

APPENDIX

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 28 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN NYPL,
Plaintiff-Appellant,

v.

JPMORGAN CHASE & CO.,
Defendant-Appellee,

SIMON FOWLES,
Real-party-in-interest-Appellee,

v.

WELLS FARGO BANK, N.A.,
Movant-Appellee.

No. 19-15293

D.C. No. 3:18-mc-80209-JCS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Submitted April 16, 2020**
San Francisco, California

Before: HAWKINS and PAEZ, Circuit Judges, and RESTANI,*** Judge.

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

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

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Appellant John Nypl (“Nypl”) seeks review of the district court’s order denying relief from a magistrate judge’s order granting Appellee Wells Fargo Bank, N.A.’s (“Wells Fargo”) motion to quash subpoena served by Nypl upon Appellee Simon Fowles (“Fowles”) and denying Nypl’s competing motion to compel. Because the derivative case is pending “in a district court of another circuit,” we take jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1291. *See In re Subpoena Served on Cal. Pub. Utils. Comm’n*, 813 F.2d 1473, 1476 (9th Cir. 1987). After reviewing for an abuse of discretion, *see Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975), we affirm.

Nypl is the putative class representative in an antitrust action pending in the Southern District of New York alleging, among other things, that between December 2007 and January 2013, agents of certain domestic and foreign financial institutions, not including Wells Fargo, along with certain known and unknown co-conspirators, engaged in price-fixing and other anti-competitive practices relating to foreign exchange (“FX”) rate trading by using covert chatrooms and coded language to conceal their unlawful conduct (the “*Nypl*” litigation). Fowles is a resident of the Northern District of California and was, prior to his termination in October 2017, the Executive Vice President of FX Trading at Wells Fargo in San Francisco. In April 2018, Fowles sued Wells Fargo for wrongful termination and retaliation in California state court, alleging principally that Wells Fargo terminated his

employment after he lodged internal concerns about Wells Fargo’s handling of a transaction dating to August 2014 — a date outside the period relevant to the specific improprieties alleged in the *Nypl* litigation.

Relying solely upon the allegations in Fowles’s publicly-filed complaint, Nypl believes California-based Fowles has information that may be relevant to the *Nypl* litigation in New York. Thus, Nypl subpoenaed Fowles for testimony as to *all* of the “reasons given” in support of his complaint and for *all* “documents, things, communications, and information that support his allegations, including notes, memoranda, or other documents.” After unsuccessful litigation to compel compliance in the issuing court, Nypl served Fowles with the same subpoena anew in the Northern District of California. Wells Fargo and Nypl then filed dueling motions to quash and to compel in that district.

After a hearing, a magistrate judge concluded that the allegations in Fowles’s complaint against Wells Fargo — a wrongful employment termination and retaliation dispute in California state court — are insufficient, without more, to show that Fowles has information that is relevant to the *Nypl* litigation — a federal class action antitrust suit in New York federal court. Accordingly, the magistrate judge granted Wells Fargo’s motion to quash and denied Nypl’s motion to compel. Thereafter, the district court denied Nypl’s motion for relief, adopting the magistrate judge’s factual determinations on relevance.

Whether the information sought in a discovery dispute is relevant to the underlying litigation is a ““fact-intensive”” inquiry that is “better suited to resolution by the district court than the court of appeals.” *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1168 (2017) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990)). Rigid, *per se* rules and formulae are thus ill-suited to this context. *See id.* (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)). In view of these principles, we have long declined to “substitute our judgment for that of the trial judge” in adjudicating a pretrial discovery motion, unless the decision was “unusual and exceptional” and either “based on an erroneous conclusion of law” or “the record contains no evidence on which” the trial court “rationally could have based” its decision. *Premium Serv.*, 511 F.2d at 229. Similarly, a reviewing court will not disturb a district court’s decision to deny relief from a magistrate judge’s pretrial discovery order unless, “on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.” *In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1076 (9th Cir. 2015) (internal citations and quotations omitted).

Nypl does not establish that the district court’s decisions were unusual, exceptional, contrary to law, or based upon an implausible view of the record. To the contrary, Nypl’s requests “were sweeping in nature, covering every [communication] touching on any relationship between” Fowles and Wells Fargo.

Premium Serv., 511 F.2d at 229. It was therefore reasonable to find that Nypl’s need for untethered access to the requested information “was not sufficient to outweigh the burden and invasion” of Fowles’s and Wells Fargo’s privacy interests, “especially since they were not parties to the suit,” and to determine that the subpoena sought irrelevant information. *Id.*

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOHN NYPL,

Plaintiff,

v.

JP MORGAN CHASE & CO.,

Defendant.

Case No. 18-mc-80209-JCS

**ORDER DENYING PLAINTIFF’S
MOTION FOR RELIEF FROM
MAGISTRATE JUDGE’S NON-
DISPOSITIVE PRE-TRIAL ORDER**

[Re: ECF 23]

Before the Court is Plaintiff’s Motion for Relief from Non-Dispositive Pre-Trial Order of Magistrate Judge. ECF 23. Plaintiff requests relief from Magistrate Judge Spero’s orders (ECF 19 and ECF 22) granting a motion to quash subpoena to non-party Simon Fowles and denying Plaintiff’s motion to compel deposition of Simon Fowles. *See* Motion at 1, ECF 23. A magistrate judge’s non-dispositive pre-trial order may be modified or set aside if it is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). “[T]he magistrate’s factual determinations are reviewed for clear error, and the magistrate’s legal conclusions are reviewed to determine whether they are contrary to law.” *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010).

As an initial matter, Plaintiff objects to Magistrate Judge Spero hearing this discovery dispute in the first instance under this Court’s General Order 44 because Plaintiff “sought to file [] a declination, declining to have a Magistrate Judge conduct further proceedings” which was not accepted by the clerk. *See* Motion at 3; Winters Decl. ¶¶ 1–2. However, Plaintiff misreads General Order 44. The instant “case” is not a “civil case” under General Order 44.E.1 but instead a “civil miscellaneous matter” under General Order 44.E.3. Thus, General Order 44.E.1.c concerning declination to a magistrate judge does not apply. Moreover, Plaintiff previously filed a motion for reassignment to Judge Chen which was denied. *See* ECF 4; ECF 7. The Court finds no

1 clear error in Judge Spero's decision to deny Plaintiff's motion for reassignment. Plaintiff's
2 motion for reassignment is one paragraph and was based solely on the fact that Judge Chen issued
3 a protective order in *Fowles v. Wells Fargo Bank* (3:18-cv-02794-EMC) and that Wells Fargo
4 cited that protective order in support of its motion to quash. *See* Motion for Reassignment at 1,
5 ECF 4. The mere existence of a protective order in the *Fowles* action does not mandate
6 reassignment and Plaintiff made no other argument in support of the motion for reassignment.

7 Turning to the substance of Plaintiff's Motion, Plaintiff objects to Judge Spero's decision
8 to quash the deposition subpoena of non-party Simon Fowles. *See* Motion at 4, ECF 23. Judge
9 Spero granted the motion to quash and denied the motion to compel via minute order on January
10 18, 2019. *See* ECF 19. At the hearing on the same day, Judge Spero noted that "[t]he topic of the
11 Fowles complaint has nothing to do with [Plaintiff's action]." *See* Hearing Transcript at 4:21–22.
12 Judge Spero thoroughly explained how and why the respective actions are different. *See id.* at
13 4:15–5:13. Judge Spero therefore reasoned that deposition of Simon Fowles was not warranted
14 because "[t]he allegations of [the Fowles] complaint do not concern [the allegations of Plaintiff's
15 complaint]." *See id.* at 5:9–10. In other words, Judge Spero found that "just because [Fowles is]
16 involved in the exchange rate business and he blew the whistle on Wells Fargo with respect to an
17 aspect of the exchange rate business [has nothing] to do with price fixing [as alleged by Plaintiff]." *See id.* at 7:19–23. This Court agrees with Judge Spero's conclusion that Plaintiff's counsel did
18 not demonstrate the relevance of the Fowles deposition and show that it was more than a fishing
19 expedition. *See id.* at 14:19–15:4.

21 Having reviewed Plaintiff's motion, Judge Spero's pre-trial order (ECF 19), and the
22 hearing transcript (ECF 22), the Court finds no "clear error" in the magistrate judge's factual
23 determinations and does not find that the magistrate judge's legal conclusions are "contrary to
24 law." *See Perry*, 268 F.R.D. at 348. Accordingly, Plaintiff's motion at ECF 23 is hereby
25 DENIED.

26 **IT IS SO ORDERED.**

27 Dated: February 13, 2019



BETH LABSON FREEMAN
United States District Judge

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
CIVIL MINUTE ORDER**

Case No.: 18-mc-80209-JCS	Case Name: Nypl v. JP Morgan Chase & Co.	
Chief Magistrate Judge: JOSEPH C. SPERO	Date: January 18, 2019	Time: 22 M

Attorney for Plaintiff: Joseph Alioto, Sr., Lingel Winters

Attorney for Defendant: Dane Shikman, Melcolm Heinicke - Wells Fargo; Dan Feder - Simon Fowles, interested party

Deputy Clerk: Karen Hom

Court Reporter: FTR 9:32-9:54

PROCEEDINGS

1. Motion to Quash Subpoena to non-party Simon Fowles [dkt 1] - Granted
2. Motion to Compel Deposition of Simon Fowles [dkt 6] - Denied

ORDERED AFTER HEARING

NOTES:

CASE CONTINUED TO:

Order to be prepared by:

☐ Plaintiff ☐ Defendant ☐ Court

cc:

*(T) = Telephonic Appearance

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 1 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN NYPL,

Plaintiff-Appellant,

v.

JPMORGAN CHASE & CO.,

Defendant-Appellee,

SIMON FOWLES,

Real-party-in-interest-
Appellee,

v.

WELLS FARGO BANK, N.A.,

Movant-Appellee.

No. 19-15293

D.C. No. 3:18-mc-80209-JCS
Northern District of California,
San Francisco

ORDER

Before: HAWKINS and PAEZ, Circuit Judges, and RESTANI,* Judge.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.

35.

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc are
DENIED.

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF CALIFORNIA
 3 SAN FRANCISCO DIVISION

4 JOHN NYPL, et al.,) Case No. 18-mc-80209-JCS
 5)
 6 Plaintiffs,) San Francisco, California
 7) Friday, January 18, 2019
 8 vs.)
 9)
 10 JP MORGAN CHASE & CO.,)
 11 et al.,)
 12)
 13 Defendants.)
 14)
 15)
 16)
 17)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 25)

11 TRANSCRIPT OF MOTION HEARING
 12 BEFORE THE HONORABLE JOSEPH C. SPERO
 13 UNITED STATES CHIEF MAGISTRATE JUDGE

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25 Proceedings recorded by electronic sound recording; transcript
 produced by transcription service.

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1 SAN FRANCISCO, CALIFORNIA FRIDAY, JANUARY 18, 2019 9:32 A.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: We are calling Case Number 18-mc-80209, Nyp1
5 v. JP Morgan Chase.

6 (Pause.)

7 THE COURT: Appearances, please.

8 MR. SHIKMAN: Good morning, Your Honor. Dane Shikman
9 from Munger, Tolles & Olson, along with my colleague Malcolm
10 Heinicke also from Munger Tolles for Wells Fargo.

11 THE COURT: Welcome.

12 MR. FEDER: Daniel Feder for Mr. Fowles.

13 THE COURT: He's been identified. Mr. Heinicke's been
14 identified.

15 MR. ALIOTO: May it please the Court, Joseph M. Alioto
16 for the Plaintiffs. Along with me is Mr. Winters.

17 THE COURT: Good morning.

18 MR. ALIOTO: Thank you.

19 THE COURT: So, gentlemen, I am going to give you my
20 tentative and then we can talk briefly about you trying to
21 persuade me that I'm wrong.

22 I've read all the materials in great detail. Obviously, it's
23 a very interesting case pending in the Southern District of New
24 York, and I wish you the best of luck with that.

25 However, this subpoena has nothing to do with that case and

1 my tentative is to quash it. Let me go through my reasoning.

2 You're welcome to -- when you talk, I'd like you to be at the
3 podium but, otherwise, you're welcome to sit down.

4 MR. SHIKMAN: Thank you.

5 THE COURT: Or stand at the podium, wherever you're more
6 comfortable. I think the standing issue is a red herring because
7 Mr. Fowles has joined in the motion. But to the extent there's a
8 standing issue, Wells Fargo has standing because of their own
9 business confidentiality interests.

10 The subpoena issue is very simple in scope. It seeks topics
11 -- it seeks to have a deposition of Mr. Fowles about the -- a
12 basis for his allegations in his April 11th, 2011 wrongful
13 termination complaint against the bank and documents that support
14 those allegations.

15 The topic of the Southern District action, the Nypl action,
16 is a claim of price fixing in the benchmark exchange rates for
17 foreign currency, the FX benchmarks. The allegation is that the
18 conspirators coordinated their trades in connection with the two
19 daily fixes and another action in connection with the two daily
20 fixes like withholding bids in order to manipulate that price.

21 The topic of the Fowles complaint has nothing to do with
22 that. The topic of the Fowles complaint is wrongful termination
23 and retaliation for opposing alleged illegal conduct by the bank.
24 The allegation is that the compensation plan for the foreign
25 exchange sales persons -- can't remember exactly what they were

1 called, but -- was based on revenue which would result in
2 significant risk of illegal conduct such as not adhering to a
3 customer's spread agreement or overcharging the client of the bank
4 on FX transactions, illegally increasing the spreads, and
5 customers at year-end to -- so they can make their numbers, and
6 the Department of Justice has been asking questions about one
7 particular transaction, whether it generated revenue for the bank
8 that should have been shared with the customers.

9 The allegations of that complaint do not concern price fixing
10 of the benchmark rate for foreign exchange currency. Period.

11 The unlawful conduct that's referred in the Fowles' complaint
12 is unrelated to that -- that matter of the benchmark price and is
13 not related to a price-fixing conspiracy.

14 The fact that -- just as an aside -- that another employee
15 other than Mr. Fowles -- I think his name is Keefer (ph) --
16 participated in the chat room where non -- employees of other
17 banks engaged in price fixing, not this particular bank -- Wells
18 Fargo -- it does not make the deposition or the documents
19 relevant. First of all, it's not Mr. Fowles and it's not a topic
20 of Mr. Fowles' complaint, more particularly, which is all you have
21 subpoenaed. And there's no connection between Mr. Fowles and the
22 chat room and, you know, we're not here to discuss whether Mr.
23 Keefer can be deposed, but there's not even an effort to show that
24 what Mr. Keefer did in the chat room had anything to do with
25 illegal activity.

1 As an aside, I will say that the argument that the
2 confidentiality, attorney-client privilege, work product
3 privileges were waived is a completely frivolous argument on the
4 grounds that it was made.

5 Mr. Fowles couldn't possibly waive Wells Fargo's privileges
6 or confidentiality, and -- you need to keep that closed. You can
7 be on this side of the door, but you need to keep it closed -- and
8 the filing of a lawsuit by an employee for a wrongful termination
9 certainly doesn't waive a bank's privilege and certainly does not
10 waive Mr. Fowles' privileges of attorney-client or work product
11 with respect to the topics that he's raised. Not some of these
12 lawyers.

13 So that is an entirely frivolous argument.

14 I just -- I -- you know, this is -- this is a classic over-
15 reach. You know, it's -- there -- an employee of Wells Fargo
16 participated in the chat room. This is not that employee. I just
17 have no idea why you're going with this other than to dig up dirt
18 to hopefully do something against Wells Fargo and that's not a
19 permissible scope of discovery.

20 So that is my rather strident tentative. But I'd be happy
21 to hear from counsel for the Plaintiffs.

22 MR. ALIOTO: Thank you, Your Honor. May it please the
23 Court. The Plaintiffs have the opportunity to be able to argue
24 against the Court's tentative ruling. I want to point out right
25 from the very beginning that of course Your Honor's ruling was

1 contrary and is contrary to the ruling by the federal judge who is
2 sitting on the case in New York prior to the time of this filing
3 by Wells Fargo.

4 THE COURT: I'm aware of that.

5 MR. ALIOTO: I also want to point out very clearly
6 there's not one affidavit by Wells Fargo or by Mr. Fowles, there's
7 no identification of any documents that they claim to be
8 privileged or confidential. And the statements made by Mr. Fowles
9 in his complaint specifically go to an issue of being a
10 whistleblower with regard to the exchange rate cases -- or
11 exchange rate business by Wells Fargo.

12 He was in charge of the exchange rate --

13 THE COURT: So, Mr. Alioto, I appreciate it.

14 MR. ALIOTO: Yes.

15 THE COURT: But if you're going to repeat everything
16 that was in your briefs, we're going to be here quite a long time.
17 So do you have anything that is new that I'm missing, that I might
18 not have seen in your briefs?

19 The heart of this is that I'm not buying the argument that
20 just because he's involved in the exchange rate business and he
21 blew the whistle on Wells Fargo with respect to an aspect of the
22 exchange rate business, that that has anything to do with price
23 fixing. So that's the heart of the argument.

24 If you want to address that, I'd be happy to hear that.

25 MR. ALIOTO: Well, I think that, in all due respect,

1 Your Honor, that you're missing the point of what he said in his
2 complaint. He said he was going to advise the regulatory bodies
3 about what he perceived to be violations of the law.

4 THE COURT: What violations would those be?

5 MR. ALIOTO: The violations that he specifically pointed
6 out -- some were general -- he said basically "violations." But
7 some of them, when he was specific, was mail fraud and -- mail
8 fraud. And mail fraud, of course, was one of the major counts of
9 the indictments of the Defendants in New York.

10 THE COURT: So that's way too broad and you know it's
11 way too broad.

12 MR. ALIOTO: That's too broad? When they're involved
13 with the very exchange rates -- they're involved with the very
14 exchange rates, that's too broad?

15 THE COURT: No. That's not -- so that's not what I'm
16 talking about and I think you know that's not what I'm talking
17 about. Mail fraud covers any species of fraud. It covers if you
18 use the mail screw (ph). It can cover an antitrust conspiracy.
19 It can cover that kind of conduct that might underlie an antitrust
20 conspiracy. It can also cover one-on-one fraud with a client
21 where you get profits that you shouldn't be entitled to with one-
22 on-one client contact.

23 Clearly, clearly -- 'cause I've read his complaint cover t
24 cover -- the complaint is about the latter, not the former.

25 MR. ALIOTO: To the contrary, Your Honor. I would

1 respectfully direct the Court's attention to paragraph 24 of Mr.
2 Fowles' complaint in which he states, in substantive part, in mid-
3 September of 2017 -- and he starts to change just as soon as the
4 conspiracy was over. He says, "Plaintiff made it very clear to
5 upper management that he intended to inform federal regulators of
6 the significant ethical, legal, and regulatory issues he had noted
7 and been complaining about concerning the FX sales team's use of
8 their cash incentive program."

9 Specifically going to the exchange rates and their team and
10 their use. And he's more specific --

11 THE COURT: Where in there does it talk about going to
12 their use of the exchange rate?

13 MR. ALIOTO: He says -- again, Your Honor, he says the
14 issues -- the claims that are illegal and unethical "about the FX
15 sales team's use of the cash base incentive program." The FX
16 sales team, as he previously identified, are the very groups that
17 are involved in the exchange rating by Wells Fargo.

18 THE COURT: So let me give you a -- let me give you a
19 hypothetical. Okay. Say, for example, he decides that Wells
20 Fargo has a terrible incentive program -- which I think you do --
21 and he decides that with respect to that terrible incentive
22 program, there is a regulatory violation and that regulatory
23 violation is because of the nature of the cash incentive programs.
24 At the end of the year -- at the end of the year, the sales people
25 decide that they're going to defraud their customers by taking

1 more of a percentage of the transactional profits -- the one
2 particular transaction in the brief -- than they were entitled to.
3 Okay. That would be a kind of fraud. That would be a kind of
4 regulatory violation. It certainly would be immoral. And you
5 could see why.

6 What's that got to do with price fixing in the FX benchmark
7 twice-a-day fix in the European market?

8 MR. ALIOTO: It's exactly what he said it had to do with
9 it. He said that because of this incentive, they were -- they
10 were motivated by greed and if they were motivated by greed --
11 which, of course, all of the people who pled guilty in New York --
12 the motivation there was to make sure that if they were motivated
13 by greed, which he says, then they -- what they would do is they
14 would stop different sales from different customers in order to
15 stabilize and fix the prices of the exchange rates.

16 THE COURT: Any evidence that this person did that? --
17 that Fowles did that, that Wells Fargo did that, that they did
18 what you just said?

19 MR. ALIOTO: That's what he says in his complaint.

20 THE COURT: No. Any evidence that they did that? --
21 that they withheld, that they overbid, they underbid, whatever, in
22 order to stabilize the benchmark rates, twice-daily benchmark
23 rates that are set in European market?

24 MR. ALIOTO: Quite obviously. I mean, he said so, but
25 this is what this is about. It's discovery to ask him what he --

1 what he was talking about and what he meant. This isn't -- this
2 is -- and what does he do? Does he give you an affidavit saying
3 he was not involved? He does not. His lawyer? No. His --

4 THE COURT: Well, his lawyer filed something in New York
5 saying he knows nothing about this.

6 MR. ALIOTO: Right, and it's -- yes. That's very good.
7 That's hearsay. He can't say whether or not Mr. Fowles --

8 THE COURT: This is not a trial.

9 MR. ALIOTO: I know.

10 THE COURT: Hearsay is not an objection. If you have
11 some proof that he's wrong, I'd like to hear it.

12 MR. ALIOTO: You're prohibiting me from taking the
13 deposition of someone who specifically is in this very business
14 who specifically says that he has information about illegal
15 conduct, makes it very plain. He says that it's motivated by
16 greed. And it lines up with the very time period of the
17 indictments and the guilty pleas in New York.

18 And all the Court has in front of it is a hearsay statement
19 by his lawyer as to what he thinks or does. Then you have Wells
20 Fargo coming in and Wells Fargo is giving you double hearsay.
21 They're giving you what -- what Fowles' lawyer told them that
22 Fowles maybe told somebody else.

23 What Fowles did as a --

24 THE COURT: What I'm concentrating on --

25 MR. ALIOTO: Pardon me?

1 THE COURT: What I'm concentrating on is two things --
2 and this is the way I do these all. First of all, this is a non-
3 party, so the bar is higher than for a party. I've got to protect
4 a non-party.

5 Second, and equally importantly, I compare the two
6 complaints. I look at the two complaints and I say, Does this
7 complaint in San Francisco in front of Judge Chen have anything to
8 do with the allegation in New York? If it does, that's one thing
9 If it doesn't, that's another. It's buttressing that they put in
10 a letter that says A, B, and C in New York, but that's just
11 frosting on the cake. The question is comparing the two
12 complaints.

13 MR. ALIOTO: The question, Your Honor, is that in the
14 complaints filed in New York, attached to two of the complaints
15 are the plea agreements. Under the plea agreements, these folks
16 in the same business, the same large -- large banks, these guys
17 have admitted that they have violated the antitrust laws by fixing
18 the price and, indeed, making fun of it while they did it.

19 This person in his complaint -- not what his lawyers say or
20 his lawyers' lawyers or what the bank lawyers say -- but what does
21 he say? Your Honor has nothing in front of this Court that gives
22 any affidavit by Mr. Fowles that he didn't have anything to do
23 with or didn't know anything about this

24 To the contrary -- his allegation is that he does know about
25 it, that they have the incentive to do it, that they have the

1 greed to be able to do it. That's what he says in his complaint.
2 All we want to do is ask him, What are you talking about? What is
3 the basis of what you are saying? This is discover. Protect him.
4 Fine.

5 Has he come in to attempt to protect himself? No. He hasn't
6 given you --

7 THE COURT: His lawyer's right there.

8 MR. ALIOTO: Well, that's fine. His lawyer's affidavit
9 is worthless, Your Honor. He didn't give you an affidavit. And,
10 more importantly -- I would point this out -- the judge who was in
11 on the case when originally the motion was -- it's not binding,
12 obviously, on Your Honor. However, when she was on the case and
13 prior to the time that she felt that the actual compulsion would
14 have to be in this court in the Northern -- in the Northern
15 District, she said three things. One, the deposition is going
16 forward; two, the documents are going to be produced unless you
17 give a log and unless you give an affidavit within a certain time
18 period -- three days. So she ruled, after a lot of -- after
19 people argued in front of her, she ruled that the deposition
20 obviously should go forward and that there should be a log.

21 There's been no log. And I think the Court can be persuaded
22 by what that judge, the federal judge who's working on this case
23 and who knows what the allegations are, who saw the complaint by
24 Mr. Fowles, who sees that it's the same time period, who sees that
25 he is going to say and has complained that the -- to the officers

1 that there is this illegal activity and violation and he intends
2 to tell the regulators.

3 Now, that means he has very valuable information and she
4 simply -- and we've been very courteous to them. We attempted to
5 arrange a deposition, tried to talk to their lawyers, didn't want
6 to talk to me. Okay. Fine. The secretary actually set a date
7 for us for the deposition.

8 THE COURT: No. I don't have any problem with the time.
9 It's not a conflict.

10 MR. ALIOTO: Okay. Well, all right. All right. Then
11 the Court should be somewhat persuaded in a discovery case that
12 the federal judge on this case was of the view that the deposition
13 definitely should go forward and any so-called documents should
14 either be put in a log or attested to. And if they were under
15 either the rules under the -- under Rule 45, to say so.

16 Well, they've done none of that, so Your Honor has nothing
17 in front of the Court by them except their lawyer's argument -- no
18 affidavit, no disclaimer, no document, no document offered.

19 THE COURT: Well, of course the burden's on you, not
20 them.

21 MR. ALIOTO: The burden on me is to ask for discovery.

22 THE COURT: No.

23 MR. ALIOTO: And --

24 THE COURT: That's not -- that's not the burden. The
25 burden is cause. You have to tell me why this is relevant and not

1 overburdensome and just a fishing expedition with respect to a
2 non-party. That's your burden.

3 MR. ALIOTO: A fishing expedition, Your Honor?

4 THE COURT: Uh-huh.

5 MR. ALIOTO: In light of plea agreements of guilt among
6 all the major banks at which this person was in charge of during
7 the time period and at which one of his sales persons is shown to
8 be in the chat rooms when they were doing these conspiracies?
9 That's not enough? And he is the one who said it in his complaint
10 -- he filed it in open court?

11 THE COURT: Okay. Let me hear from Wells Fargo and Mr.
12 Fowles.

13 MR. ALIOTO: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MR. SHIKMAN: Thank you, Your Honor. I'll be very
16 brief. First, I want to say that your tentative was remarkably
17 thorough and I don't think we have anything to contest about that.
18 But I want to make two quick points about what Mr. Alioto has
19 said.

20 First of all, the decision by the New York court, Judge
21 Schofield in the Southern District, came before Wells Fargo
22 articulated the relevancy issue that you have just articulated
23 with your tentative. After we articulated that, Judge Schofield
24 issued an order saying that she is rescinding the motion to compel
25 for "substantial reasons" that we've made in our letter, including

1 the fact that the Southern District lacked authority.

2 So I think it's improper to suggest the Southern District
3 thought that there was a relevancy to the Fowles' complaint.

4 The second --

5 THE COURT: Well, I don't know that. That's not
6 entirely correct. If she thought it was irrelevant, they wouldn't
7 have issued the first order so, you know, this is an excellent
8 judge in New York. She doesn't do things without thinking about
9 them. She obviously thought about it and knows this is a non-
10 party and thought it was relevant. And she may have been
11 persuaded afterwards that someone else should make that decision,
12 and I respect that.

13 MR. SHIKMAN: Of course. Well, I wanted Your Honor to
14 have the full story and that's the only point we'll make on that.

15 Otherwise, I think that your tentative lays out everything.
16 We're happy to answer any particular questions, but we'll
17 otherwise rest on our papers.

18 THE COURT: Okay.

19 MR. FEDER: Your Honor, I have nothing to add. I think
20 your tentative is correct.

21 THE COURT: All right. Tentative is confirmed. Motion
22 is granted. The subpoena is quashed. Thank you very much.

23 MR. SHIKMAN: Thank you, Your Honor.

24 MR. ALIOTO: Thank you, Your Honor.

25 THE COURT: Thank you.

1 (Proceedings adjourned at 9:54 a.m.)

2
3 I, Peggy Schuerger, certify that the foregoing is a
4 correct transcript from the official electronic sound recording
5 provided to me of the proceedings in the above-entitled matter.

6
7 /S/ Peggy Schuerger
8 Signature of Approved Transcriber

January 26, 2019
Date

9 Peggy Schuerger
10 Typed or Printed Name

Ad Hoc Reporting

11 Approved Transcription Provider
for the U.S. District Court,
Northern District of California