Jack P. DiCanio (SBN 138782)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
Email: jack.dicanio@skadden.com

Boris Bershteyn (*pro hac vice* forthcoming)
Sam Auld (*pro hac vice* forthcoming)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
Email: boris.bershteyn@skadden.com
Email: sam.auld@skadden.com

Attorneys for Amici Curiae

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LISA MCCARTHY, et al., Plaintiffs, v. INTERCONTINENTAL EXCHANGE INC., et al., Defendants.	)	Case No. 20-cv-05832-JD BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., STRUCTURED FINANCE ASSOCIATION, THE BANK POLICY INSTITUTE, AND THE LOAN SYNDICATIONS AND TRADING ASSOCIATION Honorable James Donato

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Plaintiffs' extraordinary request to bring the publication of the U.S. dollar LIBOR benchmark rate ("LIBOR") to an immediate halt threatens to disrupt financial transactions all over the world and undermine years of planning for an orderly transition from LIBOR. To obtain a preliminary injunction, plaintiffs must establish, among other things, that the "balance of hardships tips 'sharply'" in their favor and that the injunction would serve the public interest. *Fang v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2016 WL 9275454, at *1 (N.D. Cal. Nov. 10, 2016) (Donato, J.), *aff'd*, 694 F. App'x 561 (9th Cir. 2017). Plaintiffs cannot meet their burden here.

Suddenly suspending the publication of LIBOR and thereby enjoining the performance of contracts that reference it would be unfair to defendants, amici, and the public. Because millions across the globe—from banks to businesses to homeowners and to student loan borrowers—rely upon LIBOR's publication, halting it without an orderly transition process could, among other things, inject great uncertainty into financial transactions, pose systemic risks to the financial system, and leave parties to millions of contracts without a mechanism to calculate their payment obligations. Indeed, as the Financial Stability Board reinforced just days ago, halting LIBOR's publication would be "fair for everyone" only if done after extensive and orderly transition planning—which is already underway—not in a flash, as plaintiffs propose.[1] Regulators, amici, and their members have directed substantial resources over the course of multiple years to avoiding the severe consequences of what plaintiffs seek: a disorderly cessation of LIBOR.

ARGUMENT

I. GRANTING PLAINTIFFS' INJUNCTION WOULD INJECT UNCERTAINTY INTO FINANCIAL MARKETS AND POSE INNUMERABLE RISKS

The equities and interests of the public weigh heavily against plaintiffs' proposed injunction because it would inject extraordinary uncertainty and risks into financial transactions and global financial markets. Plaintiffs propose enjoining LIBOR's publication, but benchmarks offer important efficiencies to contracting parties, and LIBOR is one of the world's most widely

[1] *ARRC Applauds Major Milestone in Transition from U.S. Dollar LIBOR*, ARRC, Nov. 30, 2020, *available at* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Press_Release_Applauds_Milestone_Transition_US_Dollar_LIBOR.pdf.

referenced benchmarks. As the world has contemplated a transition from LIBOR over the past several years, one insight is beyond dispute: A sudden cessation of LIBOR's publication could bring widespread disruption and uncertainty—costs for which no conceivable justification exists.

Benchmarks, including LIBOR, help form the bedrock of the financial system. Their benefits include reducing transaction costs and increasing price transparency. (ECF No. 136-25 at 9-11.) Without mechanisms to determine future borrowing costs, parties would expend substantial resources in negotiating future price schedules or be forced to transact at fixed rates. (*Id.*) Benchmarks also provide regulators with a useful tool for monitoring bank funding costs.[2] LIBOR is a benchmark used around the world and has been published virtually every London business day since 1986.[3] Regulated by the UK's Financial Conduct Authority ("FCA"), LIBOR is based on information provided by a panel of participating banks that "is designed to produce an average rate that is representative of the rates at which large, leading internationally active banks with access to the wholesale, unsecured funding market could fund themselves in such market in particular currencies for certain tenors."[4]

LIBOR is referenced in a vast array of contracts, including business loans, home mortgages, student loans, and derivative instruments.[5] LIBOR's availability is critical to the performance of these contracts—so much so that the FCA has the authority to compel banks to make LIBOR submissions and to compel ICE Benchmark Administration Ltd. to publish it. As regulators have explained, "many existing contracts lack any provisions that deal with the end of LIBOR or have provisions that would cause significant economic impacts that the parties may not have anticipated."[6] In some cases, instruments designed to reference a floating interest rate that

---

[2] *What Are Benchmark Rates*, European Central Bank, July 11, 2020, *available at* https://www.ecb.europa.eu/explainers/tell-me-more/html/benchmark_rates_qa.en.html.

[3] *The LIBOR Transition*, Congressional Research Service, at 3, Sept. 19, 2019, *available at* https://fas.org/sgp/crs/misc/IF11315.pdf.

[4] *Overview of LIBOR*, Intercontinental Exchange, Inc., *available at* https://www.theice.com/iba/libor.

[5] Speech of Michael Held, Executive Vice President and General Counsel of the N.Y. Federal Reserve, *SOFR and the Transition from LIBOR*, Feb. 26, 2019, *available at* https://www.newyorkfed.org/newsevents/speeches/2019/hel190226.

[6] *Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition*, ARRC, at 2, *available at*

changes with economic conditions could default to a fixed rate.[7] As the general counsel of the New York Federal Reserve Bank has recognized, a disorderly cessation of LIBOR could precipitate a "DEFCON 1 litigation event" as contracting parties turn to courts to resolve the many uncertainties that could emerge.[8]

Indeed, precipitously suspending LIBOR could pose systemic risks to the global financial system. Banking regulators have recognized that the "sudden cessation of LIBOR may threaten individual financial institutions and the U.S. financial system more broadly" by "destabilizing balance sheets."[9] Suddenly suspending LIBOR also poses "operational, strategic . . . and compliance" challenges to financial institutions.[10] Additionally, enjoining LIBOR intrudes on the FCA's authority to compel submissions to (and publication of) LIBOR, may "impair the functioning of a variety of markets," and "could pose consumer protection . . . risks."[11] Consumers could also be adversely impacted because "commercial businesses . . . use derivatives contracts to hedge risks," and "[i]f that market is disrupted" by LIBOR's sudden cessation, "those businesses would charge higher prices."[12] The potential fallout from the proposed injunction is so significant that an adequate bond, as required by Fed. R. Civ. P. 65(c), would be incalculable.

Plaintiffs' reply brief appears to backpedal from their injunction request by claiming that they now seek an order setting LIBOR to zero. (ECF No. 212 at 6.) Setting aside the

---

https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Proposed-Legislative-Solution.pdf.

[7] Sinead Cruise, *The End of Libor: The Biggest Banking Challenge You've Never Heard Of*, Reuters, Oct. 8, 2019, *available at* https://www.reuters.com/article/us-britain-libor-transition-analysis/the-end-of-libor-the-biggest-banking-challenge-youve-never-heard-of-idUSKBN1WN0H4.

[8] Held, *supra* n.5.

[9] *2018 Annual Report*, Financial Stability Oversight Council, at 108, *available at* https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf.

[10] OCC Bulletin 2020-68, *LIBOR Transition*, *available at* https://www.occ.treas.gov/news-issuances/bulletins/2020/bulletin-2020-68.html.

[11] *Statement on LIBOR Transition*, Board of Governors of the Federal Reserve System, et al., Nov. 30, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf.

[12] *Quick Take: Your Primer on LIBOR Transition*, The Chamber of Commerce of the United States of America, *available at* https://www.uschamber.com/series/above-the-fold/quick-take-your-primer-libor-transition.

impropriety of seeking a new remedy on reply, "federal courts generally are unsuited to act as rate-setting commissions." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990); *see also Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (noting a "historical antipathy to rate setting by courts" because it is "a task [courts] are inherently unsuited to perform competently") (Posner, J.). Moreover, that proposal would introduce similar contractual uncertainties and market risks as suspending LIBOR's publication, e.g., in some cases, certain contracts with floating rates could default to fixed rates. *See supra*, page 2-3.

Under any formulation, plaintiffs' proposed injunction would therefore create widespread disruption in financial markets and uncertainty in financial transactions. While some of the risks are identifiable, their complete scope is not—because "LIBOR is embedded everywhere in the plumbing of the financial world" and it has never been temporarily enjoined, let alone indefinitely suspended or fixed to zero.[13] This Court should decline plaintiffs' invitation to flood the financial system with risks and uncertainty, and should therefore deny their request for an injunction.

II. GRANTING PLAINTIFFS' PROPOSED INJUNCTION WOULD DISRUPT YEARS OF PLANNING AN ORDERLY TRANSITION AWAY FROM LIBOR

Years of work and countless resources have been invested in facilitating an orderly transition from LIBOR in order to mitigate the very risks that the requested injunction poses. Those investments are critical because, as the Federal Reserve Bank of Atlanta has put it, "[t]he transition from LIBOR . . . is complex and challenging and, if not handled appropriately, puts the stability of the financial system at risk . . . ."[14] Therefore, efforts by amici, their members, regulators, and other market participants to ensure an orderly, rather than sudden, transition from LIBOR have consumed more than six years and are ongoing. In 2014, the Federal Reserve, along with the Treasury Department and the Commodities Futures Trading Commission, formed the Alternative Reference Rates Committee ("ARRC")—in which amici serve alongside other market

[13] Cruise, *supra* n.7.

[14] *LIBOR Transition—Ready or Not?* Federal Reserve Bank of Atlanta, Feb. 6, 2020, *available at* https://www.frbatlanta.org/economy-matters/banking-and-finance/viewpoint/2020/02/06/libor-transition-ready-or-not.

participants and ex officio governmental members—to identify alternative reference rates and tools to support a smooth transition.[15] Transition efforts accelerated in 2017, when the FCA announced that it would no longer be necessary to compel participating banks to provide submissions to LIBOR after 2021.[16] The FCA announced that it picked the end of 2021 because it was "far enough away to significantly reduce the risks and costs of a more sudden change."[17] That five-year runway appears to have been insufficient, causing the Federal Reserve—in consultation with other policymakers—to support a recent proposal by LIBOR's administrator to consult about its intention to cease publishing the most widely used tenor settings of LIBOR after June 30, 2023.[18] In doing so, policymakers recognized that "the transition away from LIBOR will be orderly and fair for everyone" only if adequate preparation precedes LIBOR's cessation.[19]

Market participants and regulators around the world have devoted substantial time and resources to plan a careful transition away from LIBOR. That planning, which has often been led by amici (including through their participation in ARRC) has included identifying and developing successors to LIBOR, reviewing contractual agreements to identify risks, developing fallback contractual language, and proposing legislation to avoid disputes precipitated by LIBOR's cessation. After several years of study, in 2017, the ARRC recommended the Secured Overnight Financing Rate as a successor to LIBOR for certain instruments and has published a plan to help guide the transition.[20] To assist the market with meeting those milestones, amicus Structured Finance Association ("SFA") developed a set of best practices for market participants.[21]

ARRC has observed "that most contracts referencing LIBOR do not appear to have envisioned a permanent or indefinite cessation of LIBOR and have fallbacks that would not be

---

[15] *Governance of ARRC*, ARRC, ***available at*** https://www.newyorkfed.org/arrc/about#members.
[16] Andrew Bailey, Chief Executive, Financial Conduct Authority, *The Future of LIBOR*, July 27, 2017, ***available at*** https://www.fca.org.uk/news/speeches/thefuture-of-libor
[17] *Id.*
[18] Board of Governors of the Federal Reserve System, et al., *supra* n.11.
[19] ARRC Applauds Major Milestone, *supra* n.1.
[20] *See* Federal Reserve Bank of Atlanta, *supra* n.14.
[21] *A Set of Recommended Best Practices for LIBOR Benchmark Transition*, Structured Finance Association, ***available at*** https://structuredfinance.org/wp-content/uploads/2019/05/SFIG_LIBOR_Green_Paper_Combined_12.17.18.pdf.

economically appropriate if this event occurred"—and therefore has proposed contractual fallback language for a variety of products that would help address the eventual cessation of LIBOR.[22] As co-chair of the ARRC's Business Loans Working Group, amicus the Loan Syndications and Trading Association has also helped develop fallback language for syndicated loans.[23] Similarly, SFA has helped develop fallback language for securitizations and collateralized loan obligations as a co-chair of the ARRC's Securitization Working Group.[24] Over time, this proposed fallback language can help facilitate the transition from LIBOR and allow for the selection of a replacement.[25]

Some obstacles limit wide-scale adoption of ARRC's recommended fallback language, including the need to obtain bilateral or multilateral consents to amend the multitude of agreements that currently reference LIBOR. To help address these challenges, ARRC introduced a proposal to the New York legislature on March 6, 2020, that would facilitate the automatic amendment of certain contracts referencing LIBOR governed by New York law.[26] Parallel legislation is being contemplated at the federal level.[27] Similar efforts are occurring worldwide, including in the United Kingdom, Europe, and Hong Kong, where regulators have expended

[22] *Summary of ARRC's LIBOR Fallback Language*, ARRC, Nov. 2019, *available at* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/LIBOR_Fallback_Language_Summary.

[23] *LIBOR Fallback For U.S. Syndicated Loans FAQs*, LTSA, *available at* https://www.lsta.org/content/libor-fallback-for-u-s-syndicated-loans-faqs/.

[24] *Recommendations Regarding More Robust Fallback Language For New Issuances of LIBOR Securitizations*, ARRC, *available at* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/Securitization_Fallback_Language.pdf.

[25] *Id.*

[26] *ARRC Executive Summary of Proposed Legislative Solution, supra* n.6.

[27] Robert Mackenzie Smith, *Congress Readies Surprise "Tough Legacy" LIBOR Fix*, Risk.net, Nov. 9 2020, *available at* https://www.risk.net/regulation/7708326/congress-readies-surprise-tough-legacy-libor-fix.

substantial resources in preparing for the transition, including by considering legislation to aid the transition[28] and by developing transition milestones for financial institutions.[29]

Amici and their members have invested considerable resources to address legacy contracts that reference LIBOR and extend beyond the proposed transition dates. For instance, fourteen banks expect to spend a total of more than $1.2 billion on the LIBOR transition, "with the costs for the finance industry as a whole set to be several multiples of that sum."[30] These costs include "the arduous task of changing the terms of contracts tied to LIBOR . . . ."[31] In support of those efforts, amicus SIFMA has hosted webinars and conferences to discuss the ways in which operations professionals can prepare for the LIBOR transition.[32]

To address the need for bilateral amendments to derivative contracts that reference LIBOR, on October 23, 2020, amicus ISDA launched a uniform mechanism for parties to voluntarily amend existing derivatives contracts in order to reduce disruption.[33] ISDA also launched a mechanism for including fallbacks in new derivative contracts that use LIBOR as a reference rate.[34] ISDA's work in developing these mechanisms included securing a favorable Business Review Letter from the United States Department of Justice, which concluded that the proposed mechanisms are "unlikely to produce anticompetitive effects."[35]

---

[28] Written Statement of Rishi Sunak, Financial Services Regulation, U.K. Parliament, June 23, 2020, *available at* https://questions-statements.parliament.uk/written-statements/detail/2020-06-23/HCWS307; *The EU Prepares for the End of LIBOR*, European Commission, *available at* https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_2270.

[29] *Reform of Interest Rate Benchmarks*, Hong Kong Monetary Authority, July 10, 2020, *available at* https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200710e1.pdf.

[30] *See* Cruise, *supra* n.7.

[31] *Id.*

[32] *See, e.g.*, *LIBOR – Preparing for Alternative Reference Rates*, Sept. 16, 2010, *available at* https://www.sifma.org/event/ops-libor-webinar/.

[33] ISDA, *ISDA Launches IBOR Fallbacks Supplement and Protocol*, Oct. 23, 2020, *available at* https://www.isda.org/2020/10/23/isda-launches-ibor-fallbacks-supplement-and-protocol/.

[34] *Id.*

[35] Business Review Letter from M. Delrahim, U.S. Dep't of Justice to ISDA, Oct. 1, 2020, *available at* https://www.justice.gov/opa/pr/justice-department-issues-favorable-business-review-letter-isda-proposed-amendments-address.

Due to the complexity of effectuating an orderly transition from LIBOR, much work remains. For instance, financial institutions continue to invest significant resources to develop systems and processes to identify at-risk contracts and notify their counterparties.[36] ARRC continues to develop replacement rate solutions, including developing a term-rate structure similar to one that exists for LIBOR.[37] Thus, completing an orderly transition will continue to "require[] significant commitment and sustained effort from both financial and non-financial institutions . . . ."[38]

These efforts are necessary to avoid widespread disruption and uncertainty—but they will not succeed if plaintiffs obtain an injunction immediately suspending LIBOR or setting LIBOR to zero. Either injunction would trigger precisely the same ill effects associated with a sudden LIBOR cessation that amici, their members, other market participants, and regulators around the world are working to mitigate. Equities and public interest therefore weigh overwhelmingly against the injunction.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for an injunction should be denied.

[36] *See* Cruise, *supra* n.7.

[37] *Transition from LIBOR*, ARRC, *available at* https://www.newyorkfed.org/arrc/sofr-transition.

[38] *Reforming Major Interest Rate Benchmarks: Progress Report*, Financial Stability Board, Dec. 18, 2019, *available at* https://www.fsb.org/2019/12/reforming-major-interest-ratebenchmarks-progress-report-2/.

DATED: December 10, 2020

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

By: /s/ Jack P. DiCanio

Jack P. DiCanio (SBN 138782)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
Email: jack.dicanio@skadden.com

Boris Bershteyn (*pro hac vice* forthcoming)
Sam Auld (*pro hac vice* forthcoming)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
Email: boris.bershteyn@skadden.com
Email: sam.auld@skadden.com

Counsel for Amici Curiae

ATTESTATION

I, Jack P. DiCanio, am the ECF user whose ID and password are being used to file the above motion and accompanying memorandum of law. In compliance with Local Civil Rule 5-1(i)(3), I hereby attest that each counsel listed as a signatory above has concurred in this filing.

/s/ Jack P. DiCanio