IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM SIVETER, et. al.	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No.:
	:	**JFM 03 CV 659**
	:	
PEAK INCORPORATED, a Maryland Corporation, et al	:	
	:	
	:	
Defendant	:	

DEFENDANT PEAK, INC.'S MOTION FOR PROTECTIVE ORDER, AND SUPPORTING MEMORANDUM OF LAW

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DEFENDANT PEAK, INC.'S MOTION FOR PROTECTIVE ORDER

COMES NOW the Defendant, Peak Incorporated, by and through its attorneys, Jeffrey T. Brown and DeCaro, Doran, Siciliano, Gallagher & DeBlasis, LLP, and pursuant to Rule 26(c) and Rule 37(a)(4) of the Federal Rules of Procedure moves this Honorable Court for a Protective Order regarding Plaintiff's noticing of a second videotaped trial deposition of Dr. Thomas Murray in the above-captioned matter, and as reasons therefor states as follows:

1. Dr. Thomas Murray is Plaintiff's expert in the field of physiatry. Plaintiff noted and completed his de bene esse deposition in this matter on November 8, 2006 in Jacksonville, Florida.

2. On August 1, 2007, Defendant filed a Motion in Limine to Strike Dr. Murray as an expert in this matter in light of his trial testimony, setting forth several grounds, including but not limited to Plaintiff's failure to offer Dr. Murray as an expert witness in

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his testimony, Plaintiff's attempted solicitation of expert opinion testimony without having done so or otherwise laying a proper foundation, Dr. Murray's failure to testify to facts, data, information, methodology, principles, or other evidence or means by which his opinions were allegedly derived, Dr. Murray's use of a vehicle photo to both diagnose and compare injuries among several car accidents, and for other reasons set forth in Defendant's Motion in Limine, and Reply to Plaintiff's Opposition to Defendant's Motion in Limine.

3. After the filing of Defendant's Motion in Limine, noting the aforementioned defects, among others, Plaintiff alerted Defendant to his desire to re-record Dr. Murray's testimony for trial. This was done via email on August 8, 2007, to which Defendant replied on August 10, 2007. Defendant replied that Dr. Murray's testimony had already been recorded and that he did not need to be included among those experts whose testimony Plaintiff sought to record.

4. Thereafter, in Plaintiff's Response in Opposition to Defendant's Motion to Strike Dr. Murray, Plaintiff asserted that the testimony of Dr. Murray was actually a discovery deposition, despite the testimony having been noted by Plaintiff, having been recorded at Plaintiff's request, that it consisted of direct examination with requested explanations for the benefit of a jury,

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that Defendant was limited to cross-examination based on direct, and that there is not even the merest suggestion on the video or written record of any discussion or agreement that this testimony was for discovery, rather than for trial. In fact, on cross-examination, Defendant reminded the doctor that this was his trial testimony, with regard to his inability to recall Plaintiff's prior treatment.

5. On September 6, 2007, Plaintiff noticed a second Trial Video Deposition Duces Tecum of Dr. Thomas Murray for Friday, September 21, 2007 at 2:00 p.m. in Jacksonville, Florida. This deposition appears to have been noticed solely as a reaction to the substance of Defendant's Motion in Limine to Strike Dr. Murray. Plaintiff's efforts in other materials filed herein to recharacterize Dr. Murray's previous and deficient testimony as "discovery" in order to accomplish this are misrepresentations and contrary to the record of Dr. Murray's deposition.

6. Plaintiff cites no authority entitling it to a second video trial deposition of Dr. Murray. Defendant should not be prejudiced by being compelled to participate in a second video trial deposition of Dr. Murray merely because the first one did not yield the results Plaintiff might have desired.

7. Pursuant to Rule 26(c), the Defendant requests that this Court order that the discovery sought by Plaintiff not be had, and

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award reasonable attorneys fees necessitated by the filing of this motion pursuant to Rule 37(a)(4).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION
MOTION FOR PROTECTIVE ORDER

On September 29, 2006, Plaintiff noted the Video Deposition Duces Tecum of Dr. Thomas R. Murray for use at trial, to take place on Wednesday, November 8, 2006 at 5:30 p.m. in Jacksonville, Florida. Plaintiff's counsel also served Dr. Murray, one of his experts, with a subpoena. The Notice of Deposition and Subpoena are attached hereto as Exhibit A.

On September 6, 2007, Plaintiff once again noted a video trial deposition of Dr. Murray, this time for September 21, 2007. The notice thereof is attached hereto as Exhibit B. Defendant had been notified by Plaintiff's counsel's paralegal of counsel's desire to take a second video deposition of Dr. Murray, and Plaintiff had been notified of Defendant's objection thereto. Plaintiff has corresponded with Defendant's counsel, and has sought to explain this attempt to obtain a second trial appearance by Dr. Murray by offering the theory that Plaintiff's failure to provide Defendant in advance of Dr. Murray's 2006 trial testimony with materials referred to by Dr. Murray in his trial testimony resulted, during the deposition, in Plaintiff agreeing to have his video trial deposition somehow become a discovery deposition, which Plaintiff's

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counsel continued to take and which the record reflects was understood by all to be for trial. Defendant has advised Plaintiff's counsel that this clearly did not happen, that there is no agreement regarding Plaintiff's creative theory of conversion into a discovery deposition, let alone that such was ever accepted by Defendant, and that this deposition was and always remained Plaintiff's trial examination of Dr. Murray.

The video trial deposition transcript of November 8, 2006 is unambiguously clear regarding the continual nature and purpose of the video trial deposition of Dr. Murray, and that it was clearly understood by all to be trial testimony. Counsel for Defendant appeared for Dr. Murray's video trial deposition, and it went forward as such. Although it became clear that Defendant had not been provided with certain of the materials Dr. Murray referenced during his trial testimony, which was noted several times on the video (Murray Trial Deposition at p. 27, 29, 45, attached hereto as Exhibit C), at no time did there occur an exchange, on or off the record, to the effect that the trial deposition was being terminated as such, or that counsel expressed regret for the failures to provide Defendant in advance with the materials noted to have been withheld. There did occur one exchange, off the video record but on the transcript record at the request of the Defendant, regarding the undisclosed fact of Dr. Murray having met

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with another of Plaintiff's experts, Mr. Spruance. However, there occurred no exchange regarding concern or regret on Plaintiff's counsel's part regarding this deficiency, nor any offer of remedy. The trial deposition merely proceeded with Defendant's objections having been noted.

The trial testimony commenced with Plaintiff's counsel questioning his expert regarding his qualifications, and proceeding throughout direct examination with opinion questions, to which Defendant made objections in light of Plaintiff's failure to offer and have Dr. Murray accepted as an expert by the Court. During the course of his direct examination, Plaintiff's counsel repeatedly asked his expert to "explain to the jury", "describe for the jury", and "identify for the jury" certain matters, clearly demonstrating Plaintiff's counsel's understanding and intention that this testimony would be shown to the jury in lieu of Dr. Murray's live appearance. (Exhibit C at p. 5, l. 4; p. 21, l. 16; p. 26, l. 5). Following direct examination, Defendant commenced cross-examination, which was appropriately limited to the scope of direct examination. During cross-examination, Defendant's counsel reminded Dr. Murray that his testimony was trial testimony, as well. (Exhibit C at p. 63, l. 23). At no time was Defendant under the impression that a discovery deposition was underway. Following cross-examination, Plaintiff conducted a re-direct examination,

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including a question at the very end of the trial deposition regarding the effect of anything about which Defendant questioned the expert "during the course of his cross-examination". (Exhibit C at p. 109). It is clear and unambiguous on its face that this was Dr. Murray's trial testimony, that what Defendant conducted was cross-examination and not discovery, and that this was understood as such throughout by both sides.

Had Plaintiff's counsel at any time offered to terminate the video trial deposition of Dr. Murray as such and agree, instead, to a discovery deposition, as Plaintiff represents, then such an agreement and acceptance thereof by Defendant would have been evident from the record, either by an express statement to that effect, or by the commencement of a discovery deposition by Defendant from that point onward. This simply never happened. Furthermore, the fact that this latest attempt to recharacterize the trial testimony of Dr. Murray is a misrepresentation is further demonstrated by other evidence. The attempt to obtain a second bite of the apple regarding Dr. Murray did not arise until after Defendant filed its Motion in Limine to Strike Dr. Murray, pointing out the several deficiencies in the foundation, substance and sufficiency of his testimony. Thereafter, on August 8, 2007, Plaintiff's counsel's assistant sent an email regarding confirming video deposition dates which had been discussed between the

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assistant and counsel for Defendant, to which Defendant responded regarding Dr. Murray in particular on August 10, 2007. A copy of that correspondence is attached hereto as Exhibit D.

In addition, as the Court is aware, this matter has had several different prior trial dates. In anticipation of an impending trial date, subsequent to Dr. Murray's November 8, 2006 testimony, Plaintiff's counsel's assistant corresponded by email to schedule those video trial depositions that Plaintiff believed were still necessary as of that time. Specifically, on February 23, 2007, Plaintiff sought to schedule the video depositions of the same three persons to be videotaped later this month (Dr. Mason, Mr. Spruance and Dr. Jacob Green), but made no request to place Dr. Murray on videotape a second time. (Email of February 23, 2007, attached hereto as Exhibit E). By then, of course, the Motion in Limine as to Dr. Murray and his deficiencies had not been filed.

Plaintiff has already elicited Dr. Murray's trial testimony, for better or worse. He is not entitled to do so more than once, or as often as he may feel necessary to obtain the desired outcome.

Rule 26(c) of the Federal Rules of Procedure permits the entry of a protective order to protect the Defendant from impermissible discovery, and from annoyance, oppression, and undue burden or expense. As the video trial deposition of Dr. Murray would solely benefit the Plaintiff with multiple opportunities to obtain

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favorable testimony without justification, and as the Defendant has already undergone the time and expense of preparing for and participating in Dr. Murray's trial testimony, including putting Plaintiff on notice of Defendant's cross-examination so that Plaintiff would benefit by knowing what to prepare against for a second effort, the Defendant would be both prejudiced and burdened with the unwarranted expense of allowing Plaintiff to control and manipulate the evidence in this matter until he obtained the product he desired, rather than that which he already elicited.

Furthermore, Rule 37(a)(4) permits Defendant to recover the reasonable expenses necessary to the preparation and filing of the Motion for Protective Order in the event that the Defendant prevails, including attorney's fees. This Motion for Protective Order was necessitated solely by Plaintiff's efforts to misrepresent the clear record in this matter to impermissibly obtain a second opportunity to obtain trial testimony which had already been presented and preserved at Plaintiff's sole request. Once again, the Defendant finds itself in the position of having to police the Plaintiff's adherence to the rules, at its own expense and at the expense of other preparation for the trial of this matter, which appears to be the intended effect when considered in conjunction with the pattern of such conduct as set forth in Defendant's pending Motion for Sanctions.

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Defendant respectfully requests that this Court GRANT this Motion for Protective Order, prohibit a second trial deposition of Dr. Murray, and award reasonable costs and attorney's fees for Defendant's time spent attempting to force Plaintiff's compliance with applicable rules.

Respectfully submitted,

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