistics are also facially deficient because they have cherry-picked data in an attempt to "fool[] by numbers." *Victaulic*, 839 F.3d at 262. For instance, plaintiffs rely upon data from only half the class period for one of their analyses, include only select defendants in a different analysis, and improperly scale their charts in yet another analysis in order to create an illusion of unusual conduct. (Appellees' Br. at 37-39.) Yet plaintiffs offer no explanation for these key methodological decisions. *Cf. Burgis v. N.Y.C. Dep't of Sanitation*, 798 F.3d 63, 70 (2d Cir. 2015) ("Among other shortcomings, the statistics provided by plaintiffs show only the raw percentages of White, Black, and Hispanic individuals at each employment level, without providing any detail as to the number of individuals at each level, the qualifications of individuals in the applicant pool and of those hired for each position, or the number of openings at each level.").

Accordingly, plaintiffs' statistical analyses fail to satisfy this Court's precedent for deploying statistical analyses in support of satisfying the plausibility standard.

To sidestep these standards, plaintiffs and amicus curiae American Antitrust Institute ("AAI") claim that even threshold questions about the adequacy of statistical allegations should be deferred until much later in the litigation, when the court can conduct a "*Daubert* style analysis." (Appellants' Br. at 44.) But that is no answer to the problems plaintiffs' statistics pose. First, although "*Daubert* and the Federal Rules of Evidence will filter out unreliable statistical evidence in due course," neglecting to ask "whether statistical evidence actually supports a plausible inference of wrongdoing" is "contrary to *Twombly* . . . ." *Victaulic*, 839 F.3d at 269-70. Second, if statistics escape scrutiny at the motion to dismiss stage, there is little, if any, chance that uninformative statistics like the ones plaintiffs put forward here will ever be tested by the *Daubert* standard because their uselessness will prompt plaintiffs to shift to another mode of proof—or simply to use the cost of discovery as leverage for an early settlement. *Cf. id.* at 270 ("The ultimate lesson of *Twombly* and *Iqbal* is that a federal lawsuit is not a mechanism to confirm a vague suspicion that fraudulent conduct occurred.").

Amicus AAI argues that the district court should have deferred any scrutiny of plaintiffs' statistics until much later in the litigation simply because plaintiffs "assert[ed] there are relationships between the various metrics." (AAI Br. at 13.)

But that argument seeks to skirt this Court's requirement that plaintiffs provide "allegations to explain why their chosen . . . statistics" plausibly suggest unlawful conduct, *NTT Data*, 975 F.3d at 212—a requirement so well-entrenched that it is confirmed by the case on which AAI relies. (*Id.* (citing *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 535 (2d Cir. 2020) (relying upon the "detailed supporting allegations" explaining the relationship between the metrics being compared).)

These deficiencies are not unique to plaintiffs' pleading in this case—and an endorsement of plaintiffs' position would disturb settled pleading standards and threaten to open the doors of district courts to other unmeritorious claimants. Indeed, antitrust complaints filed in this circuit increasingly employ the tactic of naming a large group of defendants, compiling vague statistics about their behavior from public sources, and then juxtaposing those statistics to metrics that supposedly have some unexplained relationship to the defendants' behavior. Most district courts have rightly rejected these gambits as insufficient to meet plaintiffs' pleading burden. *See, e.g.*, *Fire & Police Pension Ass'n of Colo. v. Bank of Montreal*, 368 F. Supp. 3d 681, 705 (S.D.N.Y. 2019) ("Plaintiff further contends that its claims are supported by statistical analysis [but] Plaintiff's statistical evidence . . . demonstrates that CDOR was not suppressed during the relevant time-period . . . ."); *see also FrontPoint Asian Event Driven Fund, L.P. v. Citibank*,

N.A., No. 16-CV-5263 (AKH), 2017 WL 3600425, at *11 (S.D.N.Y. Aug. 18, 2017) ("Plaintiffs' so-called 'economic evidence,' however, does not support an inference of the existence of an antitrust conspiracy" because "plaintiffs provide no explanation—other than a vague reference to the 'law of one price'—as to why the SIBOR and SOR rates should necessarily be the same.").

Indeed, even in instances where the plaintiffs pair statistical analyses with regulatory investigations or purported direct evidence, district courts have rejected statistics that are too vague to plausibly suggest misconduct by a particular defendant. *See, e.g.*, *In re GSE Bonds Antitrust Litig.*, 396 F. Supp. 3d 354, 365 (S.D.N.Y. 2019) ("Even assuming that the price-fixing conspiracy extended beyond the banks appearing in the chatroom logs, there is no particular reason to believe that the other defendants named in this suit were involved apart from plaintiffs' say-so."). Nevertheless, despite these courts' correct application of well-settled pleading standards, this Court's continued vigilance against implausible inferences from threadbare statistical analyses is critical to avoiding end-runs around the plausibility standard.

III. PERMITTING VAGUE STATISTICAL ANALYSES TO PROCEED PAST A MOTION TO DISMISS IMPOSES UNDUE COSTS

"[M]isapplying the *Twombly* standard" by "allow[ing] a complex case" based upon facially unreliable statistics would "create irrevocable as well as unjustifiable harm." *In re Text Messaging Antitrust Litig.*, 630 F.3d at 626. As

previously described, reversing the district court's opinion would break with established pleading standards and the resulting harm would not be limited to this case. That harm would flow from being forced to undertake costly discovery—often including millions of documents, complex datasets, and many depositions—in cases that are based only upon misleading statistics. These cases are designed not to succeed on the merits, but to use the specter of enormous discovery costs and the pressures of possible classwide damages to secure a quick settlement. Nor would the resulting costs and inefficiencies be borne only by defendants: over-enforcement of antitrust laws can chill lawful competitive conduct beneficial to consumers, even as scarce judicial resources are diverted to managing discovery in meritless cases.

The Supreme Court's demand for a plausibility analysis of pleadings was rooted in part in the expense and expanse of discovery. As the Court cautioned, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly*, 550 U.S. at 558; *see also In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 263 (2d Cir. 1993) (warning against incautiously sending the parties to discovery given "the extensive discovery costs that frequently ensue once a complaint survives dismissal"). And discovery costs—which often burden defendants asymmetrically—have become "astronomical . . . with the electronic

archives of large corporations or other large organizations holding millions of emails." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010). Moreover, the costs of discovery that businesses bear are not simply monetary; they "include the disruption of the defendant's operations," as management and employees are required to devote time to fielding document requests and sitting for depositions. *Id.*; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) ("The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation.").

Discovery in antitrust class actions offers a useful illustration, for such cases involve "massive factual controvers[ies]." *Twombly*, 550 U.S. at 558-59 (citing authorities describing the "unusually high cost" and "extensive scope" of antitrust discovery). Antitrust class actions are "arguably the most complex action[s]" to litigate, *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (citation omitted), because they can sweep in "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." Manual for Complex Litigation § 30, at 519 (4th ed. 2004); *see also* John Bogart, *The Supreme Court Decision in Twombly: A New Federal Pleading Standard?*, 20 Utah Bar J. 20, 22 (Sept./Oct. 2007) ("As anyone involved

in private antitrust litigation knows, discovery in such cases is usually quite expensive, very burdensome, and terribly distracting for management. Discovery costs in antitrust cases run into the millions of dollars for document collection alone.").

Despite these expenses and distractions, discovery usually does not lead to a resolution of the merits of the class action. Instead, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559; *see also In re Time Warner*, 9 F.3d at 263 ("[T]here is the interest in deterring the use of the litigation process as a device for extracting undeserved settlements as the price of avoiding the extensive discovery costs that frequently ensue once a complaint survives dismissal, even though no recovery would occur if the suit were litigated to completion."). As other Courts of Appeals have recognized, "the expensive and settlement-inducing quagmire of antitrust discovery," *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1267–68 (11th Cir. 2019) (en banc), "frequently . . . gives the plaintiff the opportunity to extort large settlements even whe[n] he does not have much of a case," *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Those threats are hardly mitigated by the prospects that the statistics used to prop up plaintiffs' pleading will be

debunked; after all, plaintiffs can and do often disavow their statistical analyses amidst discovery and fish for new theories of proof.

Moreover, the threat of classwide treble damages in antitrust suits further ratchets up the pressure on defendants to settle meritless cases. *See, e.g.*, *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) (explaining that the "danger" of settling vexatious nuisance suits "increase[s] . . . by the presence of a treble damages provision"). As Judge Easterbrook noted over 30 years ago: "Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation . . . ." Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12-13 (1984).

Permitting antitrust class actions premised upon uninformative statistics to proceed to discovery also poses other economic harms. First, over-enforcement of the antitrust laws can "chill competition, rather than foster it." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *Twombly*, 550 U.S. at 554 ("[W]e have . . . hedged against false inferences from identical behavior at a number of points in the trial sequence."); *see also* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. at 15-16 (explaining why the dangers posed by a "false positives" are greater than the dangers posed by "false negatives"). To avoid being subject to a mistaken inference and then paying the heavy toll of discovery, businesses might "seriously alter [their] conduct in undesirable ways." *Credit Suisse Sec. (USA)*

LLC v. Billing, 551 U.S. 264, 283 (2007). They might, for example, decline to submit information to public data repositories or participate in the creation of financial benchmarks, for that pro-competitive activity can be abused by artful litigants to conjure up misleading statistics in litigation.

Meanwhile, the scarce resources of trial judges would be stretched even thinner by refereeing sweeping discovery in meritless cases—all as a prelude to granting summary judgment years down the road. Every implausible case that clogs a court's docket necessarily limits or delays its capacity to move along the rest of its docket. Accordingly, before directing the parties toward "the discovery swamp—'that Serbonian bog . . . where armies whole have sunk,'" *In re Text Messaging Antitrust Litig.*, 630 F.3d at 626, this Court should demand that statistical analyses pass the plausibility test. The district court properly did so here.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Dated: November 19, 2020

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CERTIFICATE OF COMPLIANCE UNDER RULE 30(g)(1)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 32.1(a)(4) because this brief contains 4,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

/s/ *Boris Bershteyn*
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Dated: November 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Boris Bershteyn

Boris Bershteyn