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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 1

 I. GRANTING PLAINTIFFS’ INJUNCTION WOULD INJECT
 UNCERTAINTY INTO FINANCIAL MARKETS AND POSE
 INNUMERABLE RISKS 1

 II. GRANTING PLAINTIFFS’ PROPOSED INJUNCTION WOULD
 DISRUPT YEARS OF PLANNING AN ORDERLY TRANSITION AWAY
 FROM LIBOR 4

CONCLUSION..... 8

PRELIMINARY STATEMENT

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

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

ARGUMENT

20
21 **I. GRANTING PLAINTIFFS’ INJUNCTION WOULD INJECT UNCERTAINTY**
22 **INTO FINANCIAL MARKETS AND POSE INNUMERABLE RISKS**

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

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

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

4 Benchmarks, including LIBOR, help form the bedrock of the financial system.
5 Their benefits include reducing transaction costs and increasing price transparency. (ECF No. 136-
6 25 at 9-11.) Without mechanisms to determine future borrowing costs, parties would expend
7 substantial resources in negotiating future price schedules or be forced to transact at fixed rates.
8 (*Id.*) Benchmarks also provide regulators with a useful tool for monitoring bank funding costs.²
9 LIBOR is a benchmark used around the world and has been published virtually every London
10 business day since 1986.³ Regulated by the UK’s Financial Conduct Authority (“FCA”), LIBOR is
11 based on information provided by a panel of participating banks that “is designed to produce an
12 average rate that is representative of the rates at which large, leading internationally active banks
13 with access to the wholesale, unsecured funding market could fund themselves in such market in
14 particular currencies for certain tenors.”⁴

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

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23 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.

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

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

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

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

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

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

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

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

20 ⁷ Sinead Cruise, *The End of Libor: The Biggest Banking Challenge You’ve Never Heard Of*,
 21 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-](https://www.reuters.com/article/us-britain-libor-transition-analysis/the-end-of-libor-the-biggest-banking-challenge-youve-never-heard-of-idUSKBN1WN0H4)
 22 [idUSKBN1WN0H4](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.

23 ⁹ *2018 Annual Report*, Financial Stability Oversight Council, at 108, available at
 24 <https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf>.

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

27 ¹¹ *Statement on LIBOR Transition*, Board of Governors of the Federal Reserve System, et al., Nov.
 28 30, 2020, available at
 29 <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-](https://www.uschamber.com/series/above-the-fold/quick-take-your-primer-libor-transition)
 30 [primer-libor-transition](https://www.uschamber.com/series/above-the-fold/quick-take-your-primer-libor-transition).

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

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

15 **II. GRANTING PLAINTIFFS’ PROPOSED INJUNCTION WOULD DISRUPT YEARS**
 16 **OF PLANNING AN ORDERLY TRANSITION AWAY FROM LIBOR**

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

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 27 ¹³ Cruise, *supra* n.7.

28 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>.

1 participants and ex officio governmental members—to identify alternative reference rates and tools
2 to support a smooth transition.¹⁵ Transition efforts accelerated in 2017, when the FCA announced
3 that it would no longer be necessary to compel participating banks to provide submissions to
4 LIBOR after 2021.¹⁶ The FCA announced that it picked the end of 2021 because it was “far
5 enough away to significantly reduce the risks and costs of a more sudden change.”¹⁷ That five-year
6 runway appears to have been insufficient, causing the Federal Reserve—in consultation with other
7 policymakers—to support a recent proposal by LIBOR’s administrator to consult about its
8 intention to cease publishing the most widely used tenor settings of LIBOR after June 30, 2023.¹⁸
9 In doing so, policymakers recognized that “the transition away from LIBOR will be orderly and
10 fair for everyone” only if adequate preparation precedes LIBOR’s cessation.¹⁹

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

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

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23 ¹⁵ *Governance of ARRC*, ARRC, available at <https://www.newyorkfed.org/arrc/about#members>.

24 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>

25 ¹⁷ *Id.*

26 ¹⁸ Board of Governors of the Federal Reserve System, et al., *supra* n.11.

27 ¹⁹ ARRC Applauds Major Milestone, *supra* n.1.

28 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](https://structuredfinance.org/wp-content/uploads/2019/05/SFIG_LIBOR_Green_Paper_Combined_12.17.18.pdf).

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

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

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

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

26 ²⁵ *Id.*

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

28 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>.

1 substantial resources in preparing for the transition, including by considering legislation to aid the
2 transition²⁸ and by developing transition milestones for financial institutions.²⁹

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

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

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19 ²⁸ Written Statement of Rishi Sunak, Financial Services Regulation, U.K. Parliament, June 23,
20 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.

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

23 ³⁰ *See* Cruise, *supra* n.7.

24 ³¹ *Id.*

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

26 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/>.

27 ³⁴ *Id.*

28 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-](https://www.justice.gov/opa/pr/justice-department-issues-favorable-business-review-letter-isda-proposed-amendments-address)
[letter-isda-proposed-amendments-address](https://www.justice.gov/opa/pr/justice-department-issues-favorable-business-review-letter-isda-proposed-amendments-address).

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

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

14 **CONCLUSION**

15 For the foregoing reasons, plaintiffs’ motion for an injunction should be denied.
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26 ³⁶ See Cruise, *supra* n.7.

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

28 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/>.

1 DATED: December 10, 2020

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