

1 2. The SEC and its expert is hereby ordered to produce the records requested in
2 the deposition notice (including the expert's engagement letter, billings, or
3 correspondence with the SEC); and

4 3. The SEC is required to pay all of the expenses of such continued deposition,
5 including any expert costs, court reporter and videographer fees.

6 **II. Procedural Background**

7 All discovery in this case has been referred by the district court (Hon. Charles R.
8 Breyer) pursuant to 28 U.S.C. §636(b). Jury trial is scheduled for January 25, 2010.

9 **III. Argument**

10 Pattison noticed the deposition of the SEC's rebuttal expert, Howard Mulcahey, for
11 January 8, 2010. With the notice, Pattison also requested production of documents,
12 including the engagement letter for Mulcahey's services, his billings, and his
13 correspondence with the SEC, including emails. (Decl of Pltf. Counsel Patrick Richard at
14 ¶7, Ex. A.) Pattison had served the document request along with the notice of deposition on
15 December 21, 2009. On December 24, 2009, SEC counsel Robert Tashjian informed
16 Richard that the SEC objected to the document request on the ground that it was "unduly
17 burdensome and seeks to impose obligations on the Commission beyond the scope of the
18 Federal Rules of Civil Procedure." Richard Decl. ¶8, Ex. B. He also objected on the ground
19 that the return date, two days after service, was unreasonable and burdensome. *Id.*

20 Pattison's counsel responded by agreeing to give the SEC until January 6, 2010, to
21 produce the requested documents. Richard Decl. ¶9, Ex. C. At the deposition, the witness
22 testified that no one told him until 6 p.m. the night before about the document request. The
23 witness also testified that the SEC had the documents in question and in his opinion their
24 production would not be burdensome. Richard Decl. ¶10, Ex. D.

25 Pattison's counsel emailed SEC counsel on January 9 to meet and confer regarding
26 the SEC's not producing documents at the deposition. Richard Decl. ¶11, Ex. E. SEC
27 counsel Susan La Marca responded via email that as long as Pattison continued to
28 withhold documents regarding his experts from the SEC, the SEC would continue to refuse

1 to produce the documents related to Howard Mulcahey. *Id.* at Ex. F: “we will not make a
2 unilateral production while you continue to withhold this information from us. If you would
3 like to do such a prisoner swap, then I’m sure the parties can agree to the parameters.”

4 In responding to this motion, the SEC contends that there was no attempt by
5 defense counsel to meet and confer, a contention plainly belied by the email evidence. The
6 SEC also seems to believe that its “offer to [resolve] the issue by mutual exchange of
7 documents between the parties” somehow relieves it of its obligation to comply with
8 discovery rules, even after defense counsel accommodated the SEC’s claimed need for
9 more time. The SEC also argues that the documents need not be produced because they
10 are not among the materials considered by the witness in forming his opinions.

11 **IV. Conclusion and Order**

12 The SEC did not raise any objections prior to the deposition, other than burden,
13 which was obviated by the extension of time granted by Pattison. Pattison also argues
14 persuasively that Mulcahey’s retainer and fee agreement are relevant to bias. The amount
15 an expert witness is being paid for his services is discoverable and must be disclosed, for
16 precisely this reason. *Cary Oil, Inc. V. MG Refining & Marketing, Inc.*, 257 F.Supp.2d 751
17 (S.D.N.Y. 2003)(holding that FRCP Rule 26 permitted discovery of expert witness
18 compensation for impeachment but denying it in case with multiple experts where discovery
19 was being used for harassment) *Id.* at 757. The Court in this case finds no such intention
20 by Pattison. The document request is narrow, specific to this case, not attempting to
21 discover the witness’s compensation for previous cases or any other improper purpose.

22 The deposition itself demonstrates Pattison’s need for the documents. Without the
23 documents to refresh his recollection, Mulcahey had virtually no recollection of the details
24 of his contract with the SEC through the SEC’s contractor, Forensic Economics.
25 Specifically, he could not remember when the SEC first contacted him. (Richard Decl. at
26 Ex. D, transcript of deposition testimony at 11:22-23); he wasn’t sure how many emails he
27 had exchanged with the SEC (*Id.* at 24:21); nor could he say how much time he had spent
28 preparing his report for the SEC (*Id.* at 26:23-25); nor could he recall when he last spoke to

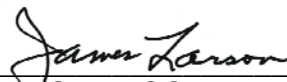
1 someone from the SEC regarding his engagement letter (*Id.* at 28:11-18.) In fact he
2 admitted that he couldn't recall because "I don't have the document with me to check." (*Id.*
3 at 28:16-18)

4 If Mr. Mulcahey had brought with him to his deposition the documents that Pattison
5 requested, then Pattison could have obtained answers to his questions regarding the terms
6 of the contract between Mulcahey and the SEC. Without them, it was impossible for
7 Pattison to obtain a complete deposition of this witness, who was specifically engaged to
8 rebut Pattison's expert, Dr. Lehn. Being deprived of this deposition testimony prejudices
9 Pattison and should not be allowed.

10 Accordingly, Pattison's motion is granted in its entirety, as described in detail above.

11 IT IS SO ORDERED.

12 DATED: January 13, 2010

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16 JAMES LARSON
17 United States Magistrate Judge

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