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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LISA MCCARTHY, et al., Plaintiffs, v. INTERCONTINENTAL EXCHANGE, INC., et al., Defendants.	Case No. 20-cv-05832-JD UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., THE BANK POLICY INSTITUTE, AND THE LOAN SYNDICATIONS AND TRADING ASSOCIATION Date: November 19, 2021 Time: 9:00 a.m. Courtroom: 11 Judge: Honorable James Donato

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amici have a strong interest in the outcome of defendants' joint motion to dismiss because plaintiffs are "seek[ing] the elimination of the LIBOR rate" by imposing per se antitrust liability, but benchmarking activities are at the heart of well-functioning markets. Indeed, benchmarks like LIBOR and other standard setting activities are key to enhancing the efficiency, innovation, and transparency of markets, and amici and their members routinely participate in those activities. Holding that participating in benchmarking or standard setting activities are restraints of trade for purposes of Section 1 of the Sherman Act or, worse yet, deeming them per se illegal, would threaten to deprive consumers of the many benefits that flow from those activities.

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

Amicus Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's nearly one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services.

Amicus International Swaps and Derivatives Association, Inc. ("ISDA") is the global trade association representing leading participants in the derivatives industry. Since 1985, ISDA has worked to make the global over-the-counter derivatives markets safer and more efficient, including by participating in standard setting organizations. Today, ISDA has over 960 member institutions from 78 countries.

Amicus Bank Policy Institute ("BPI") is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United

States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, many of which reference LIBOR, and are an engine for financial innovation and economic growth.

Amicus the Loan Syndications and Trading Association ("LSTA") is a financial services trade association that represents a broad and diverse membership of over 530 firms involved in the origination, syndication, and trading of commercial loans. Its members include commercial banks, investment banks, broker dealers, fund managers, and other institutional lenders, as well as service providers and vendors. The LSTA is the only trade association solely focused on the $1.2 trillion U.S. syndicated loan market and its mission is to promote the fair, orderly, efficient, and growing corporate loan market while advancing and balancing the interests of all market participants.

Amici and their members participate in developing and administering benchmark and standard setting programs, and their voluntary participation in these programs enhances the efficiency and stability of financial markets. Amici also regularly file amicus briefs in cases presenting issues of importance to their members and the public interest, including this one. *See* ECF No. 214; *see also, e.g.*, Brief of ISDA et al., as Amici Curiae in Support of Appellees, *Prime International Trading v. BP PLC*, 17-2233 (2d Cir. 2018). Submissions from amici have been accepted in a variety of litigation contexts, including other antitrust litigation concerning benchmarking activity. *See* Brief of the Chamber & BPI as Amici Curiae in Support of Appellees, *In re ICE LIBOR Antitrust Litig.*, No. 20-1492 (2d Cir. 2020).

This Court has already permitted amici to participate in this case in opposition to plaintiffs' motion for a preliminary injunction, and amici's participation here will likewise aid the Court's disposition of defendants' motion to dismiss. "District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *See, e.g.*, *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (citation omitted). Amici here have particular expertise with LIBOR and other benchmarking activities due to their

members' current use of LIBOR, as well as amici's and their members' efforts to enhance markets by voluntarily participating in benchmarking and other standard setting activities. Thus, the standard for allowing amicus participation is liberal and amici once again easily meet it.

Plaintiffs and defendants do not oppose the filing of this proposed amicus brief. For the foregoing reasons, this Court should grant amici's request to file the enclosed brief.

DATED: October 15, 2021

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

This Court should reject plaintiffs' invitation to take the unprecedented step of declaring that participating in the process of setting a benchmark is per se unlawful under the Sherman Act, for at least three reasons. *First*, only a "small group of restraints are unreasonable per se," *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018), and that group is confined to agreements "that are 'so plainly anticompetitive that no elaborate study . . . is needed to establish their illegality,'" *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *Nat'l Soc'y of Pro. Eng. v. United States*, 435 U.S. 679, 692 (1978)). Plaintiffs' factual allegations come nowhere near to placing the process of setting LIBOR among that small, well-established group of "plainly anticompetitive" agreements subject to per se liability.

Second, per se treatment is particularly inapt here because benchmarks like LIBOR help to increase transparency and liquidity, reduce transaction costs, and promote innovation.

Third, the Court should not apply the per se rule to benchmarking and standard setting activities because it would chill those procompetitive activities—the very type of conduct that the antitrust laws are designed to promote.

ARGUMENT

I. THE PER SE RULE DOES NOT APPLY TO MERE PARTICIPATION IN BENCHMARKING ACTIVITIES

Plaintiffs do not and cannot plead facts sufficient to show that the setting of a benchmark like LIBOR falls within the narrow category of agreements subject to per se antitrust liability because benchmarking has well-recognized procompetitive benefits. Read literally, Section 1 could prohibit every agreement that restrains trade, but the Supreme Court "has not taken a literal approach." *Dagher*, 547 U.S. at 5. Instead, the Court has held that Section 1 bars only agreements that "unreasonabl[y]" restrain competition. *See Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 344 (1990). Within that limited category, agreements "can be unreasonable in one of two ways": (i) per se unreasonable, or (ii) unreasonable after a court applies the rule of reason. *Am. Express*, 138 S. Ct. at 2283-84.

Only "a small group of restraints are unreasonable per se," and there are a number of prerequisites that a plaintiff must meet before a court applies that rule. *Id.* First, "[t]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007); *see also Flaa v. Hollywood Foreign Press Ass'n*, 2021 WL 1399297, at *3 (C.D. Cal. Mar. 23, 2021) ("Plaintiffs cite no authority for—let alone a substantial history of—courts applying the per se rule under similar circumstances. On this basis alone, the per se rule is inapplicable."). Second, the restraint must "'always or almost always tend to restrict competition and decrease output.'" *Am. Express*, 138 S. Ct. at 2283 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). Third, plaintiffs must demonstrate that a practice "clearly reduces competition and lacks any procompetitive benefit," *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977), such that "courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason," *Leegin*, 551 U.S. at 886-87. Indeed, the existence of "any" procompetitive benefits flowing from the challenged practice ordinarily precludes courts from imposing per se liability. *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011).

Because the per se rule applies only in narrow circumstances, the Supreme Court has instructed that courts should "presumptively appl[y] rule of reason analysis." *Dagher*, 547 U.S. at 5. Under that analysis, the court balances the procompetitive benefits of the agreement against any anticompetitive effects, "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Carefully distinguishing between where to apply the per se rule and the rule of reason is critical because the process of proving a rule of reason claim is "radically different" from proving a per se claim: In rule of reason cases, the plaintiff must "prov[e] not only that the defendants fixed prices (all they'd have to prove, besides damages, in a per se case), but also that the defendants had market power . . . and that their collusive activity was indeed anticompetitive." *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (Posner, J.).

Plaintiffs satisfy none of the necessary prerequisites before this Court can apply the per se rule. Instead, they seek to do what the Supreme Court has long sought to prevent: deprive consumers of procompetitive benefits by conclusorily labeling activities as per se illegal, even though they have no factual or legal basis to do so. Indeed, not a single court in the United States has ever held that the mere setting of a benchmark is an unreasonable restraint of trade. This Court should not be the first, because nothing about the mere publication of a benchmark restrains trade, especially because, as demonstrated below, benchmarking offers significant procompetitive benefits.

II. BENCHMARKING AND STANDARD SETTING OFFER SUBSTANTIAL PROCOMPETITIVE BENEFITS

The rule of reason necessarily applies to benchmarking and standard setting activities—not only because they do not meet the narrow criteria for per se treatment, but also because they offer many procompetitive benefits. In general, benchmarks provide market participants with aggregate information regarding market conditions. Benchmarks "play a key role in the financial system, the banking system and the economy overall."[1] And benchmarks are central to trillions of dollars of financial instruments. For instance, the S&P 500 is used as a benchmark of the U.S. economy's health, with over $1 trillion of investments tied to that benchmark, ECF No. 136-25 at 10-11. Benchmarks are also ubiquitous outside of the financial markets. For example, the Kelley Blue Book benchmarks the value of particular models of used cars while the Consumer Price Index measures the average change in prices paid by consumers for retail goods and services.[2]

Benchmarks like LIBOR are so widely used because they offer many procompetitive benefits, including: (1) aggregating market information, (2) increasing transparency and liquidity, (3) reducing transaction costs, and (4) fostering innovation. To begin, benchmarks provide a comprehensive picture of market conditions by aggregating a high volume of transaction-

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

[2] United States Bureau of Labor and Statistics, *Consumer Price Index*, https://www.bls.gov/cpi/.

related and other relevant data from the relevant market(s). Through this aggregation, benchmarks enhance efficiency by eliminating the need for each market participant to survey voluminous transactional data to estimate prevailing market conditions. For instance, in the absence of benchmarks like the Kelley Blue Book, car buyers would have to expend significant efforts to analyze transactions from all over the United States to determine the market value of a particular make and model. Of course, when buyers or sellers of used cars consult the Kelley Blue Book, they are gathering information to incorporate into independent pricing decisions, and not reaching an illicit agreement to transact at the benchmark price. That is true even if parties choose to incorporate the benchmark into contract terms, e.g., "I'll pay Blue Book value for the car," or "I'll pay Blue Book value less 5%." Plaintiffs do not plead any facts to show that referencing LIBOR in financial contracts is any different.

In addition, benchmarks increase transparency by compiling transaction-related and other relevant data that can paint a comprehensive picture of market conditions. *See* J. Harold Mulherin, Jeffry M. Netter & James A. Overdahl, *Prices Are Property: The Organization of Financial Exchanges from a Transaction Cost Perspective*, 34 J. L. & Econ. 2 (1991); *see also Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1173 (8th Cir. 1971) ("The main economic functions performed by [benchmarks] are . . . the provision of reliable pricing information, and the insurance against loss from price fluctuation."). Increasing transparency often increases liquidity, as parties can each negotiate from a baseline understanding of market prices or other market conditions. *See id.*

To illustrate, prior to LIBOR, market participants primarily used other benchmarks issued by central banks as reference rates. *See* Jacob Gyntelberg & Philip Woolridge, *Interbank Rate Fixings During the Recent Turmoil*, BIS Q. Rev., Mar. 2008, at 59-60. Following a period of market instability, LIBOR was created to replace those rates due to a concern that they did not reflect actual market conditions. *See* Milson C. Yu, *Libor Integrity and Holistic Domestic Enforcement*, 98 Cornell L. Rev. 1271, 1277 (2013). The transparency into market conditions that LIBOR brought "enhanced liquidity . . . to the benefit of investors," *Gyntelberg*, *supra* at 60, by

providing "consumers and other market participants with a benchmark rate that reflects expected funding costs without the limitations from exposure to the idiosyncratic costs of any particular lender," ECF No. 136-25 at ¶ 24.

Benchmarks are also procompetitive because they help reduce transaction costs when included as the reference rate in contracts. Long-term contracts often require protracted and sometimes unfruitful negotiations concerning how the contract should account for future market conditions. Benchmarks often ease those negotiation costs, as the parties can agree that the fluctuations in the benchmark will guide future payments. *See* Paul L. Joskow, *Price Adjustments in Long-Term Contracts: The Case of Coal*, 31 J.L. & Econ. 47, 52 (1988). That, in turn, "simplifies contracting, reduces the need for renegotiation, and facilitates adjustments." (ECF No. 136-25 at 10.) For example, labor unions were among the first to recognize the benefits of benchmarks in long-term contracts by insisting that future wage increases contained in collective bargaining agreements reflect the Consumer Price Index. *See* Thomas A. Stapleford, *The Cost of Living in America*, 256, 258-71 (2009). Furthermore, interest rate benchmarks such as LIBOR are incorporated in many different types of agreements because they serve as a mechanism for contracting parties to efficiently allocate the risk of future market developments (e.g., fluctuating interest rates) through a well-defined baseline process.

Finally, benchmarks help generate innovations that benefit consumers. For example, "the S&P 500 index and other indices have been instrumental in the development of innovative, low-cost alternative investment offerings, such as passively managed mutual funds and ETFs." (ECF No. 136-25 at 11.) Those investment vehicles have become "highly popular, in part, because they . . . allow[] individuals investing in such instruments to track their performance through readily accessible public sources." (*Id.*) Reference rates like LIBOR offer additional benefits to consumers. For one, using "reference rates to price financial contracts reduces their complexity and facilitates standardization."[3] LIBOR and other reference rates also "reduce[] informational asymmetries" between lenders and their customers, and provide consumers with an

[3] Financial Stability Report, *Reforming Major Interest Rate Benchmarks*, July 22, 2014.

"independent pricing source."[4] Benchmarks have also been essential to the development and operation of financial derivatives because "[l]inking derivatives to a relevant benchmark has simplified structuring a financial instrument that addresses the risks particular to the underlying" asset. Gina-Gail S. Fletcher, *Benchmark Regulation*, 102 Iowa L. Rev. 1929, 1944 (2017).

Regulators and courts have extolled the benefits that benchmarking activities can provide. For instance, a commissioner of the Federal Trade Commission explained that:

> Benchmarking has obvious procompetitive potential. It allows companies to learn about more efficient means of production and distribution, which can in turn lead to better and lower cost products for consumers.

Remarks of Federal Trade Commissioner J. Thomas Rosch, *Antitrust Issues Related to Benchmarking and Other Information Exchanges*, May 3, 2011; *accord Hardin*, 452 F.2d at 1173.[5] Furthermore, while courts have condemned concerted efforts to manipulate benchmarks, no court has declared that the activity of calculating a benchmark is itself unlawful, much less per se unlawful. *See Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("Persons who . . . report market prices[] are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them.").

To the contrary, courts and Congress have recognized the benefits offered by standard setting activities—the family of activities to which many benchmarks belong. Indeed, the Supreme Court has held that standard setting should generally be evaluated under the rule of reason because those activities have the potential to offer "significant procompetitive advantages." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988). Congress has expressly recognized "the importance of technical standards developed by voluntary consensus standards

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[4] Speech of Lorie K. Logan, Executive Vice President of the N.Y. Federal Reserve, *The Role of the New York Fed as Administrator and Producer of Reference Rates*, Jan. 9, 2018.

[5] *See also* Bus. Rev. Letter from M. Delrahim, U.S. Dep't of Justice, Antitrust Div. (Oct. 1, 2020) (concluding that LIBOR "reduces the complexity of financial instruments and facilitates their standardization"); Bus. Rev. Letter from T. Barnett, U.S. Dep't of Justice, Antitrust Div. (Oct. 30, 2006) ("Collaborative standard setting can produce many procompetitive benefits.").

bodies to our national economy." Standards Development Organization Advancement Act of 2004, Pub. L. 108-237, tit. I, § 102, 118 Stat. 661 (2004). Accordingly, the per se rule is especially inapt for benchmarking and standard setting activities because they provide significant procompetitive benefits.

III. APPLYING THE PER SE RULE WOULD CHILL THE VERY TYPE OF CONDUCT THE ANTITRUST LAWS ARE DESIGNED TO PROMOTE

The Supreme Court has recognized that over-enforcing the antitrust laws can "chill competition, rather than foster it." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). That concern arises in an acute form during a motion to dismiss because sending a "sprawling, costly, and hugely time-consuming" Section 1 case to discovery can itself deter the very procompetitive business activities that the antitrust laws were designed to promote. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007). Weeding out unmeritorious claims at summary judgment is not a panacea because the "settlement-inducing quagmire of antitrust discovery," *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1267-68 (11th Cir. 2019) (en banc), "frequently . . . gives the plaintiff the opportunity to extort large settlements even whe[n] he does not have much of a case," *Kendall v. Visa U.S.A.*, Inc., 518 F.3d 1042, 1047 (9th Cir. 2008); *see also Assoc. of Am. Phys., Inc. v. Am. Bd. of Med. Specialties*, No. 20-3072, 2021 WL 4704621, at *3 (7th Cir. Oct. 8, 2021) ("Right to it, *Twombly* bars the discover-first, plead-later approach that AAPS urges us to adopt. For good reason: modern antitrust litigation is expensive.").

Those concerns ring loudly in the context of benchmarking and standard setting activities because cooperation is essential for consumers to reap their procompetitive benefits. Indeed, industry groups like amici, and their members, must make numerous decisions about the appropriate development of standards. Those decisions include which institutions should be included in the standard setting, when information will be collected from those institutions, and how it will be compiled. Imposing per se liability on benchmarking and standard setting activities would deter organizations from participating in them because they would face a heightened risk of antitrust litigation—with its attendant discovery costs and the specter of trebled damages—and

may never have the opportunity to demonstrate the benchmarks' procompetitive benefits. Thus, the Court should conclude that mere participation in LIBOR is subject to the rule of reason, not to a per se prohibition.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' joint motion to dismiss for failure to state a claim.

DATED: October 15, 2021

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ATTESTATION

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

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LISA MCCARTHY, et al., Plaintiffs, v. INTERCONTINENTAL EXCHANGE, INC., et al., Defendants.	Case No. 20-cv-05832-JD **[PROPOSED] ORDER GRANTING AMICI'S UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Before the Court is Amici Curiae the Chamber of Commerce of the United States of America, Securities Industry and Financial Markets Association, International Swaps and Derivatives Association, Inc., Bank Policy Institute, and Loan Syndications and Trading Association's unopposed motion for leave to file an amicus curiae brief in support of defendants' joint motion to dismiss. Having considered the record and all of the papers filed in connection with the motion, the Court hereby grants the motion.

IT IS SO ORDERED.

DATED: _____

_____
Honorable James Donato
United States District Judge