No. 24-

IN THE

Supreme Court of the United States

LISA MCCARTHY, *et al.*,

Petitioners,

v.

INTERCONTINENTAL EXCHANGE INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. ALIOTO
Counsel of Record
TATIANA V. WALLACE
ALIOTO LAW FIRM
One Sansome Street, 35th Floor
San Francisco, CA 94104
(415) 434-8900
jmalioto@aliotolaw.com

LAWRENCE G. PAPALE
LAW OFFICES OF LAWRENCE G. PAPALE
The Cornerstone Building
1308 Main Street, Suite 117
St. Helena, CA 94574

Counsel for Petitioners

380127

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This is a private antitrust suit brought under Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26) for violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2).

The questions presented are:

Whether Petitioners were denied their constitutional right to a "hearing" and opportunity for an oral argument under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Whether in light of the admissions by the Respondents that the LIBOR-based intra bank interest rate used as the benchmark rate offered for loans to consumers and businesses, and all varieties of consumer financial instruments, injures and damages consumers who pay for those financial products pursuant to Section 4 of the Clayton Antitrust Act, which provides that any person may bring suit for "any amount" for injury sustained by reason of the violations of Sections 1 and 2 of the Sherman Antitrust Act.

Whether in light of the Respondents' admissions that the LIBOR-based intra bank interest rate used as the benchmark rate offered for loans to consumers and businesses, Petitioners sufficiently alleged standing both as a threat of injury and injury in fact, which is satisfied by their purchase of any LIBOR-based consumer loans at higher-than-competitive rates from the Respondents or their co-conspirators.

Whether the agreed upon formula, in which each of the sixteen Participant Banks submits on a regular basis its opinion as to what the interest rate should be and Respondent ICE discards the lowest four and highest four, taking the average or mean of the remaining eight, shows the difference between the lowest suggested amount and the agreed average rate and sufficiently estimates the amount of damage suffered by the Petitioners.

Whether, after the filing of the Petitioner's case, the admission by the Respondents that their agreement to fix the LIBOR-based intra bank interest rate interbank interest rate pursuant to a formula without Congressional approval "may be restricted or prohibited by law" in the United States is an admission that the Respondents' conduct is illegal under Sections 1 and 2 of the Sherman Antitrust Act.

Whether, contrary to this Court's seminal decision in *United States v. Socony Vacuum Oil.*, 310 U.S. 150 (1940), the Court below erred in affirming the District Court's Rule 12(b)(6) dismissal notwithstanding the "plausibility" of the allegations by the Petitioners that the Respondents' agreement to fix the LIBOR-based intra bank interest rate used as the benchmark rate offered for loans to consumers and businesses, pursuant to a set formula without Congressional approval, in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Whether contrary to the Panel's assertion, specific intent is required for per se violations of the antitrust laws for price-fixing. *See United States v. Socony-Vacuum Oil, Co. Inc., et al.*, 310 U.S. 150 (1940).

Whether the decision by the Court of Appeals finding certain Respondents beyond the reach of personal jurisdiction is contrary to Section 12 of the Clayton Act allowing jurisdiction over Respondents who were found or did business in the United States or had an effect on the commerce of the United States. *See Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962).

Whether the courts below erred in prohibiting Petitioners to take jurisdictional and merit deposition discovery pursuant to Rule 12(c) and Rule 56(d) of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the Court of Appeals. They are: LISA MCCARTHY;MARY KATHERINE ARCELL;KEITH DEAN BRADT; JOSE BRITO;JAN MARIE BROWN; ROSEMARY D'AUGUSTA; BRENDA DAVIS;PAMELA FAUST; CAROLYN FJORD; DONALD C. FREELAND; DONNA FRYE; GABRIEL GARAVANIAN;HARRY GARAVANIAN; YVONNE JOCELYN GARDNER;VALARIE JOLLY; MICHAEL MALANEY;LENARD MARAZZO; TIMOTHY NIEBOER;DEBORAH PULFER;BILL RUBINSOHN;SONDRA RUSSELL;JUNE STANSBURY; CLYDE DUANE STENSRUD; GARY TALEWSKY;DIANA LYN NULTICAN; PAMELA WARD;CHRISTINE M. WHALEN.

Respondents in the Court of Appeals were INTERCONTINENTAL EXCHANGE, INC.;INTERCONTINENTAL EXCHANGE HOLDINGS, INC.; ICE BENCHMARK ADMINISTRATION LIMITED;ICE DATA SERVICES,INC.; ICE PRICING AND REFERENCE DATA LLC;BANK OF AMERICA CORPORATION;BARCLAYS BANK PLC;BARCLAYS CAPITAL,INC.;CITIBANK, N.A.; CITIGROUP,INC.; CITIGROUP GLOBAL MARKETS,INC.; RABOBANKU.A.; CREDIT SUISSE GROUP AG; CREDIT SUISSE AG; CREDIT SUISSE SECURITIES (USA) LLC; DEUTSCHE BANKAG; DEUTSCHE BANK SECURITIES,INC.;HSBC HOLDINGS PLC; HSBCBANK PLC;HSBC BANK USA,N.A.;HSBC SECURITIES (USA)INC.; JPMORGAN CHASE & CO.; J.P.MORGAN SECURITIES LLC; LLOYDSBANK

PLC;LLOYDS SECURITIES INC.; MUFG BANK, LTD.;THE BANKOF TOKYO-MITSUBISHI UFJ LTD;MITSUBISHI UFJ FINANCIAL GROUP INC.;MUFG SECURITIES, AMERICAS INC.; ROYAL BANK OFSCOTLAND GROUP PLC; ROYALBANK OF SCOTLAND,PLC; NATIONAL WESTMINSTER BANK PLC;NATWEST MARKETS SECURITIES INC.;SUMITOMO MITSUIBANKING CORPORATION; SUMITOMO MITSUIFINANCIAL GROUP, INC.;SUMITOMO MITSUI BANKING CORPORATION EUROPE LTD; SMBC CAPITAL MARKETS, INC.;UBS GROUP AG;UBS AG; UBS SECURITIES LLC; BANK OFAMERICA, N.A.; JPMORGAN CHASEBANK, N.A.

RELATED PROCEEDINGS

The following proceedings are directly related within the meaning of Rule 14(b)(iii):

Lisa McCarthy, et al., v. Intercontinental Exchange, Inc., et al., No. 20-cv-05832-JD. Judgment entered October 9, 2023.

Lisa McCarthy, et al., v. Intercontinental Exchange, Inc., et al., Appeal from the United States District Court for the Northern District of California, James Donato, District Judge, Presiding, No. 23-3458 9th Cir. Judgment *affirmed*, December 5, 2024.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Cited Authorities

Page

Statutes and Rules

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not published in the Federal Reporter but is reprinted at App. A, p. 1a. The District Court's decisions are not published in the Federal Supplement but are reprinted at App. B, p. 8a and App. C, p. 19a.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued an order affirming the judgment of the District Court on December 9, 2024. App. A, p. 1a. The Court denied the petition for panel rehearing and rehearing *en banc* on January 22, 2024. App. E, p. 43. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

> other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 12 of the Clayton Act, 15 U.S.C. § 22

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all processes in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Section 16 of the Clayton Act, 15 U.S.C. § 26

> . . . any person . . . shall be entitled to sue and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.

INTRODUCTION

This case involves claims by 27 named Petitioners for damages and injunctive relief under Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26) for violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2).

Petitioners alleged that the Respondents have engaged in a combination to fix prices, a *per se* violation of the U.S. antitrust laws, eliminating competition between and among themselves, securing for themselves guaranteed profits, damaging and threatening innocent parties who paid or were threatened to pay the unlawfully fixed prices. The Respondents did not seek nor were they granted any congressional sanctions or approval by Congress, as was specifically required by the Supreme Court of the United States for any agreements fixing or stabilizing prices in any industry. *See United States v. Socony-Vacuum Oil, Co. Inc., et al.*, 310 U.S. 150 (1940). Rules and regulations of foreign countries cannot authorize conduct which is in violation of the laws of the United States.

The Respondent banks who were participants ("Participant Banks") in the submissions to determine the interest rate for USD LIBOR by formula were the largest, most successful, and financially strongest banks in the world, which reasonably knew and foresaw that those interest rates would be applied and would affect the foreign and interstate commerce of the United States and the citizens of the United States. The Respondents, including foreign-based banks or their subsidiaries, divisions or parents, and IBA as the calculator and administrator of the fixed price, all agreed to adhere to the fixed price and

contributed to, profited from, and furthered the purposes, motives, and intents of the unlawful cabal. Knowing and unknowing national, regional, and local banks and other financial entities furthered the unlawful combination by charging their consumers and customers the fixed price and thereby became participants in the furtherance of the fixed price.

According to the formula, each of the Participant Banks would submit on a regular basis its opinion as to what the interest rate should be. Respondent ICE would accept these sixteen submissions, discard the lowest four and highest four, and then take the average or mean of the remaining eight. The result would be the agreed upon interest rate by a set formula to be charged by all of the major banks for their financial instruments, including swaps, mortgages, student loans, automobile loans, etc., which automatically eliminated price cutters, guaranteed a profit, and eliminated any visage of competition between and among themselves. The estimate of damages for borrowers is easily determined by subtracting the lowest suggested interest rate from the agreed upon formula interest rate. Contrary to the Panel's claim that "Plaintiffs' damages are "speculative" (Panel Order, ¶ 3), the Respondents themselves in their own rules of rate making established the least amount of the damages that they have caused by highlighting the difference between the fixed price and the lowest price cutter rate discarded by the agreed-upon formula, each amount of which is easily ascertained by the Defendants' own statistics and calculations.

On August 18, 2020, Petitioners filed their original complaint and motion for an order to show cause why the

Respondents should not be prohibited from fixing the price of an agreed formula to fix the LIBOR intra bank interest rate, said to be the most important number in the world, affecting, as claimed by a senior executive of JPMorgan, more than $400 Trillion ($400,000,000,000,000) in financial instruments throughout the world, specifically including consumer products such as mortgages, student loans, automobile loans and other consumer products, as well as business and financial instruments involving swaps and other trades. (FAC ¶ 1).

The Respondents have admitted through requests for admissions in this case that they (1) engaged in transactions in the United States that reference USD; (2) agreed to abide Code of Conduct which set administered the formula to set the USD ICE LIBOR rate; (3) knew USD ICE LIBOR was a benchmark rate referenced in financial transactions that was used in the United States during the Relevant Period; and (4) not aware of any congressional immunity for the bank with regard to LIBOR. *See* FAC ¶¶ 64-76.

Because of and subsequent to the claims made by the Petitioners in this case, IBA had warned the Respondents that their conduct the use of LIBOR in the United States may be a violation of the antitrust laws of the United States:

> "The use of LIBOR in jurisdictions outside the United Kingdom [the United States] and by entities subject to the oversight of other regulatory authorities [the United States Congress and the United States Supreme Court] may be <u>restricted or prohibited by law</u>

> in those jurisdictions and by the requirements of such regulatory authorities." FAC ¶ 10, *see also* Ice Benchmark Administration LIBOR, Using LIBOR, https://www.theice.com/iba/libor, published as of at least 10/2/2022.

On October 10, 2023, three years after the filing of the Complaint and denying all Petitioners' requests for deposition discovery, the District Court without notice of a hearing and without a hearing granted Respondents' dispositive motions, entered a judgment in favor of Respondents and against Petitioners. On December 9, 2024, the U.S. Court of Appeals for the Ninth Circuit, without a hearing, issued an order affirming the judgment.

STATEMENT

Respondents have been and are members of a price-fixing cartel designed to eliminate price competition between and among themselves and among their co-conspirators to fix the intra bank interest rate used as the minimum rate offered for loans to consumers and businesses, including, inter alia, for mortgages, student loans, credit cards, auto loans, lines of credit, contracts, and all varieties of financial instruments. This rate is known as the London Inter-Bank Interest Rate or LIBOR. FAC ¶ 7. LIBOR is a registered trademark of the ICE Benchmark Administration Ltd. (hereinafter "IBA"). In its online publications, IBA has admitted that:

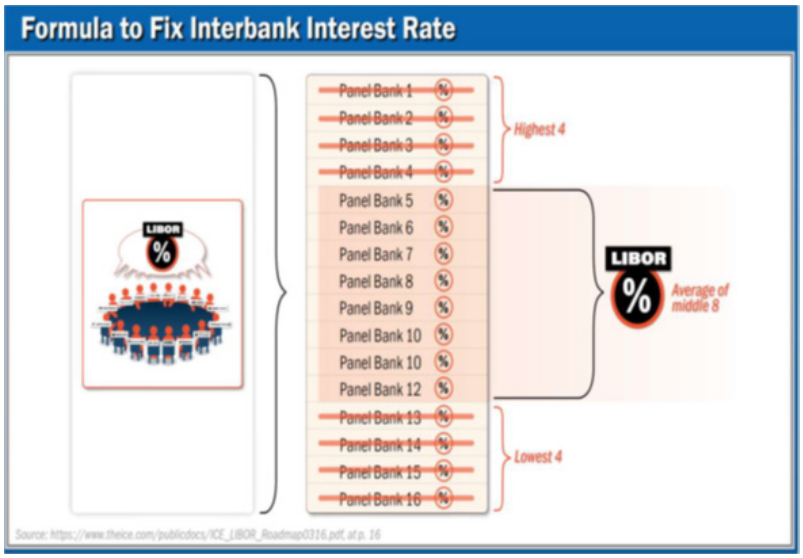
> "LIBOR is a widely-used benchmark for short-term interest rates.
>
> The current LIBOR methodology, which used input data provided by LIBOR panel banks

> (Panel Banks) 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 find themselves in such markets in particular currencies for certain tenors.
>
> "LIBOR is currently calculated for five currencies (USD, GBP, EUR, CHF and JPY) and for seven tenors in respect of each currency (Overnight/Spot Next, One Week, One Month, two Months, Three Months, Six Months and 12 Months). This results in the publication of 35 individual rates (one for each currency and tenor combination) every appliable London business day.
>
> Used globally, LIBOR is often referenced in derivative, bond and loan documentation, and in a range of consumer lending instruments such as mortgages, and student loans." FAC ¶ 9; *see also* FAC ¶¶ 88-97.

Structure of the Respondents' Price Fixing Conspiracy

Fifteen out of the sixteen "LIBOR Participant Banks" operate within the United States, each of which is a Respondent in this action: Bank of America, Barclays, Citibank, Rabobank, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Lloyds Bank, MUFG Bank, Royal Bank of Scottland, Royal Bank of Canada, Sumitomo, Norinchukin and UBS. Each Bank Respondent is one of the Panel Banks that contributes rate data to ICE for calculation of the USD LIBOR benchmark formula

rate. Respondent ICE LIBOR is the designated calculator, coordinator and administrator of the cartel price-fixing conspiracy and LIBOR is the interest rate that all the participating Respondent Banks agree to charge. Each of the 16 Participating Panel Banks submits its individual suggestions as to the intra-bank interest rates that should be charged to ICE LIBOR. Pursuant to its operating agreement with the Banks, ICE LIBOR accepts each Bank's interest rate suggestions, then discards the four highest and the four lowest pursuant to its formula. The average that remains is the LIBOR interest rate that each Participating Bank agrees to charge.



The simple surgical precision of this formula belies the unlawful, open and notorious, if not contemptuous, infection of "almost $400,000,000,000,000 of wholesale and consumer products in the United States." (JP Morgan Chase, David S. Watson, Head of the Libor Transition

Program, Commercial Banking, September 12, 2019.) Because LIBOR is a component or benchmark used in countless business dealings, it has been called "the world's most important number."[1]

In effect, LIBOR is the rate that an exclusive group of major international Banks charge each other for short-term loans and it has been the primary benchmark for short-term interest rates to consumers globally. LIBOR is calculated for five different currencies—the US dollar, the Euro, the British pound, the Japanese yen, and the Swiss franc—and serves seven different tenors—overnight/spot next, one week, and one, two, three, six, and 12 months. Since February 1, 2014, the rate has been calculated and published by the Intercontinental Exchange Benchmark Administration ("IBA") and became known as ICE LIBOR or simply LIBOR. Issuers of financial instruments typically set interest rates at a spread above LIBOR. The interest rate consumer loans, whether variable or fixed, tied to USD LIBOR include mortgages, lines of credit, student loans, credit card debt and other forms of consumer debt.

This action challenges the establishment and enforcement by Intercontinental Exchange Holdings, Inc. and its ICE subsidiaries of an agreement between and among the Respondents and their co-conspirator Banks to fix prices on interest rate consumer loans and credit in the United States by jointly adhering the LIBOR formula and by agreeing to use the resulting LIBOR interest rate as a component of the interest charged to borrowers in consumer loans and credit. This agreement, which is

1. *Gelboim v. Bank of Am.*, 823 F.3d 759, 765 (2d Cir. 2016)

unlawful per se, results in anticompetitive rates of interest charged to Petitioners who are consumers of variable or fixed rate interest loans and credit in the United States, and it unreasonably restrains commerce.

The Origins of LIBOR

The British Bankers' Association ("BBA") is the leading trade association for the financial-services sector in the United Kingdom. *Gelboim*, 823 F.3d at 765. When the BBA administered LIBOR, BBA was a private association that was operated without regulatory or government oversight and governed by senior executives from its Member Banks. The BBA began setting LIBOR on January 1, 1986, using separate banking panels for different currencies. Id. The U.S. Dollar ("USD") LIBOR panel was composed of as many as 16 to 18 Member Banks of the BBA. Id.

The LIBOR Price-Fixing Formula

Under the BBA LIBOR regime, the daily USD LIBOR was set by surveying the 16 panel Bank members and asking, "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?" Each Bank was to respond on the basis of (in part) its own research and its own credit and liquidity risk profile. Thomson Reuters would later compile these submissions and publish them on behalf of the BBA. The final LIBOR formula rate was the mean of the eight submissions that remained after excluding the four highest and the four lowest. *Gelboim*, 823 F.3d at 765-766. The daily submission

of each Bank was to remain confidential until after the LIBOR formula was computed and the rate published. *Gelboim*, 823 F.3d at 766.

On February 1, 2014, the British Bankers Association (BBA) handed over the administration of LIBOR to Intercontinental Exchange Benchmark Administration Limited (IBA). IBA managed the compilation and publication of the London Interbank Offered Rate, known as ICE LIBOR. The IBA is an independently chartered commercial enterprise, not a government-run agency. The IBA manages 35 different LIBORs, including five different currencies for seven different maturities—ranging from overnight to 12 months, producing a total of 35 interest rates, at 11:55 am London time on each applicable London business day. *See* FAC ¶ 98. LIBOR's practical applications are myriad. The rate is included by name in the standard language of many loan documents, and its influence ranges from esoteric financial instruments such as swaps and derivatives to more commonplace student loans and mortgages. Each LIBOR calculation is currently based on input data contributed by a panel of between 11 and 16 Contributor Banks for each of the five LIBOR currencies. Each Contributor Bank submits input data for all seven LIBOR maturities in every currency for which it is on a panel. FAC ¶ 100. The following table shows the panel composition for USD LIBOR as of the filing of the original complaint in August, 2022:

Respondents Bank of America, Barclays, Citibank, Rabobank, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Lloyds Bank, MUFG Bank, Royal Bank of Scotland, Royal Bank of Canada, Sumitomo, Norinchukin, and UBS are IBA Contributor Banks for the USD LIBOR panel. The LIBOR rate is calculated based upon a formula using the submissions from the Contributor Banks. Once all submissions are received, they are ranked in descending order and the highest and lowest four submissions are excluded. A mean is calculated from the remaining middle submissions and that mean is rounded to five decimal places. Each Contributor Bank's submission carries equal weight in the calculation. The LIBOR rate is agreed upon by the Respondents.

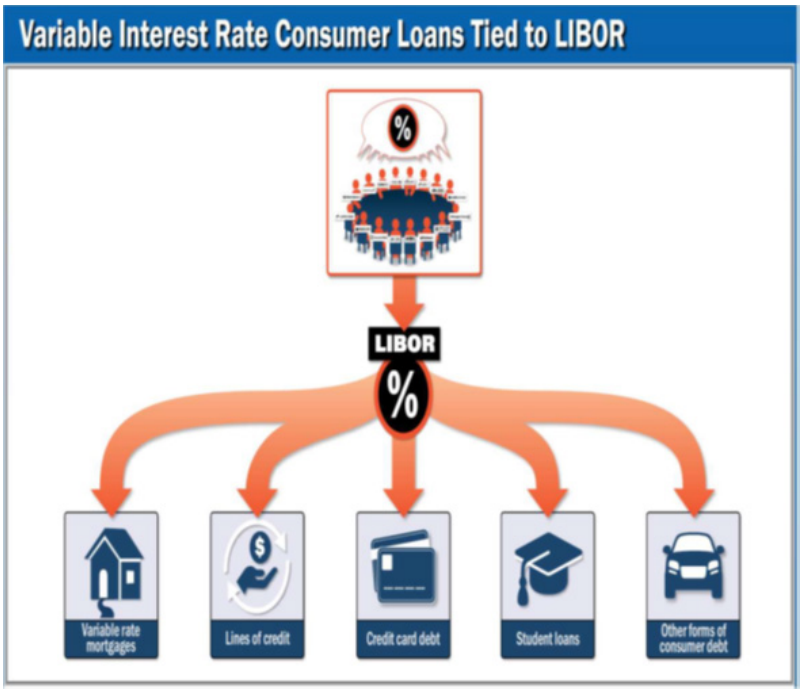
The formula to fix the rate agreed to by the Respondent banks and co-conspirators, and their Respondent agents charged with calculating the agreed price-fixed interest rate, is simple in its arithmetic and devastating in its implementation: As of the date of the filing of the original complaint (1) the sixteen panel banks

submit their proposals for what the interest rate should be to the Respondent ICE US LIBOR; (2) the Respondent ICE US LIBOR excludes the four highest and four lowest submitted rates; and then (3) averages the remaining eight. The result of this agreed "trim average" is the LIBOR interest rate that Respondents have agreed in writing to be published, used and complied with as a benchmark interest rate for financial instruments offered in the United States. FAC ¶ 11. The Respondent banks agreed to this "trim average" formula, the resultant rate, and the implementation of it in their consumer and business loans and other financial products such as credit cards, mortgages and student loans. United States consumers, including certain of these Petitioners, have paid the fixed-price LIBOR rate as a benchmark base rate on their loans and credit cards. FAC ¶ 12, *see also* FAC ¶¶ 98-136.

The LIBOR Code of Conduct sets out the manner and method by which submissions must be made and how LIBOR rates will be used. Each Respondent Bank has agreed in writing to adhere to the LIBOR Code of Conduct which requires each Bank to use LIBOR as a base rate. (*See* ICE Administration LIBOR Code of Conduct, Issue 7, July 24, 2019, at Paragraph 8.1: "Each contributor's [Bank's] submitter and the direct managers of that submitter shall acknowledge in writing that they have read the code of conduct and that they will comply with it.")

Consumer Loans with LIBOR Benchmark

As of 2019, $1.2 trillion worth of residential mortgage loans and $1.3 trillion of consumer loans had been priced using LIBOR.



(FAC ¶110).

The LIBOR agreement deprives businesses and consumers of the benefits—lower fees, more favorable terms, innovation, and differentiated services—that they would otherwise realize if there was competition among the LIBOR affiliated Banks on interest rates.

The fact that the formula agreed to by the Respondent Banks rejects the four lowest rate submissions in coming to the agreed upon interest rate effectively skews the LIBOR rate higher and costs the Banks' customers more in interest. For example, the amount paid by consumers is easily calculated as the following chart demonstrates for one day in 2014: *See* FAC ¶109

Decisions Below

On October 10, 2023, the District Court without notice of a hearing and without a hearing granted Respondents' dispositive motions, entered a judgment in favor of Respondents and against Petitioners. (A-6, A-7).

On December 9, 2024, the U.S. Court of Appeals for the Ninth Circuit without a hearing affirmed the judgment of the District Court. (App. A). On January 22, 2025, the Court of Appeals denied the petition for panel rehearing and rehearing en banc. (App. E).

REASONS FOR GRANTING THE WRIT

PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO A HEARING BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ON THE MOTION TO DISMISS

Notwithstanding the Petitioners' demand for a hearing, both the Panel and the District Court denied the Petitioners' right to a hearing, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, as interpreted by this Court, as well as Rule 12(i) of the Federal Rules of Civil Procedure, which requires a hearing before trial on motions brought under Rule 12(b).

The Fifth Amendment provides, in pertinent part, as follows:

> No person shall be [. . .] deprived of life, liberty, or property, without due process of law . . .

This Court interpreted the Due Process Clause. In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court stated as follows:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313 (emphasis added).

This Court has reaffirmed this principal time and time again. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court stated:

> "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property. . . ." *Id.* at 557 (emphasis added).

Rule 12 provides, in pertinent part, as follows:

> (i) Hearing Before Trial. If a party so moves, any defenses listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. R. Civ. P. 12(i) (emphasis added).

Rule 12 requires and guarantees Petitioners a hearing on the Respondents' potentially dispositive motions.

Finally, this Court gives the English language its plain and common usage. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). A hearing is not a "writing."

THE LOWER COURTS IGNORED KEY FACTS IN THE COMPLAINT WHICH SUFFICIENTLY ALLEGED A PRIMA FACIE PRICE-FIXING CONSPIRACY AMONG RESPONDENTS

A. Petitioners' Complaint States the Classic Conspiracy in Violation of the Antitrust Laws

Section 1 of the Sherman Antitrust Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. There is no need for Plaintiffs to show an "express" agreement among the Defendants in order to prove a conspiracy in violation of Section 1 of the Sherman Act.

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939) (citations omitted). *See also Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976) ("Conspiracies . . . are rarely evidenced by explicit agreements, but must almost always be proved by inferences that may be fairly drawn from the behavior of the alleged conspirators." [internal quotation omitted]). Therefore, Petitioners are entitled to all inferences that may fairly be drawn from the factual allegations:

> "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. et al. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

Bell Atl. v. Twombly does not require Petitioners to plead evidence, as the District Court appears to suggest. In *Twombly*, this Court simply required plaintiffs to provide factual allegations that "raise a right to relief above the speculative level" and that offer more than just "a formulaic recitation of the elements of a cause of action." *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). This, Petitioners have done. The Court made clear that plaintiffs do "not need detailed factual allegations," and it did not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 555, 570. This Court did not intend for its "plausibility" requirement to expand into a "probability" hurdle, and it allowed a complaint to proceed "even if it

strikes a savvy judge that actual proof of these facts is improbable." *Id*. at 556.

Similarly, the Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) made clear that "[t]he plausibility standard is not akin to a 'probability requirement,'" and it required a "context-specific" analysis in which "the reviewing court [] draw[s] on its judicial experience and *common sense*." *Id*. at 679 (emphasis added). *Twombly* "never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression." *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). The *Twombly* Court "emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement." *Id*. at 233, 234. Even after *Twombly*, "Rule 8 requires only a short and plain statement of the claim and its grounds." *Id*. at 232.

That standard applies here.

"Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), citing *Twombly*, 550 U.S. at 555 (quotation and other citation omitted). "[V]iewing the totality of the alleged circumstances in the light most favorable to [plaintiff], the complaint puts forth 'enough facts to state a claim for relief that is plausible on its face.' Our notice pleading requirements do not require more." *Johnson v. Riverside Healthcare Sys*., 534 F.3d 1116, 1123 (9th Cir. 2008) (quoting *Twombly*, *supra*) (emphasis added). *Twombly* has never imposed the heightened pleading standard in antitrust cases that the District Court appears to suggest. *See*, *e.g.*, *In re TFT-LCD (Flat*

Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009).

Here, Petitioners have met and exceeded the pleading standards of *Twombly* and *Iqbal*. *See* FAC ¶¶ 9-13, 30, 31, 42, 57, 64-86, 98-136. The FAC alleges very specific and detailed, plausible facts of conspiracy—which the Court must accept as true—and which, when proved, will demonstrate that Respondents have violated the law. *Iqbal*, 556 U.S. at 678.

B. Respondents' Agreement is a *Per Se* Violation of the Sherman Act

The facts alleged in the FAC are *per se* violations of the antitrust laws for price fixing (*see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150). This Court specifically refers to the use of "formulae" as one of the means to fix the price. *Id.* at 222. Such prices "are fixed because they are agreed upon." *Id.* Likewise, claims of "financial disaster" (*Id.* at 221) and other predictions of financial chaos are irrelevant.

Horizontal price-fixing is illegal without further inquiry:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense . . . Hence, prices are fixed . . .

> if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial . . . the result was to place a floor under the market. . . .

Socony-Vacuum Oil, 310 U.S. at 221-23 (emphasis added).

As this Court held " . . . price-fixing combinations which lack congressional sanction are illegal per se. . . ." *Socony*, *supra*, at 226-27. This Court was quite specific in holding that Congressional approval of any price-fixing was absolutely necessary. "For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise, national policy on such grave and important issues as this [price-fixing] would be determined not by Congress nor by those to whom Congress has delegated authority but by virtual volunteers." *Id*. Indeed, the Court stated that any other procedure would be an adoption of a foreign system: "The methods adopted by Congress for alleviating the penalty of the Sherman Act through approval by designated public representatives would be supplanted by a foreign system." *Id*. at 227 (emphasis added).

Furthermore, this Court definitively held that "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive . . . if such a shift is to

be made, it must be done by the Congress. Certainly, Congress has not left us with any such choice nor has the Act created or authorized the creation of any special exceptions in favor of the [bank] industry." *Id.* at 221.

It is undisputed in this case that LIBOR has not received any Congressional sanction. Therefore, the LIBOR price-fixing combination is illegal *per se*. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

C. The FAC Alleges a Conspiracy in Which Each Respondent Participated

Unlike the complaint found lacking in *Twombly*, the Complaint here does not seek to draw an inference of an agreement based merely on passive parallel behavior and inaction. *See Twombly*, 550 U.S. at 564-65. Rather, the FAC directly alleges an agreement—an agreement that Respondents readily admit. In our case, each Respondent's participation as a co-conspirator in the agreement is specifically detailed and plausibly alleged.

Petitioners FAC alleges Respondents' unlawful combination and conspiracy to fix prices on USD LIBOR-based interest rates in violation of Sections 1 and 2 of the Sherman Act. (FAC ¶¶ 98-141). Specifically, Petitioners assert that "LIBOR interest rates are jointly set by the Respondents. Respondents and their co-conspirator banks and credit card companies in the United States agree to use and do use USD LIBOR as a component of the interest charged in fixed and variable interest rate loans on credit cards in the United States. Variable and fixed interest rate loans and credit tied to USD LIBOR include fixed and

variable rate mortgages, asset backed securities, lines of credit, municipal bonds, credit default swaps, credit card debt, student loans, auto loans and other forms of debt. (*Id.* ¶ 110.) Petitioners further allege that by agreeing to set LIBOR, Respondents engaged in *per se* illegal price-fixing. (*Id.* ¶¶ 142-161.)

Moreover, the Panel erred in finding that the allegations against "unnamed co-conspirators" are "immaterial." Panel Order, ¶ 3. Petitioners sufficiently alleged standing which again is proved by the purchase of a fixed product on any LIBOR-based consumer loan whether from a Respondent or unnamed co-conspirators. *See*, *e.g.*, FAC ¶¶ 20, 21 (*see* specific allegations with regard to Plaintiff Lisa McCarthy).

As demonstrated above, the FAC directly alleges a plausible agreement and provides sufficient facts to show each Respondent's participation in the conspiracy. The allegations far exceed the slight evidence standard and must be accepted as true.

THE PETITIONERS HAVE STANDING

Contrary to the courts below, the allegations of the Complaint demonstrate that the Petitioners as victims of the price-fixing agreement have antitrust standing. The Court of Appeals affirmed the dismissal of the Petitioners' claims for "lack of antitrust standing" (Panel Order, ¶ 3). The District Court dismissed claims against the United States Defendants "with prejudice for failure to adequately plead antitrust standing" (App. B, pp. 10a-11a). The facts alleged in the Complaint demonstrate a classic example of antitrust standing.

First, Petitioners sufficiently alleged standing both as a threat of injury and injury in fact, which is proved by the fact of the purchase of the fixed product, and standing is satisfied by the Petitioners' purchase of any LIBOR-based consumer loans at higher-than-competitive rates from the Respondents or their co-conspirators.

For example, the FAC specifically alleged the following with regard to some of the Petitioners:

> 20. . . . Plaintiff Yvonne Jocelyn Gardner has paid LIBOR based interest on this note and therefore has incurred overcharges as a result of the LIBOR price-fixing conspiracy. She is threatened with injury as a result of the LIBOR price-fixing conspiracy to the extent the card may be used in the future.
>
> 21. Plaintiff Lisa McCarthy is also a purchaser of a LIBOR-based adjustable rate mortgage through Fifth Third Mortgage Company located in Cincinnati, Ohio. The Adjustable Rate Note is dated July 17, 2006 and tracks the LIBOR One-Year Index as published in the Wall Street Journal, with rate caps. The "Index" is the average of the interbank offered rates for one-year U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The initial interest rate was 6.875% on a loan of $38,000. Monthly payments started at $265.55. Plaintiff McCarthy has paid LIBOR based interest on her adjustable rate mortgage and

> therefore has incurred overcharges as a result of the LIBOR price-fixing conspiracy.

See FAC ¶¶ 20, 21.

Under Section 4 of the Clayton Act, a purchaser of a fixed price is injured at the purchase when the person purchases, which is the injury in fact. *See Reiter v. Sonotone*, 442 U.S. 330 at 339 (1979). The principle in *Reiter* is a well-established one: " . . . A person whose property is diminished by payment of money wrongfully induced is injured in his property." *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906).

The broad text of Section 4 readily covers consumers who purchase LIBOR-based consumer loans at higher-than-competitive prices from the Respondents or their co- conspirators. The classic case of antitrust injury was interpreted by this Court's decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-44 (1979), as follows:

> "In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for [t]he people of the United States as individuals,' especially consumers," and the treble damages provision of the Clayton Act as "conceived primarily as 'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.'" 429 U. S. 486 n. 10. Thus, to the extent that the legislative history is relevant, it supports our holding that a consumer deprived of money by

> reason of allegedly anticompetitive conduct is injured in "property" within the meaning of § 4.
>
> "Nor does her status as a 'consumer' change the nature of the injury she suffered or the intrinsic meaning of "property" in § 4 that consumers of retail goods and services have standing to sue under Section 4 is implicit in our decision in *Goldfard v. Virginia State Bar*, 421 U.S. 773 (1975)." *Reiter v. Sonotone, supra*, 442 U.S. at 340-341.
>
> " . . . Congress designed the Sherman Act as a 'consumer welfare prescription.' . . . [cites omitted] Certainly, the leading proponents of the legislature perceived the treble- damages remedy of what is now Section 4 as a means of protecting consumers from overcharges resulting from price-fixing. *E.g.*, 21 Cong. Rec., 2457, 2460, 2558 (1890)." *Id.* at 343; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Second, even the District Court confirmed that "[a] single plaintiff, Yvonne Jocelyn Gardner, alleges that she is a "purchaser of a LIBOR rate based note from Defendant Bank of America." App. B, p. 11a. Thus, the relationship between plaintiffs' harm and the defendants' alleged wrongdoing is not too remote to be actionable. Petitioners have been shown to be either consumers of a LIBOR interest rate product or consumers of interest rate financial instruments. *See* FAC ¶¶ 18-35. The Court should have accepted as true these allegations. Accepting the allegations in the FAC as true, taken together, these

allegations surely support an inference that Petitioners have standing to bring this lawsuit.

In addition, when LIBOR was terminated and a new measure was instituted, the Respondents nonetheless agreed that because the new measure was lower than LIBOR, a committee would add a "spread adjustment" to increase the rate to measure against LIBOR. Petitioners' banks intended to follow the recommendation of the "spread adjustment" increase. The FAC specifically alleges as follows:

> "On May 12, 2021, Plaintiff McCarthy was advised by Fifth Third Preferred Mortgage Company that her LIBOR based adjustable rate mortgage would be replaced by the Secured Overnight Financing Rate ("SOFR"):
>
> > "Due to a change in market circumstances, LIBOR will cease to exist immediately after June 30, 2023. In preparation for this change, the Federal Reserve created the Alternative Reference Rates Committee (ARRC) to select an alternative interest rate to replace LIBOR. One of the ARRC's key goals is to ensure a transition to a new rate in a manner this is fair to both borrowers and lenders.
> >
> > "ARRC selected the Secured Overnight Financing Rate (SOFR) to replace LIBOR in residential

> adjustable rate mortgages (ARMS). Because LIBOR and SOFR are similar, but not identical, the SOFR interest rate has historically been lower than the LIBOR rate. ARRC therefore added what is referred to as a "spread adjustment" to SOFR so that the actual interest rate that borrowers pay under SOFR will be similar to the LIBOR rate. Please note, however, that SOFR, like LIBOR, will be subject to fluctuations." FAC ¶ 21.

The Respondents in this case combined to fix the interbank interest rate by agreeing to fix the price by a set formula which automatically eliminated price cutters, guaranteed a profit, and eliminated any visage of competition between and among themselves. The Respondents, including foreign based banks or their subsidiaries, divisions or parents, and IBA as the calculator and administrator of the fixed price, all agreed to adhere to the fixed price and all contributed to, profited from, and furthered the purposes, motives, and intents of the unlawful cabal. Knowing and unknowing national, regional, and local banks and other financial entities furthered the unlawful combination by charging their consumers and customers the fixed price, and thereby became participants in the furtherance of the fixed price.

The facts alleged in the FAC sufficiently plead a violations of the antitrust laws for price fixing. *See* FAC ¶¶ 12, 18-35. In fact, this Court specifically refers to the use of "various formulae [that] are related to the market price." *United States v. Socony-Vacuum Oil Co.*, 310 U.S.

at 222. Such prices "are fixed because they are agreed upon." *Id*. This Court gives the English language its plain and common usage, which is what it explicitly stated with regard to the price fixing, and Petitioners respectfully submit that the Court's literal interpretation of the Respondents' agreement to fix the price by a set formula cannot be simply disregarded.

THE PANEL IGNORED THE EXISTENCE OF SECTION 12 OF THE CLAYTON ACT AND ERRED IN AFFIRMING LACK OF PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS

The Panel erroneously found that "[t]he district court did not err in dismissing the claims against the Foreign Defendants for lack of personal jurisdiction" and further affirmed in error that "the district court did not abuse its discretion in denying Plaintiffs the opportunity to conduct jurisdictional discovery." App. A, pp. 4a-5a. Petitioners submit that the Panel, as the Court below, simply failed to recognize the importance of Section 12 of the Clayton Antitrust Act (15 U.S.C. § 22), nor did the Court adhere to the controlling and binding authority on personal jurisdiction. *See Continental Ore Co. et al. v. Union Carbide*, 370 U.S. 690 (1962).

First, the lower courts erred in concluding that Petitioners have not met their burden to "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction" claiming that after "Defendants filed an extensive set of declarations with respect to their lack of contacts with the United States, Dist. Ct. Dkt. Nos. 375-1 through 375-29, plaintiffs did not answer with a single opposing declaration or contrary factual showing of any

kind." App. B, p. 10a. The allegations in the FAC are not "conclusory, vague, and controverted" (A-6, p. 3), but rather sufficiently alleges jurisdictional facts demonstrating that the Respondents' conspiracy was "within the flow of" and had "a substantial effect on the interstate commerce of the United States" and that Respondents "intentionally targeted and used the instrumentalities of interstate commerce, including interstate wires, in furtherance of their illegal scheme." FAC at ¶ 17; *see also* ¶¶ 7-15, 26-31, 56-87. The Respondents have specifically admitted through requests for admissions in this case that they targeted the U.S. market. *Id.* ¶¶ 56-87. The Court must accept these allegations as true and cannot consider hearsay information outside the FAC when ruling on the Motion to Dismiss.

Second, the Respondents' unlawful price fixing agreement indisputably caused foreseeable consequences in the United States. Petitioners' FAC alleges that Respondents price fix United States Dollar LIBOR. The Court must accept these allegations as true when deciding the Defendants' Motions to Dismiss. The District Court peculiarly appears to ridicule the Plaintiffs' appeal to "common sense" (App. B, p. 10a), which unquestionably dictates that by setting the LIBOR rate in United States dollars, Respondents intended and were aware that that rate would be used in the U.S. The inclusion of a representative of the United States Federal Reserve on the LIBOR Oversight Committee implicitly acknowledges the impact of USD LIBOR in the United States (of course, that representative was not authorized by Congress, or otherwise, to immunize the Respondents' price-fixing, which had an effect in the United States. According to this Court, that representative would be a "mere volunteer.")

The District Court's reliance on the Respondents' "sworn declarations" is also misguided. Petitioners specifically alleged that "[a]ll of the foreign Defendants[']United States subsidiaries aided in the publication, promulgation, implementation and sale of the USD LIBOR rates in the United States on behalf of their parent companies." FAC ¶ 86 (emphasis added). In the Order, the Court erroneously adopted the foreign defendants' hearsay "sworn declarations denying that allegation. *See*, *e.g.*, Dist. Ct. Dkt. No. 375-2 ¶ 9 ("During the relevant time period, . . . , no UBS branch, office, agency, or employee in the United States was responsible for the determination or submission of rates for use in the calculation of USD ICE LIBOR."). App. B, p. 10a (emphasis added). In fact, Petitioners did not allege that the Respondents "determined" or "submitted" the rates for use in the calculation of USD ICE LIBOR, but rather "published," "promulgated," "implemented" and "sold" them to the Petitioners. The UBS "corporate and governance attorney at UBS AG" John Connors, who submitted the "sworn declaration" in support of the Respondent's Motion District Ct. Dkt. No. 375-2 was not the same individual (Angus Graham) who admittedly contributed to the LIBOR "Input Data" on behalf of the Respondent UBS. *See* FAC ¶ 124.

Third, Respondents have divided and targeted the LIBOR rate publishing process into geographic areas. There are five major LIBOR publications for world currencies: GBP LIBOR, EUR LIBOR, CHF LIBOR, JPY LIBOR and USD LIBOR. GBP LIBOR sets rates for the British pound; EUR LIBOR sets rates for the European euro; CHF LIBOR sets rates for the Swiss franc; JPY LIBOR sets rates for the Japanese yen; and

USD LIBOR sets rates for the US dollar. These rates are very obviously organized and targeted for transactions in the geographic areas where these currencies are used: Great Britain, Europe, Switzerland, Japan and the United States. The fact that the United States is targeted as a geographic area for USD LIBOR is another indicum of these Respondents' intent to effect transactions in the United States.

These Respondents knew or should have known that their conduct specifically targets the United States Dollars and the effect it would have in the United States by reason of their anticompetitive conduct was "prohibited by law." *See* FAC ¶ 3, fn. 1. The binding authority of this Court's decision in *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), and its progeny confirm and re-confirm the fact that only the U.S. Congress may insulate the banks or any industry from antitrust scrutiny. Respondents' conduct is not immune or protected. "[P]rice-fixing combinations which lack Congressional sanction are illegal per se." *Socony-Vacuum*, 310 U.S. at 228. Because Respondents' LIBOR combination lacks Congressional sanction, it is illegal *per se*. Petitioners respectfully submit that the Court erroneously overlooks the fact that the Antitrust Laws of the United States have prohibited price-fixing for at least a hundred years, which predates the establishment of LIBOR, and the Respondents knew full well that price-fixing, including by formula among horizontal competitors, was, and always has been, illegal in the United States.

Finally, these Respondents transact business or may be found in the United States. The FAC alleges that numerous Respondents operate branches in San Francisco

and/or are registered to do business in California.[2] This is sufficient under § 12 of the Clayton Act to establish personal jurisdiction over the Respondents. *See Action Embroidery v. Atl. Embroidery*, 368 F.3d 1174, 1180 (9th Cir. 2004). In addition, most of these entities have been served in the United States, establishing personal jurisdiction.[3] (*See* Dist. Ct. Dkt. No. 91-116, 152; Fed. R. Civ. P. 4(k)(1) and (2), "Serving a summons . . . establishes personal jurisdiction over a defendant . . . when authorized by a federal statute"; and 15 U.S.C. § 22). The so-called "jurisdictionally relevant conduct" under Section 12 of the Clayton Act includes any district where a Defendant may be found or "transact business" or "caused sufficiently foreseeable consequences in this country."

Thus, contrary to and notwithstanding the lower courts' findings, Petitioners respectfully submit that they indeed met their burden of establishing personal jurisdiction over the Foreign Defendants by making a prima facie showing that the Foreign Defendants "performed some act or consummated some transaction by which [they] purposefully directed [their] activities toward the United States or purposefully availed [themselves] of the privilege of conducting business in the United States." App. B, p. 10a. Petitioners respectfully submit that the lower courts improperly went outside of the "four corners" of the FAC and could not draw inferences or conclusions on the basis of such evidence. *See Bell Atl. v. Twombly*, 550

2. *See* FAC, ¶¶ 36-55.

3. All Respondents were either served or sent requests for waiver of service of process. Proofs of service were filed. (Dist. Ct. Dkt. No. 91-116). The remaining Respondents agreed to waive service of process. (Dist. Ct. Dkt. No. 252).

U.S. 544, 455-56 (2007). Since the courts below considered the hearsay evidence outside the FAC, the Respondents' Motion to Dismiss must be converted to a Motion for Summary Judgment and discovery must be permitted. *See* Fed. R. Civ. P. 12(d) and 56(d).

The Lower Courts Erroneously Denied Petitioners' Request for Jurisdictional Discovery

Petitioners respectfully submit that the Panel erroneously affirmed the District Court's improper exercise of its discretion to deny their request for jurisdictional discovery. App. B, p. 10a. As detailed above, Petitioners' theories of jurisdiction were not "too speculative" and Petitioners did not proffer only "bare allegations." *Id.* If the Court believes that relevant facts relating to jurisdiction are in dispute, the Court should allow jurisdictional discovery. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986).

Petitioners had continually sought to take the 30(b)6 depositions and sought to compel the depositions of Respondents since as early as mid-2020. After the original Complaint was filed on August 18, 2020, Petitioners, pursuant to Rule 26, offered their pretrial disclosures and their plan for discovery which included Rule 30(b)6 depositions of Respondents. The Respondents, however, declined to produce any disclosures or discovery or sit for depositions until the Court ruled on their motions to dismiss.

In order to fully meet their burden of proving jurisdiction and conclusively provide the evidence that the Court was expecting, the District Court should have

permitted Petitioners jurisdictional discovery because the additional information that Petitioners would need to make that showing is within the Petitioners' possession. Specifically, the District Court should have allowed Petitioners to depose the individuals who submitted the declarations regarding the Foreign Defendants' contacts with the United States. These depositions were a necessary and efficient means of obtaining this jurisdictional information. Moreover, the requested depositions would show that when all the Respondents, foreign and domestic, joined the LIBOR cartel as co-conspirators, they knew and/or reasonable foresaw that their price-fixing of the intra-bank USD LIBOR interest rate would have a direct impact and effect and cause "foreseeable consequences" in the United States.

THE LOWER COURTS IMPROPERLY RELIED ON INFORMATION OUTSIDE THE "FOUR CORNERS" OF THE COMPLAINT AND INCORRECTLY CONSIDERED THE FOREIGN DEFENDANTS' DECLARATIONS

The Panel, as did the Court below, improperly goes outside of the "four corners" of the FAC and relies on information outside the pleading in support of the ruling.

The Court's reliance on the Foreign Defendants' "declarations" is misguided. Petitioners specifically alleged that "[a]ll of the foreign Defendants['] United States subsidiaries aided in the publication, promulgation, implementation and sale of the USD LIBOR rates in the United States on behalf of their parent companies." FAC ¶ 86 (emphasis added).

The District Court erroneously adopted, and the Panel affirmed, the foreign defendants' hearsay "sworn declarations denying that allegation. *See, e.g.*, Dist. Ct. Dkt. No. 375-2 ¶ 9 ("During the relevant time period, . . . , no UBS branch, office, agency, or employee in the United States was responsible for the determination or submission of rates for use in the calculation of USD ICE LIBOR."). App. B, p. 10a (emphasis added). In fact, Petitioners did not allege that the Respondents "determined" or "submitted" the rates for use in the calculation of USD ICE LIBOR, but rather "published," "promulgated," "implemented" and "sold" them to the Petitioners. The UBS "corporate and governance attorney at UBS AG" John Connors, who submitted a "sworn declaration" in support of the Respondent's Motion (Dist. Ct. Dkt. No. 375-2) was not the same individual (Angus Graham) who admittedly contributed to the LIBOR "Input Data" on behalf of the Respondent UBS. *See* FAC ¶ 124.

Moreover, the cases relied by the Panel do not address personal jurisdiction under Section 12, and the Panel's reliance on them is misguided. Petitioners respectfully submit that the Panel and the District Court cannot consider such evidence in ruling on the Respondents' Motions to Dismiss, nor may the Panel draw inferences or conclusions on the basis of such evidence. If information outside the FAC is considered, the Court must convert the motion to dismiss to a motion for summary judgment and permit discovery under Fed. R. Civ. P. 12(d) and 56(d).

Pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, and under the circumstances of this case, Petitioners should be allowed to take depositions of the Respondents and their expert who filed affidavits, all of which were designed by the Respondents to escape

personal jurisdiction for their participation in the agreement to use the formula to set the LIBOR rate. (Dist. Ct. Dkt. No. 394).

CONCLUSION

The rulings by the lower courts have a chilling effect upon the civil enforcement of the antitrust laws, besides being an obvious denial of due process and equal protection of the law. For the foregoing reasons, Petitioners seek to hold the Respondents accountable for their blatant disregard of antitrust laws of the United States and respectfully submit that this Court should grant the Petition, set aside the District Court's Judgment and remand this case for discovery, jury trial and equitable relief consistent with this Court's decision.

Respectfully submitted,

Joseph M. Alioto
Counsel of Record
Tatiana V. Wallace
Alioto Law Firm
One Sansome Street, 35th Floor
San Francisco, CA 94104
(415) 434-8900
jmalioto@aliotolaw.com

Lawrence G. Papale
Law Offices of Lawrence G. Papale
The Cornerstone Building
1308 Main Street, Suite 117
St. Helena, CA 94574

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3458
D.C. No. 3:20-cv-05832-JD

LISA MCCARTHY; MARY KATHERINE ARCELL; KEITH DEAN BRADT; JOSE BRITO; JAN-MARIE BROWN; ROSEMARY D'AUGUSTA; BRENDA DAVIS; PAMELA FAUST; CAROLYN FJORD; DONALD C. FREELAND; DONNA FRYE; GABRIEL GARAVANIAN; HARRY GARAVANIAN; YVONNE JOCELYN GARDNER; VALARIE JOLLY; MICHAEL MALANEY; LENARD MARAZZO; TIMOTHY NIEBOER; DEBORAH PULFER; BILL RUBINSOHN; SONDRA RUSSELL; JUNE STANSBURY; CLYDE DUANE STENSRUD; GARY TALEWSKY; DIANA LYNN ULTICAN; PAMELA WARD; CHRISTINE M. WHALEN,

Plaintiffs-Appellants,

v.

INTERCONTINENTAL EXCHANGE, INC.; INTERCONTINENTAL EXCHANGE HOLDINGS, INC.; ICE BENCHMARK ADMINISTRATION LIMITED; ICE DATA SERVICES, INC.; ICE PRICING AND REFERENCE DATA LLC; BANK OF AMERICA CORPORATION; BARCLAYS BANK PLC; BARCLAYS CAPITAL, INC.; CITIBANK, N.A.; CITIGROUP, INC.; CITIGROUP GLOBAL MARKETS, INC.; COOPERATIEVE RABOBANK U.A.; CREDIT SUISSE GROUP AG; CREDIT SUISSE AG; CREDIT SUISSE SECURITIES (USA)

LLC; DEUTSCHE BANK AG; DEUTSCHE BANK SECURITIES, INC.; HSBC HOLDINGS PLC; HSBC BANK PLC; HSBC BANK USA, N.A.; HSBC SECURITIES (USA) INC.; JPMORGAN CHASE & CO.; J.P. MORGAN SECURITIES LLC; LLOYDS BANK PLC; LLOYDS SECURITIES INC.; MUFG BANK, LTD.; THE BANK OF TOKYO-MITSUBISHI UFJ LTD; MITSUBISHI UFJ FINANCIAL GROUP INC.; MUFG SECURITIES AMERICAS INC.; ROYAL BANK OF SCOTLAND GROUP PLC; ROYAL BANK OF SCOTLAND, PLC; NATIONAL WESTMINSTER BANK PLC; NATWEST MARKETS SECURITIES INC.; SUMITOMO MITSUI BANKING CORPORATION; SUMITOMO MITSUI FINANCIAL GROUP, INC.; SUMITOMO MITSUI BANKING CORPORATION EUROPE LTD; SMBC CAPITAL MARKETS, INC.; UBS GROUP AG; UBS AG; UBS SECURITIES LLC; BANK OF AMERICA, N.A.; JPMORGAN CHASE BANK, N.A.,

Defendants-Appellees,

and

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS, LLC, THE NORINCHUKIN BANK,

Defendants.

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Submitted December 5, 2024*
San Francisco, California

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appendix A

Before: M. SMITH and BUMATAY, Circuit Judges, and WU, Senior District Judge.**

MEMORANDUM***

Plaintiffs-Appellants are consumers who allege that Defendants-Appellees, mostly large banks, conspired to fix the London Inter-Bank Interest Rate (LIBOR). The district court dismissed Plaintiffs' claims against the Foreign Defendants[1] without prejudice for lack of personal jurisdiction. Plaintiffs' claims against the remaining Defendants were dismissed with prejudice for lack of antitrust standing. The district court denied Plaintiffs' request for leave to amend their First Amended Complaint (FAC) and denied their request for jurisdictional discovery as moot. We affirm.

** The Honorable George H. Wu, United States Senior District Judge for the Central District of California, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. The Foreign Defendants are: ICE Benchmark Administration Limited, Barclays Bank PLC, Coöperatieve Rabobank U.A., Credit Suisse Group AG, Credit Suisse AG, Deutsche Bank AG, HSBC Holdings plc, HSBC Bank plc, Lloyds Bank plc, MUFG Bank, Ltd., The Bank of Tokyo-Mitsubishi UFG Ltd., Mitsubishi UFJ Financial Group, Inc., Royal Bank of Scotland Group plc, Royal Bank of Scotland plc, National Westminster Bank plc, Sumitomo Mitsui Banking Corporation, Sumitomo Mitsui Financial Group Inc., SMBC Bank International plc (f/k/a Sumitomo Mitsui Banking Corporation Europe Ltd.), UBS Group AG, and UBS AG.

Appendix A

1. The district court did not err in dismissing the claims against the Foreign Defendants for lack of personal jurisdiction. It properly considered the Foreign Defendants' declarations. It could not "assume the truth of allegations in a pleading which are contradicted by affidavit." *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 858 (9th Cir. 2022) (quoting *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977)). Plaintiffs' focus on foreseeable consequences is also misplaced. "'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Contrary to Plaintiffs' contention, the Foreign Defendants did not admit targeting the United States. Although some LIBOR rates were denominated in U.S. dollars, the LIBOR rates were set based on Defendants' submissions in London and used worldwide. This does not suggest Defendants' conduct was "expressly aimed" at the United States. *See Doe v. WebGroup Czech Republic, a.s.*, 93 F.4th 442, 452 (9th Cir. 2024) (quoting *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017)). Nor does service in the United States establish personal jurisdiction. Even "[i]n a statute providing for nationwide service of process, [an] inquiry to determine 'minimum contacts' is" conducted. *See Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). Plaintiffs' remaining contentions are unpersuasive.

2. The district court did not abuse its discretion in denying Plaintiffs the opportunity to conduct jurisdictional discovery. "[A] mere hunch that discovery might yield

jurisdictionally relevant facts, or bare allegations in the face of specific denials, are insufficient reasons for a court to grant jurisdictional discovery." *Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 507 (9th Cir. 2023) (quoting *LNS*, 22 F.4th at 864-65). That is all Plaintiffs have offered here.

3. The district court did not err in dismissing the remaining claims for lack of antitrust standing. Assuming without deciding that Plaintiffs adequately alleged an antitrust injury, they still lack standing. *See City of Oakland v. Oakland Raiders*, 20 F.4th 441, 455 (9th Cir. 2021) (noting that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation, and enumerating five factors governing antitrust standing). Their injury is not direct. None adequately alleges any transactions with any of the Defendants.[2] Although Plaintiffs have labeled various financial institutions as "unnamed co-conspirators," this is immaterial. Plaintiffs have pled no facts suggesting any such institution played a role in the alleged conspiracy. Plaintiffs' damages are speculative, both because their injury is indirect and because the alleged harms may have been produced by independent factors. Specifically, the rates Plaintiffs may have paid

2. Gardner alleges she had "a LIBOR rate based note from Defendant Bank of America." The record contradicts this allegation. Even on motions to dismiss, courts may consider documents proffered by the defendant "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Gardner's loan agreement meets this criterion, and it shows she had a fixed-rate mortgage and not one which could possibly be tied to a LIBOR.

combined LIBOR and an additional percentage set by their own lenders, who are not Defendants. Apportioning damages would also be very complex. A jury would have to untangle what the LIBOR should have been, what each of Plaintiffs' lenders would have charged, and what borrowing decisions each of Plaintiffs would have made. The existence of more appropriate plaintiffs cuts in Defendants' favor: the alleged conspiracy could be challenged by Defendants' own borrowers. The FAC also never alleges facts suggesting Defendants had specific intent to target these Plaintiffs. For all these reasons, Plaintiffs' allegations are insufficient.

4. The district court did not abuse its discretion in denying Plaintiffs leave to amend the FAC. Plaintiffs do not identify any new facts they would plead. Moreover, Plaintiffs failed to request leave to amend from the district court.

5. The district court did not contravene either the Due Process Clause or Fed. R. Civ. P. 12(i) by deciding Defendants' motion without oral argument. We have "reject[ed] th[e] argument" that a "district court violate[s] the[] right to procedural due process by ruling on [the defendant's] motion to dismiss without an oral hearing." *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015). As for Fed. R. Civ. P. 12(i), the "hearing" requirement does not require an oral hearing. *See Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) (collecting cases reaching this conclusion). The Federal Rules elsewhere confirm that motions can be decided without oral argument. *See* Fed. R. Civ. P. 78(b).

6. We need not address the other issues raised by Plaintiffs: the district court never relied on them in dismissing Plaintiffs' FAC.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 10, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 20-cv-05832-JD

LISA MCCARTHY, *et al.*,

Plaintiffs,

v.

INTERCONTINENTAL EXCHANGE, INC., *et al.*,

Defendants.

ORDER RE DISMISSAL

This antitrust action was filed by a group of consumers alleging a conspiracy among the defendant banks and financial institutions to "fix" the intra-bank interest rate known as the USD LIBOR. Dkt. No. 1. After denying plaintiffs' requests for a preliminary injunction, Dkt. No. 351, the Court dismissed the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, with leave to amend. Dkt. No. 365. The dismissal was warranted because plaintiffs had failed to meet their burden of establishing personal jurisdiction over the foreign defendants, and to plausibly allege antitrust standing for their claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *Id.*

Plaintiffs filed a first amended complaint that did not change much in the way of allegations, and which focused again on a "price-fixed LIBOR rate" said to violate Sherman Act Section 1 and Section 2. Dkt. No. 366 (FAC) ¶¶ 8, 142-61. Defendants ask to dismiss on the same grounds they raised previously. Dkt. Nos. 372, 374, 375.[1] The parties' familiarity with the record is assumed, and the FAC is dismissed. The case is ordered closed.

DISCUSSION

I. PERSONAL JURISDICTION

The foreign defendants' motion to dismiss for lack of personal jurisdiction, Dkt. No. 375, is granted without further leave to amend.[2] As the Court noted in the prior order of dismissal, plaintiffs bear "the burden of establishing that jurisdiction is proper." *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). The Court

1. Plaintiffs filed a letter advising the Court that "on June 30, 2023, LIBOR terminated," and there has been a "complete cessation of LIBOR as of June 30, 2023." Dkt. No. 394. This development does not affect the Court's analysis of the legal issues presented by defendants' dismissal motions.

2. The foreign defendants are: ICE Benchmark Administration Limited, Barclays Bank PLC, Coöperatieve Rabobank U.A., Credit Suisse Group AG, Credit Suisse AG, Deutsche Bank AG, HSBC Holdings plc, HSBC Bank plc, Lloyds Bank plc, MUFG Bank, Ltd., The Bank of Tokyo-Mitsubishi UFG Ltd., Mitsubishi UFJ Financial Group, Inc., Royal Bank of Scotland Group plc, Royal Bank of Scotland plc, National Westminster Bank plc, Sumitomo Mitsui Banking Corporation, Sumitomo Mitsui Financial Group Inc., SMBC Bank International plc (fka Sumitomo Mitsui Banking Corporation Europe Ltd.), UBS Group AG, and UBS AG. Dkt. No. 375 n.1.

has discretion over the manner of resolving a jurisdictional motion, and when, as here, the Court receives only written materials, "these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss." *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). "When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff is 'obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.'" *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (quoting *Amba Marketing Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). "Although the plaintiff cannot 'simply rest on the bare allegations of its complaint,' uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger*, 374 F.3d at 800 (quoting *Amba Marketing*, 551 F.2d at 787). Factual conflicts in the parties' affidavits are to be resolved in favor of the party asserting jurisdiction, namely the plaintiffs. *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir. 2004); *Gevorkyan v. Bitmain Techs. Ltd.*, No. 18-cv-07004-JD, 2022 U.S. Dist. LEXIS 154187, 2022 WL 3702093, at *1 (N.D. Cal. Aug. 26, 2022).

For the foreign defendants, the Court previously concluded that plaintiffs had not "met their obligation to 'come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.'" Dkt. No. 365 at 4 (quoting *Scott*, 792 F.2d at 927). The same is true again. Defendants filed an extensive set of declarations with respect to their lack of contacts with the United States,

Dkt. Nos. 375-1 - 375-29, and plaintiffs did not answer with a single opposing declaration or contrary factual showing of any kind, *see* Dkt. No. 381. Plaintiffs' appeal to "common sense" in lieu of concrete facts, *see id.* at 3, is an entirely inadequate response, as is the passing mention of the extraterritorial reach of the Sherman Act, *id.* at 6-7.

The allegations in the FAC that plaintiffs rely on are again conclusory, vague, and controverted. *See id.* at 8-14. For example, plaintiffs have alleged that "[a]ll of the foreign Defendants['] United States subsidiaries aided in the publication, promulgation, implementation and sale of the USD LIBOR rates in the United States on behalf of their parent companies." FAC ¶ 86. But the foreign defendants have proffered sworn declarations denying that allegation. *See, e.g.*, Dkt. No. 375-2 ¶ 9 ("During the relevant time period, . . . , no UBS branch, office, agency, or employee in the United States was responsible for the determination or submission of rates for use in the calculation of USD ICE LIBOR."); Dkt. No. 375-5 ¶ 13 ("USD LIBOR is administered and set on every applicable London business day from IBA's office in London. The entire daily process of receiving submissions and calculating and publishing the rates is automated and overseen by operations personnel in London."); Dkt. No. 375-6 ¶ 12 ("BBPLC's U.S. Dollar ICE LIBOR submissions have been determined by designated employees in London and transmitted from London. No U.S. branch or office of BBPLC has ever been responsible for the determination of USD ICE LIBOR rates or the submission of those rates to the ICE Benchmark Administration in the U.K. for use in the calculation of USD ICE LIBOR."). Plaintiffs did not tender any facts that might undercut this evidence.

Overall, plaintiffs did not meet their burden of establishing personal jurisdiction over the foreign defendants. *See Schwarzenegger*, 374 F.3d at 800. Plaintiffs did not make a prima facie showing that the foreign defendants "performed some act or consummated some transaction by which [they] purposefully directed [their] activities toward the United States or purposefully availed [themselves] of the privilege of conducting business in the United States," or that plaintiffs' claims "arise out of result from" the foreign defendants' "forum-related activities." *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 979 (9th Cir. 2021) (cleaned up). Plaintiffs' grabbag of arguments about enterprise jurisdiction, conspiracy-based jurisdiction, or jurisdiction based on service of process and business registration, *see* Dkt. No. 381 at 4-5, 12-14, are legally untenable and wholly unpersuasive.

Plaintiffs' request for jurisdictional discovery is declined. *See id.* at 14-15. The Court has not hesitated to permit such discovery in cases where it was warranted, but that is not the situation here. *See Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 507-09 (9th Cir. 2023) ("a mere hunch that discovery might yield jurisdictionally relevant facts, or bare allegations in the face of specific denials, are insufficient reasons for a court to grant jurisdictional discovery"; district court properly exercised its discretion to deny jurisdictional discovery where plaintiffs' theories of jurisdiction were "too speculative" and plaintiffs proffered only "bare allegations" which were "trumped by sworn statements to the contrary") (internal quotations and citation omitted).

II. ANTITRUST STANDING

Plaintiffs have again alleged claims against the United States defendants under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and they seek injunctive relief and treble damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. FAC ¶¶ 142-61, pp. 56-57 (Prayer for Relief). The Court previously dismissed these claims for lack of antitrust standing. Dkt. No. 365 at 4-7.

"To determine whether the plaintiff's case falls within the intended area of statutory protection," the Court "must 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them.'" *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). The factors for this inquiry include: "(1) the specific intent of the alleged conspirators; (2) the directness of the injury; (3) the character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character; (4) the existence of other, more appropriate plaintiffs; [and] (5) the nature of the plaintiff's claimed injury." *Id.*; *see also American Ad Mgmt., Inc. v. General Telephone Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999) (antitrust standing factors include "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages").

Appendix B

In the prior order, the Court found that plaintiffs had not met their burden of plausibly alleging antitrust standing where, *inter alia*, the complaint said "nothing about the 'specific intent of the alleged conspirators,' *Dick Geothermal*, 890 F.2d at 146, and what the defendants may have gotten out of continuing to follow the formula and method for setting LIBOR, which are well-known to the public, as demonstrated by plaintiffs' allegations." Dkt. No. 365 at 6. Plaintiffs also did not adequately allege or explain the "directness of the injury," the "nature of the plaintiff's claimed injury," or the "existence of other, more appropriate plaintiffs." *Id.* (quoting *Dick Geothermal*, 890 F.2d at 146). Other questions left unanswered by plaintiffs in the complaint included: "whether (and which) plaintiffs even had interest rates or other financial obligations that were tied to the LIBOR rate; whether plaintiffs made any payments that were tied to the LIBOR rate; whether, and to what degree, the LIBOR rate was higher than what a competitive rate would have been in the absence of the LIBOR formula and methodology; and the role played by third-party credit-issuing companies such as Capital One, which presumably set other important components of the interest rates and financial obligations plaintiffs were subject to." *Id.* at 6-7.

The allegations in the FAC have done little to improve these shortfalls. To be sure, plaintiffs added allegations that refer to the issues flagged by the Court. For example, plaintiffs now allege that "[t]he specific intent of the Defendant [*sic*] as co-conspirators in their agreement to set and published [*sic*] LIBOR rates was to promulgate agreed-upon non-competitive rates that

would be exploited by their banks, by other banks, and by financial institutions throughout out [*sic*] the world, but particularly in the United States with respect to USD LIBOR." FAC ¶ 30. And, "[t]he nature and directness of the plaintiff's [*sic*] claimed injury is that they paid the overcharge." *Id.* ¶ 31. While these allegations, and others like them, pay superficial service to the Court's concerns, they do not fundamentally resolve them in a meaningful way by supplyfing facts to back them up.

The allegations about the plaintiffs' injury, and the relationship between the plaintiffs' harm and the alleged wrongdoing by the defendants remain hopelessly vague. *See Dick Geothermal*, 890 F.2d at 146. For 23 of the 27 plaintiffs, there are no specific allegations of harm whatsoever, *i.e.*, the FAC says nothing about any interest they paid on any financial instrument. *See* FAC ¶¶ 18-26. There are only vague and conclusory allegations to the effect that "each Plaintiff was either a borrower/consumer of a loan or credit card with a LIBOR interest rate or has been threatened with injury as a result of the LIBOR rate," and that "some Plaintiffs are purchasers of LIBOR based interest rate loans and credit." *Id.* ¶¶ 18-19.

The slightly more specific allegations about the remaining four plaintiffs also remain deficient. Plaintiff Lisa McCarthy is said to have been an "authorized user" on a Capital One credit card, which "lists the 1-month LIBOR rates in its statements as possible components in disclosing variable interest rates to be charged to its customers." FAC ¶ 20. McCarthy was also a "purchaser of a LIBOR-based adjustable rate mortgage through

Fifth Third Mortgage Company." *Id.* ¶ 21. Plaintiff Harry Garavanian is "a borrower on a LIBOR based Education Refinance Loan from Citizens Bank" and he "has paid LIBOR based interest on his note." *Id.* ¶ 24. Plaintiff Jose Brito is a "borrower on a LIBOR-based adjustable rate mortgage based upon the one-year LIBOR rate" from Prospect Mortgage, LLC, and he "has paid LIBOR-based interest on his adjustable rate mortgage." *Id.* ¶ 25. But the complaint is devoid of any allegations that explain how, specifically, these "LIBOR-based" rates were tied to LIBOR, or, more importantly, what any of these defendants might have done to set the rates in these financial instruments issued by third parties. A single plaintiff, Yvonne Jocelyn Gardner, alleges that she is a "purchaser of a LIBOR rate based note from Defendant Bank of America." *Id.* ¶ 23. But plaintiffs do not refute defendants' argument that the terms of that note, which should be deemed incorporated by reference into the FAC, show that Gardner's mortgage was a "fixed-rate loan, not a variable-interest-rate loan tied to LIBOR," and so Gardner has not plausibly alleged that she ever "paid 'LIBOR based interest' in connection with this note." Dkt. No. 372 at 7; Dkt. No. 383.

The state of play is that, while defendants are alleged to have set the USD LIBOR rate using publicly-known formulas that necessarily excluded the lowest submitted rates, *see, e.g.*, FAC ¶¶ 33-35, 106-08, they are not alleged to have actually charged any LIBOR-based interest rates to any plaintiff in this case. Instead, plaintiffs have alleged in a wholly conclusory manner that "Defendants-Co-Conspirators and their co-conspirator banks and credit

card companies in the United States agree[d] to use and d[id] use USD LIBOR as a component of the interest charged in fixed and variable interest rate loans on credit cards in the United States." *Id.* ¶ 110. To put a finer point on it, plaintiffs say that for "LIBOR-based loans," "[i]f one applies for a loan based on LIBOR, the financial firm offering the loan will take the LIBOR rate for the date the loan is quoted and add an additional percentage, say 2%. . . . The lender references LIBOR when adjusting the interest rate on the loan, changing the amount paid each month during the period of adjustment." *Id.* ¶ 111. Under plaintiffs' own allegations, then, the relationship between plaintiffs' harm and the defendants' alleged wrongdoing is too remote to be actionable. It is the third-party lender or credit card issuer that sets the interest rates to be charged to consumers, and there are no non-conclusory, plausible allegations showing that the defendants forced those lenders or credit card issuers to use the USD LIBOR rate in any particular way.

Consequently, the allegations in the FAC did not meaningfully show that plaintiffs' injuries were direct, or that they are the most appropriate plaintiffs to challenge the antitrust violations alleged here, which appears quite doubtful. *See Dick Geothermal*, 890 F.2d at 146. Plaintiffs' approach to litigating this case continues to suffer from the other issues previously noted by the Court, *e.g.*, their insistence on applying "tag[s such as price fixing] with mechanical literalness," *id.* at 151. But plaintiffs' failure to adequately plead antitrust standing is a sufficient ground for dismissal, and the Court finds it unnecessary to catalog the other deficiencies in plaintiffs' pleading.

Appendix B

CONCLUSION

Plaintiffs' claims against the foreign defendants, *see* n.1 *supra*, are dismissed without prejudice. *See Grigsby v. CMI Corp.*, 765 F.2d 1369, 1372 n.5 (9th Cir. 1985). Plaintiffs' claims against the United States defendants are dismissed with prejudice for failure to adequately plead antitrust standing.

Plaintiffs have already been given an opportunity to amend, and they used that opportunity to file a complaint that is almost identical in substance to their prior version. The Court finds that further amendment is not appropriate, *see Chodos v. W. Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002), which plaintiffs have not requested in any event.

The pending discovery dispute letters, Dkt. Nos. 368, 376, 394, are terminated as moot. Judgment will be entered and the case closed.

IT IS SO ORDERED.

Dated: October 10, 2023

/s/ James Donato
JAMES DONATO
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED SEPTEMBER 13, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 20-cv-05832-JD

LISA MCCARTHY, *et al.*,

Plaintiffs,

v.

INTERCONTINENTAL EXCHANGE, INC., *et al.*,

Defendants.

ORDER RE MOTIONS TO DISMISS AND STAY

In this antitrust action, a group of consumers allege a conspiracy among the defendant banks and financial institutions to fix the intra-bank interest rate known as the USD LIBOR. Dkt. No. 1. The Court denied plaintiffs' requests for a preliminary injunction. Dkt. No. 351.

This order resolves defendants' motions to dismiss. The defendants jointly filed a motion under Federal Rule of Civil Procedure 12(b)(2) to dismiss the complaint for lack of personal jurisdiction. Dkt. No. 315. Defendants also filed a separate "merits" motion challenging plaintiffs' complaint on various grounds under Rules 12(b)(1),

12(b)(6), and 12(b)(7). Dkt. No. 316. The ICE defendants separately filed a supplemental brief raising additional, individual arguments for dismissal. Dkt. No. 319.[1]

The parties' familiarity with the facts is assumed, and the complaint, Dkt. No. 1, is dismissed with leave to amend.

DISCUSSION

I. PERSONAL JURISDICTION

Defendants seek dismissal on the ground that the Court lacks personal jurisdiction over any defendant. Dkt. No. 315. Well-established standards govern the analysis of this request. In opposing defendants' motion, it is plaintiffs who "bear[] the burden of establishing that jurisdiction is proper." *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). A district court has discretion to decide the mode of resolving a jurisdictional motion, and when, as here, the Court determines that it will receive only written materials, "these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss." *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

---

1. The United States Chamber of Commerce and others filed an unopposed motion for leave to file an amicus brief. Dkt. No. 326. The motion is granted, and the proposed amicus brief, Dkt. No. 326-1, is deemed filed.

"When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff is 'obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.'" *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (quoting *Amba Marketing Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). "Although the plaintiff cannot 'simply rest on the bare allegations of its complaint,' uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger*, 374 F.3d at 800 (quoting *Amba Marketing*, 551 F.2d at 787). Factual conflicts in the parties' affidavits are to be resolved in favor of the party asserting jurisdiction, namely the plaintiffs. *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir. 2004); *Gevorkyan v. Bitmain Technologies Ltd.*, No. 18-cv-07004-JD, 2022 U.S. Dist. LEXIS 154187, 2022 WL 3702093, at *1 (N.D. Cal. Aug. 26, 2022).

Dismissal on personal jurisdiction grounds is denied for the United States defendants.[2] For these entities, the relevant facts are not disputed, and controlling law

2. Both sides agree that the United States defendants are: Intercontinental Exchange Inc., Intercontinental Exchange Holdings, Inc., ICE Data Services, Inc., ICE Pricing and Reference Data LLC, Bank of America, N.A., Bank of America Corporation, Barclays Capital Inc., Citibank N.A., Citigroup Inc., Citigroup Global Markets, Inc., Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., HSBC Bank USA, N.A., HSBC Securities (USA) Inc., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, Lloyds Securities Inc., MUFG Securities Americas Inc., Natwest Markets Securities Inc., SMBC Capital Markets, Inc., and UBS Securities LLC. Dkt. No. 327 (plaintiffs' oppo.) at 5; Dkt. No. 339 (defendants' reply) at 1 n.1; Dkt. No. 355 (notice of voluntary dismissal of RBC Capital Markets, LLC).

warrants the exercise of jurisdiction. Our circuit has concluded that in cases under Section 12 of the Clayton Act, such as this one, the Court may exercise personal jurisdiction over a defendant consistent with constitutional principles of due process so long as the defendant has minimum contacts with the United States as a whole. *See Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1415 (9th Cir. 1989) (district court was "clearly correct . . . that the worldwide service provision of § 12 justifies its conclusion that personal jurisdiction may be established in any district, given the existence of sufficient national contacts."); *Action Embroidery*, 368 F.3d at 1180 (under a statute providing for nationwide service of process, such as Section 12 of the Clayton Act, "the inquiry to determine 'minimum contacts' is . . . 'whether the defendant has acted within any district of the United States or sufficiently caused foreseeable consequences in this country.") (quoting *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985)).

In *Action Embroidery*, the circuit determined that, "[a]s a Virginia professional corporation operating in the United States, [the law firm] Wolcott has clearly had such minimum contacts. Constitutional principles of due process are therefore satisfied, and personal jurisdiction over Action and Vanguard's antitrust claims against Wolcott is proper." *Id.* So too, here. Plaintiffs' allegations that each of the United States defendants "was organized in a state in these United States and has its principal place of business or headquarters in a city or cities within the United States" is not disputed. Dkt. No. 327 at 6. Defendants do not contest the existence of these minimum contacts, but say that these do not show that any United

States defendant "is 'at home' in California." Dkt. No. 339 at 3. This misses the mark because the relevant forum here is the United States, not California. *See Action Embroidery*, 368 F.3d at 1180. A "minimum contacts" analysis is proper here, and is met for the United States defendants because each one was a United States company "operating in the United States." *Id.*

Defendants' emphasis on the distinction between "general" and "specific" jurisdiction, *see* Dkt. No. 339, is of no moment. Neither *Action Embroidery*, 368 F.3d 1174, nor *Go-Video*, 885 F.2d 1406, specified which category of personal jurisdiction it was finding to be applicable. The United States Supreme Court has observed that "[t]he law of specific jurisdiction . . . seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025, 209 L. Ed. 2d 225 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)). It is not at all clear how, or if, that concern applies where the relevant forum is the United States as a whole. In any event, the exercise of personal jurisdiction over the United States defendants is solidly supported by *Action Embroidery*, 368 F.3d 1174.

A different conclusion is warranted for the foreign defendants.[3] For these defendants, plaintiffs have not met

3. The foreign defendants are: ICE Benchmark Administration Limited, Barclays Bank PLC, Coöperatieve Rabobank U.A., Credit Suisse Group AG, Credit Suisse AG, Deutsche Bank AG, HSBC Holdings plc, HSBC Bank plc, Lloyds Bank plc, MUFG Bank,

their obligation to "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott*, 792 F.2d at 927 (quotations omitted). Defendants submitted an extensive set of declarations on their contacts with the United States, Dkt. No. 315-2. Plaintiffs did not respond in kind. *See* Dkt. No. 327. The allegations plaintiffs rely on in the complaint are conclusory, vague, and controverted. *See id.* at 11-14. This will not do for plaintiffs' burden of establishing personal jurisdiction. *See Schwarzenegger*, 374 F.3d at 800. The foreign defendants are dismissed for lack of personal jurisdiction, and the dismissal is without prejudice. *See Grigsby v. CMI Corp.*, 765 F.2d 1369, 1372 n.5 (9th Cir. 1985) ("Plaintiffs argue that although the district court was correct in determining that it had no personal jurisdiction over the Torchmark defendants, the court erred in dismissing the complaint 'with prejudice' as to these defendants. This is true.").

II. ANTITRUST STANDING

Plaintiffs have alleged claims against the United States defendants under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and they seek injunctive relief and treble damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Dkt. No. 1. The claims are dismissed for lack of antitrust standing.

Ltd., The Bank of Tokyo-Mitsubishi UFG Ltd., Mitsubishi UFJ Financial Group, Inc., Royal Bank of Scotland Group plc, Royal Bank of Scotland plc, National Westminster Bank plc, Sumitomo Mitsui Banking Corporation, Sumitomo Mitsui Financial Group Inc., Sumitomo Mitsui Banking Corporation Europe Ltd., UBS Group AG, and UBS AG. Dkt. No. 327 at 7; Dkt. No. 339 at 1 n.2; Dkt. No. 345; Dkt. No. 355.

Appendix C

"The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in § 4 of the Clayton Act." *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (*AGC*) (citing 15 U.S.C. § 15). But Section 4 is "not to be read literally so that 'any person' who was injured 'by reason of anything forbidden by the antitrust laws' could maintain an action." *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc) (quoting *AGC*, 459 U.S. at 535). Instead, "[t]o determine whether the plaintiff's case falls within the intended area of statutory protection, we must 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them.'" *Id.*

The Court will balance several factors, no one of which is "decisive." *Id.* They include "(1) the specific intent of the alleged conspirators; (2) the directness of the injury; (3) the character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character; (4) the existence of other, more appropriate plaintiffs; [and] (5) the nature of the plaintiff's claimed injury." *Id.; see also American Ad Mgmt., Inc. v. General Telephone Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999) (antitrust standing factors include "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages").

A threshold problem for plaintiffs is the rather cavalier approach they took to this issue. Antitrust standing is

different from Article III standing and requires a "more demanding" showing. *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997); *AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."). Consequently, the Court's prior rejection of defendants' Article III standing challenge, *see* Dkt. No. 351 at 3-5, was not the end of the matter. In addition, standing is an ongoing inquiry, and the "need to satisfy the requirements of Article III persists throughout the life of the lawsuit, with the later stages of the case requiring more of plaintiffs than is required at this early stage." *Id.* at 4-5 (quotations and citations omitted).

It was plaintiffs' burden to plausibly allege antitrust standing. *See City of Oakland v. Oakland Raiders*, 20 F.4th 441, 448 (9th Cir. 2021) ("To plead a Sherman Act claim, a private plaintiff must show that it is a proper party to pursue the claim -- a requirement known as antitrust standing."). "The doctrine of antitrust standing requires an inquiry beyond that performed to determine standing in a constitutional sense. If standing is not found, an essential element of the plaintiff's case is missing and the plaintiff's case fails. To score a home run the plaintiff must first have touched first base." *Dick Geothermal*, 890 F.2d at 145 (internal quotations and citation omitted). But plaintiffs made only a passing mention of antitrust standing: "Defendants argue that plaintiffs lack antitrust standing. This argument ignores the fact that the antitrust laws prohibit price-fixing, and any loans which contain the

illegal price is the very kind of damage that flows from the price-fixing." Dkt. No. 328 at 2. This was not a serious effort to demonstrate the adequacy of plaintiffs' antitrust standing allegations under the case law.

The Court's independent review of the complaint confirmed the absence of antitrust standing. The complaint says nothing about the "specific intent of the alleged conspirators," *Dick Geothermal*, 890 F.2d at 146, and what the defendants may have gotten out of continuing to follow the formula and method for setting LIBOR, which are well-known to the public, as demonstrated by plaintiffs' allegations. *See, e.g.*, Dkt. No. 1 ¶¶ 42-43, 49-52. The "directness of the injury" is also questionable, as are the "nature of the plaintiff's claimed injury" and the "existence of other, more appropriate plaintiffs." *Dick Geothermal*, 890 F.2d at 146. Plaintiffs offer conclusory and vague allegations to the effect that "numerous plaintiffs, including plaintiffs Lisa McCarthy, Jose Brito, Jan-Marie Brown, Brenda Davis, Gabriel Garavanian, Harry Garavanian, Bill Rubinsohn, Sandy Russell, Gary Talewsky, are consumers of credit cards issued by unnamed co-conspirator Capital One, which lists the 3-month and 1-month LIBOR rates in its statements as possible components in disclosing variable interest rates to be charged to its customers," and "plaintiff Yvonne Jocelyn Gardner is a consumer of a variable interest rate mortgage from defendant Bank of America." Dkt. No. 1 ¶¶ 5-6. Questions left unanswered by these allegations and the complaint as a whole include: whether (and which) plaintiffs even had interest rates or other financial obligations that were tied to the LIBOR rate; whether plaintiffs made any payments that were tied to the LIBOR

rate; whether, and to what degree, the LIBOR rate was higher than what a competitive rate would have been in the absence of the LIBOR formula and methodology; and the role played by third-party credit-issuing companies such as Capital One, which presumably set other important components of the interest rates and financial obligations plaintiffs were subject to. Overall, plaintiffs have not done enough to establish antitrust standing.

III. OTHER ARGUMENTS FOR DISMISSAL

The Court declines to reach defendants' other arguments for dismissal at this time. As plaintiffs contemplate amendment of the complaint, they are advised to take into account the Court's concerns about their theory of the case stated in the injunction order, Dkt. No. 351, and during the hearings. "In a field in which catchwords have often been dominant there is a grave risk of applying a tag with mechanical literalness." *Dick Geothermal*, 890 F.2d at 151. That observation has particular application to the way plaintiffs have framed and attempted to litigate this case, with an unrelenting focus on defendants' agreement "to fix" the LIBOR rate "by formula." *See, e.g.*, Dkt. No. 328 at 1. This approach is all the more doubtful because the complaint says nothing about how the LIBOR formula enabled its members to "maximize their profits," even though that is a major element of a Section 1 claim. *See City of Oakland*, 20 F.4th at 458 ("In a horizontal price-fixing scheme . . . members of a cartel 'collude on price and output in an effort to maximize their profits.'").

Plaintiffs acknowledge that the LIBOR rate is "used by an estimated US $350 trillion ($350,000,000,000,000.00)

of outstanding contracts in maturities ranging from overnight to more than 30 years." Dkt. No. 1 at 3. As the Supreme Court stated "over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The current version of plaintiffs' complaint is sorely lacking in that specificity.

CONCLUSION

Plaintiffs' complaint, Dkt. No. 1, is dismissed in its entirety, with leave to amend. An amended complaint must be filed by October 4, 2022. The amended complaint may re-allege claims against the foreign defendants who were dismissed without prejudice for lack of personal jurisdiction, but it may not add new defendants or new claims without the Court's prior consent.

Pending further order, the case is stayed in all other respects. The discovery dispute and request for a case schedule, Dkt. Nos. 317, 363, are terminated without prejudice and will be addressed as developments warrant.

IT IS SO ORDERED.

Dated: September 13, 2022

/s/ James Donato
JAMES DONATO
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED DECEMBER 23, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 20-cv-05832-JD
Re: Dkt. Nos. 19, 259

LISA MCCARTHY, *et al.*,

Plaintiffs,

v.

INTERCONTINENTAL EXCHANGE, INC., *et al.*,

Defendants.

ORDER RE INJUNCTION

In this consumer antitrust action, Lisa McCarthy and twenty-six other plaintiffs allege that a number of banks and financial institutions have engaged in a conspiracy to fix the intra-bank interest rate known as the USD LIBOR. Dkt. No. 1. The gravamen of the complaint is that the LIBOR formula and procedures themselves, which have been publicly known since the 1980s, are inherently anticompetitive, and that defendants' participation in determining LIBOR is itself a conspiracy. In this respect, this case is entirely different from long-running litigation in other courts which alleged that banks and other

financial institutions manipulated the submissions used to determine the LIBOR. *See Gelboim v. Bank of America Corp.*, 823 F.3d 759, 764 (2d Cir. 2016) ("[i]t is alleged that the Banks colluded to depress LIBOR by violating the rate-setting rules" so that "the payout associated with the various financial instruments was thus below what it would have been" absent the manipulation). Plaintiffs are consumers of loans and credit cards with variable interest rates, and say they paid artificially inflated interest rates as a result of defendants' conduct.

Plaintiffs have filed a motion for preliminary and permanent injunction under Federal Rule of Civil Procedure 65, which asks that defendants be prohibited from, among other things, "continuing to engage in their price-fixing scheme" and "enforcing any financial instrument that relies in whole or in part on USD LIBOR." Dkt. No. 19 at iii. Plaintiffs also seek an order "voiding variable interest rate contracts for consumer loans which include LIBOR as a component of the variable interest rate." *Id.*

In a subsequent "application for an order to show cause why an injunction should not issue," Dkt. No. 259, plaintiffs again sought what is effectively the same relief. They asked the Court to issue "an order to show cause why defendants should not be enjoined and prohibited from continuing to engage in their LIBOR price-fixing scheme" and prohibited "from enforcing the LIBOR part of any financial instrument, including mortgages, student loans, credit cards, auto loans and lines of credit, that rely in whole or in part on USD LIBOR." *Id.* at 8.

The OSC application also asks the Court to "declare void any agreement or contract for a variable interest rate consumer loan that includes USD LIBOR as a component of its variable interest rate," as well as "require that defendants post a bond to secure the return of their retail customers' price-fixed overpayments and a bond to cover the difference between the federal treasury rate and the LIBOR price-fixed rate." *Id.*

Because the injunction and OSC requests are virtually identical, the Court will resolve both in the Rule 65 context. The requests are denied.

LEGAL STANDARDS

"Preliminary injunctions are 'an extraordinary remedy never awarded as of right.'" *Michigan v. DeVos*, 481 F. Supp. 3d 984, 990 (N.D. Cal. 2020) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). "'A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest.'" *Id.* at 990-91 (quoting *Winter*, 555 U.S. at 20); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (same). "In our circuit, a plaintiff may also obtain a preliminary injunction under a 'sliding scale' approach by raising 'serious questions' going to the merits of plaintiff's claims and showing that the balance of hardships tips 'sharply' in his or her favor." *Michigan*, 481 F. Supp. 3d at 991 (quoting *A Woman's Friend Pregnancy Res. Clinic v. Becerra*, 901 F.3d 1166, 1167 (9th Cir. 2018)

and *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 740 (9th Cir. 2011)).

"In all cases, at an 'irreducible minimum,' the party seeking an injunction 'must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation.'" *Maffick LLC v. Facebook, Inc.*, No. 20-cv-05222-JD, 2020 U.S. Dist. LEXIS 162517, 2020 WL 5257853, at *1 (N.D. Cal. Sept. 3, 2020) (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105-06 (9th Cir. 2012) (cleaned up)); *see also Garcia*, 786 F.3d at 740 ("The first factor under *Winter* is the most important -- likely success on the merits."). Because of this importance, when "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* elements]." *Garcia*, 786 F.3d at 740 (internal quotations and citations omitted).

DISCUSSION

I. ARTICLE III STANDING

Defendants say that plaintiffs lack Article III standing to sue. Dkt. No. 133 at 5-6. Consequently, the Court starts, as it must, with the justiciability of this controversy.

Under Article III of the Constitution, federal courts have "the power to decide legal questions only in the presence of an actual 'Cas[e]' or 'Controvers[y].'" *Wittman v. Personhuballah*, 578 U.S. 539, 543, 136 S. Ct. 1732, 195 L. Ed. 2d 37 (2016). Plaintiffs have invoked federal jurisdiction, and so they bear the burden of showing that they have "suffered an 'injury in fact'" that is "'fairly

traceable' to the conduct being challenged" and which "will likely be 'redressed' by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Standing to sue under Article III "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In this "very preliminary stage of the litigation," the Court will take into account the "allegations in [plaintiffs'] complaint and whatever other evidence they submitted in support of" their preliminary injunction motion. *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

"At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing." *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (citations omitted). When there are multiple plaintiffs, as is the case here, the presence of one plaintiff with standing "assures that [the] controversy before [the] Court is justiciable." *DOC v. United States House of Representatives*, 525 U.S. 316, 330, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999) (citing *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 303-05, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983)).

Defendants' Article III objection is not well taken. The complaint alleges that plaintiffs are "consumers of variable interest rate loans"; "USD LIBOR is an unlawful rate regularly utilized as a component of the pricing in

variable interest rate consumer loans by the defendants and their co-conspirators"; and plaintiffs "have been damaged and are threatened with damage in that they have paid and will pay anticompetitive rates in the future for variable interest rate loans." Dkt. No. 1 ¶ 4. On that score, plaintiff McCarthy filed a declaration attesting that she is "a consumer of variable interest rate loans, including a Capital One credit card with a variable interest rate tied to USD LIBOR." Dkt. No. 212-1 ¶ 2. The complaint also alleges that defendants conspired to fix the USD LIBOR rate with an agreed-upon formula that excluded the lowest submitted rates, and that a "reasonable estimate of the competitive price" is "the lowest rate submitted by the contributor banks, which is excluded by virtue of defendants' unlawful combination or conspiracy." Dkt. No. 1 ¶¶ 43, 45. Plaintiffs provided a declaration by Patricia Plonsker, a "financial analyst and management consultant specializing in interest rate risk for financial institutions," who states that "the impact of the US LIBOR price-fixing formula on US consumers is enormous" and has resulted in "excess overcharge interest accrued on outstanding loans." Dkt. No. 19-2 at 3 & ¶ 28.[1]

1. Defendants' requests to strike Plonsker's declarations under Federal Rule of Evidence 702, Dkt. Nos. 135, 266, are denied without prejudice to possible consideration down the road. A "trial court may give even inadmissible evidence some weight" in a preliminary injunction analysis. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *see also Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009). The Court considered the Plonsker declaration at Dkt. No. 19-2 for the specific question of standing, but did not rely on any of Plonsker's declarations for the analysis of the preliminary injunction factors.

These factors amply establish plaintiffs' standing to sue under Article III. To be sure, "[s]tanding is an ongoing inquiry" and the need to satisfy the requirements of Article III "persists throughout the life of the lawsuit," with the later stages of the case requiring more of plaintiffs than is required at this early stage. *Heeger v. Facebook, Inc.*, 509 F. Supp. 3d 1182, 1188 (N.D. Cal. 2020) (citation omitted). But at this stage, plaintiffs are positioned to sue.

II. LIKELIHOOD OF SUCCESS

The threshold inquiry under *Winter* is plaintiffs' likelihood of success. Plaintiffs state in the complaint two antitrust violations by defendants: (1) price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; and (2) a conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Dkt. No. 1 ¶¶ 68-85. The injunction requests are based on the Section 1 claim only, *see* Dkt. No. 19 at 1 & Dkt. No. 259 at 1, and so the merits inquiry focuses on that claim only. The question is whether plaintiffs have demonstrated a likelihood of success, or at the very least a serious question, on their Section 1 claim that warrants the extraordinary remedy of a preliminary injunction.

They have not. The salient facts for this conclusion are largely undisputed. The parties agree that, since the mid-1980s, a group of banks have worked together to set a daily LIBOR rate. Dkt. No. 1 ¶¶ 32-33. To set the rate, each panel bank provided an answer to the question, "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a

reasonable market size just prior to 11 a.m.?" *Id.* ¶ 33. Since management of the LIBOR was handed over from the British Bankers' Association (BBA) to defendant Intercontinental Exchange Benchmark Administration Limited (IBA) in 2014, IBA has continued to solicit this input data from panel banks. *Id.* ¶¶ 36-38. IBA then calculates LIBOR "using a trimmed arithmetic mean" in which "the highest and lowest quartiles of submissions are excluded" and "[a] mean is calculated from the remaining middle quartiles, rounded to five decimal places." *Id.* ¶ 43.

The setting of the daily LIBOR is subject to regulatory oversight. The Financial Conduct Authority (FCA), a creature of U.K. law, is charged with "regulat[ing] LIBOR and supervis[ing] both LIBOR submitters and its administrator." Dkt. No. 133 at 8. The parties agree that the FCA is in the process of phasing LIBOR out. *See* Dkt. No. 212 (plaintiffs' reply brief) at 8 ("Defendants have pledged to sunset the LIBOR formula by the end of 2023"); Dkt. No. 133 (defendants' opposition brief) at 1 ("The global financial community has been carefully planning for the eventual transition from LIBOR to alternative benchmarks through a phase-out process supervised by financial regulators and central banks.").

The parties do not dispute the nearly universal use of the LIBOR rate in the banking world. The complaint alleges that the rate is "used by an estimated US $350 trillion . . . of outstanding contracts in maturities ranging from overnight to more than 30 years." Dkt. No. 1 at 3. Defendants make the same point to the effect that an injunction against "continuing to set or observe LIBOR"

would "massively disrupt global financial markets, causing grave uncertainty regarding rights and obligations under contracts that reference LIBOR." Dkt. No. 133 at 12.

Plaintiffs say they have demonstrated a likelihood of success on the merits by virtue of a single United States Supreme Court decision of an older vintage: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). That is in effect the entirety of plaintiffs' legal argument. *See* Dkt. No. 19 at 2 ("Plaintiffs' success on the merits is manifest" under *Socony*); *see also id.* at 9-10 (same). Much of plaintiffs' argument simply hurls block quotes from *Socony* like projectiles from a catapult, because plaintiffs "believe that the simple statements by the Supreme Court, which are clear, concise and cogent, are more persuasive than any arguments that anyone else could make." Dkt. No. 288 at 2-4.

This almost exclusive reliance on *Socony* is misplaced. It is certainly true that "[a]ny combination which tampers with price structures is engaged in an unlawful activity." *Socony*, 310 U.S. at 221. But plaintiffs' insistence that the merits analysis should stop with a highly general and undisputed proposition of antitrust law plucked from *Socony* is not correct. To start, plaintiffs overlook the distinguishing fact that *Socony* was a criminal case where the defendants were convicted at trial of a conspiracy that was "not to be found in any formal contract or agreement." *Id.* at 177. In addition, legal developments in the 81 years since *Socony* was published cast considerable doubt on plaintiffs' rather mechanical analysis. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,

441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979), the Supreme Court expressly stated that the question was not "simply [one] of determining whether two or more potential competitors have literally 'fixed' a 'price.'" The Court cautioned that "[l]iteralness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Broadcast Music*, 441 U.S. at 9. In *Texaco Inc. v. Dagher*, 547 U.S. 1, 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006), the Court again underscored that the defendants' "pricing policy may be price fixing in a literal sense," but "it is not price fixing in the antitrust sense."

Plaintiffs did not engage with these developments, and simply pound *Socony* to say that price fixing is illegal. *See, e.g.*, Dkt. No. 288 at 1. This will not do for present purposes. To be sure, the Court embraces the proposition that horizontal price fixing is a *per se* violation of the Sherman Act Section 1. *See United States v. Florida*, No. 4:14-cr-00582-JD, 2017 U.S. Dist. LEXIS 58426, 2017 WL 1374599, at *2 (N.D. Cal. Apr. 17, 2017). But that does not mean that simply adding the LIBOR formula to this legal principle amounts to proof that plaintiffs are entitled to immediately void $350 trillion dollars' worth of contracts on a preliminary basis, especially when the Supreme Court has repeatedly cautioned since *Socony* that the antitrust laws should not be applied in such a rote manner.

Overall, plaintiffs have not carried their burden of establishing a likelihood of success sufficient to warrant the extraordinary relief of a preliminary injunction. Even

if plaintiffs were said to have raised a serious question about the Section 1 claim, an injunction would still be unwarranted because they have failed to satisfy the other *Winter* factors.[2]

III. IRREPARABLE HARM, BALANCE OF THE EQUITIES, AND THE PUBLIC INTEREST

Plaintiffs have not established an imminent threat of irreparable harm. The injury plaintiffs claim is that they paid too much in interest rates, but "[i]t is well established . . . that such monetary injury is not normally considered irreparable." *Maffick*, 2020 U.S. Dist. LEXIS 162517, 2020 WL 5257853, at *3 (quoting *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)). Plaintiffs also acknowledge that the LIBOR formula and procedures they attack have been publicly known and in continuous use since the 1980s. Dkt. No. 19 at 4. Why these well-known, decades-old practices are suddenly ripe for emergency relief in 2021 is not explained. This delay further undermines a claim of irreparable harm. *See Cal. Physicians Serv., Inc. v. Healthplan Servs., Inc.*, No. 3:18-cv-03730-JD, 2021 U.S. Dist. LEXIS 44170, 2021 WL 879797, at *7 (N.D. Cal. Mar. 9, 2021).

The "balance of equities" does not tip in plaintiffs' favor. *See Winter*, 555 U.S. at 24-31. Other than plaintiff

2. Because plaintiffs' merits showing is lacking, the Court need not resolve defendants' other "likelihood of success" arguments, such as antitrust standing or personal jurisdiction. Dkt. No. 133 at 6-7, 9-10. Those issues will be addressed as warranted at a later stage of the case.

McCarthy, none of the plaintiffs have demonstrated that they are paying a variable interest rate that is tied to LIBOR. Dkt. No. 212-2 - 212-8. Consequently, the hardship to plaintiffs is, on the whole, minor and purely monetary. In contrast, defendants have established that if the Court were to enjoin LIBOR across the board, as plaintiffs propose, substantial and possibly catastrophic consequences would ensue in the global financial market. *See* Dkt. No. 133 at 14-15; Dkt. No. 136. Plaintiffs did not contest this showing.

For the same reason, the public interest factor weighs heavily against plaintiffs. This factor looks at an injunction's "impact on non-parties rather than parties." *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003) (citation omitted). An amicus brief filed by the Chamber of Commerce of the United States of America and others demonstrates that the injunction plaintiffs request would "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." Dkt. No. 214-1 at 1. Another amicus brief filed by the Federal Reserve Bank of New York and the Board of Governors of the Federal Reserve System also establishes that an "abrupt end to LIBOR without an orderly transition would be detrimental to the public interest with consequences that could include . . . upending consumer contracts, including mortgages and student loans." Dkt. No. 282-1 at 1. Plaintiffs rather glibly dismiss these serious concerns by saying that "[f]inancial disasters are irrelevant in price fixing cases." Dkt. No. 318 at 1. Not so under *Winter*. The public interest factor is a critical component of a preliminary injunction analysis,

and plaintiffs have failed to show that the public interest supports the injunction they have asked for.[3]

CONCLUSION

The motion for injunction and application for an order to show cause are both denied, Dkt. Nos. 19, 259, as are defendants' requests to strike and their evidentiary objection. Dkt. Nos. 135, 266, 292. The Financial Conduct Authority's motion for leave to file an amicus brief, Dkt. No. 349, is terminated as moot in light of this order. The motions to dismiss that were taken under submission, Dkt. No. 342, will be resolved in a separate order.

IT IS SO ORDERED.

Dated: December 23, 2021

/s/ James Donato
JAMES DONATO
United States District Judge

3. Defendants' objection to new reply evidence, Dkt. No. 292, is terminated as moot. The evidence objected to played no role in this order.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3458
D.C. No. 3:20-cv-05832-JD
Northern District of California,
San Francisco

LISA MCCARTHY; *et al.*,

Plaintiffs-Appellants,

v.

INTERCONTINENTAL EXCHANGE, INC.; *et al.*,

Defendants-Appellees,

and

ROYAL BANK OF CANADA; *et al.*,

Defendants.

ORDER

Before: M. SMITH and BUMATAY, Circuit Judges, and WU, Senior District Judge.*

* The Honorable George H. Wu, United States Senior District Judge for the Central District of California, sitting by designation.

Appendix E

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge Bumatay vote to deny the petition for rehearing en banc, and Judge Wu so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 40. The petition for panel rehearing and the petition for rehearing en banc are DENIED.