UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LISA MCCARTHY, et al.,

Plaintiffs,

v.

INTERCONTINENTAL EXCHANGE, INC., et al.,

Defendants.

Case No. 20-cv-05832-JD

ORDER RE INJUNCTION

Re: Dkt. Nos. 19, 259

United States District Court
Northern District of California

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.

United States District Court
Northern District of California

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. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (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 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 (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 (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 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." *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (citing *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 303-05 (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]

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

[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

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

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