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7 Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC.,  
8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' MOTION *IN LIMINE*  
NO. 1 TO PRECLUDE PLAINTIFFS  
FROM RELYING ON EVIDENCE  
CONCERNING ALLEGED  
DISCOVERY VIOLATIONS**

Pretrial Conference: January 31, 2017  
Trial Date: January 31, 2017

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TO THE COURT, PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 31, 2017, or as soon as this matter may be heard in Courtroom 850 of the Honorable R. Gary Klausner, 255 East Temple Street, Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs from introducing evidence or argument relating to any alleged discovery disputes or alleged discovery violations Plaintiffs claim against Defendants.

This Motion is brought pursuant Federal Rules of Evidence 401-403. This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declaration of Diana Hughes Leiden (“Leiden Decl.”), previously filed documents incorporated by reference herein, and upon such other and further evidence and argument as may be presented to the Court prior to or at the time of hearing on this motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 that took place on December 9, 2016.

Dated: December 16, 2016

**WINSTON & STRAWN LLP**

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Diana Hughes Leiden  
Kelly N. Ōki  
Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC. and  
ALEC PETERS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar  
4 Productions, Inc. and Alec Peters (“Defendants”) move for an *in limine* order  
5 precluding Plaintiffs Paramount Pictures Corporation and CBS Studios Inc.  
6 (“Plaintiffs”) from relying on at trial any evidence or testimony regarding discovery  
7 disputes between the parties or alleged discovery violations by Defendants.

8 Though Plaintiffs attempted to seek a Court order compelling Defendants to  
9 conduct additional searches and produce more documents, this effort came long after  
10 the discovery cut-off in this case allowed. Nevertheless, despite this order,  
11 Defendants have continued to raise these so-called discovery “violations” both in their  
12 summary judgment motion, and throughout a second deposition of Mr. Peters taken  
13 *after* the Court declined to order any further production of documents.

14 Raising these issues is therefore not only highly misleading factually, because  
15 the Court did not hold that Defendants engaged in any discovery misconduct, but  
16 these discovery issues are also irrelevant to the ultimate copyright issues presented for  
17 trial and would likely influence the jury to conclude that one side has tried to gain an  
18 advantage by suppressing or withholding evidence. For these and all the foregoing  
19 reasons, Defendants respectfully request that the Court grant Defendants’ Motion *in*  
20 *Limine* No 1.

21 **II. FACTUAL BACKGROUND**

22 Plaintiffs have never obtained an order in this case requiring Defendants to  
23 search for or produce a single document. Defendants, an individual and a small  
24 company, made a good faith production of documents proportionally relevant to this  
25 case, producing far more times what Plaintiffs (two large corporations) produced.  
26 ECF No. 55 (Joint Stipulation Re Defendants' Motion to Compel at 3:2-8).

27 Defendants did not search and produce every social messaging post because  
28 they were publicly available and Plaintiffs had been systematically gathering those

1 they found helpful to them. *See, e.g.*, ECF. No. 26 (First Amended Complaint  
2 (“FAC”)) at ¶ 36.

3 Defendants did not search and produce text messages because they did not  
4 consider them proportional to the needs of the case, and explained that to Plaintiffs  
5 during the meet and confer process. Indeed, Plaintiffs did not produce a single text  
6 message either. Plaintiffs’ counsel, Mr. Zavin, represented to Defendants’ counsel in  
7 a meet and confer following Mr. Peters’ first deposition, on October 19, that Plaintiffs  
8 would not require Defendants to search and produce text messages. Leiden Decl., Ex.  
9 8 (Peters tr. at 281:14-19). On September 29, 2016, Defendants timely filed a motion  
10 to compel Plaintiffs to search and produce several categories of documents and serve  
11 responses to various interrogatories and other discovery requests. *See* ECF No. 60  
12 (Min. Order). Immediately following that ruling, Plaintiffs filed an *Ex Parte*  
13 *Application* With Magistrate Judge Eick requesting that the Court order Defendants to  
14 certify that they had produced all sorts of additional documents. The Court declined  
15 to order a search of text messages, and noted that Plaintiffs’ *Ex Parte* Application,  
16 brought just a couple days before discovery closed, was untimely. ECF No. 68  
17 (Minute Order).

18 As the Court noted,

19 ....Except as expressly stated herein, the Application is  
20 denied. The Discovery Cut-Off Date is November 2, 2016.  
21 See Minute Order, filed May 9, 2016. Notwithstanding the  
22 issues Plaintiffs have raised regarding the adequacy of  
23 Defendants’ document productions (based largely on  
24 information obtained in connection with the depositions  
25 taken in October of 2016), *the Court will not require at this*  
26 *late date the effective recommencement of document*  
27 *searches, reviews and productions.*

28 *Id.*

1 But that ruling has not stopped Plaintiffs from attempting to cast aspersions  
2 about Defendants' alleged discovery misconduct that did not exist and was  
3 specifically rejected by the Court. *See, e.g.*, ECF No. 72-2 (Grossman Decl. at ¶ 8  
4 (“In response to Plaintiffs’ discovery requests, Mr. Peters produced a smattering of  
5 emails, and he admittedly did not produce any social media postings or other online  
6 postings/ statements he made concerning the Axanar Works, including statements and  
7 posting he made on his own website, AxanarProduction.com.”); ECF No. 88-1  
8 (Grossman Decl. at ¶¶ 8, 100). Plaintiffs also made such accusations throughout a  
9 second deposition of Mr. Peters taken *after* the Court declined to order any further  
10 production of documents. *See* Leiden Decl., Ex. 8 (Peters tr. at 261:7-283:20). This  
11 included asking Mr. Peters to pull out his cell phone for a review of text messages,  
12 contrary to the agreement Plaintiffs’ counsel previously made, and even though  
13 discovery had closed and the Court declined to consider such issues on an *Ex Parte*  
14 basis in the final days of discovery. *Id.*

### 15 **III. LEGAL STANDARD**

16 Rulings on motions *in limine* are committed to the discretion of the trial court.  
17 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
18 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
19 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x  
20 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude  
21 evidence where the evidence is not relevant, or where the probative value is  
22 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
23 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
24 discretion in excluding conclusive, speculative evidence). Even if evidence is  
25 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
26 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
27 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
28 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s

1 probative value was substantially outweighed by unfair prejudice); *United States v.*  
2 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of  
3 evidence that was low in probative value and could have confused the jury as more  
4 prejudicial than probative under Rule 403); *Dream Games of Ariz., Inc. v. PC Onsite*,  
5 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in  
6 granting plaintiff’s motion *in limine* to exclude evidence based on concerns that it  
7 might improperly influence the jury on the amount of statutory damages to assess  
8 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
9 sufficiently probative information).

#### 10 **IV. ARGUMENT**

##### 11 **A. The Court Should Exclude All Evidence And Testimony Regarding** 12 **Discovery Disputes As Irrelevant and Prejudicial**

13 The legal rule for excluding prejudicial evidence under Federal Rule of  
14 Evidence 403 explains that “[t]he court may exclude relevant evidence if its probative  
15 value is substantially outweighed by a danger of one or more of the following: unfair  
16 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or  
17 needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

18 Plaintiffs intend to offer the testimony and evidence regarding alleged  
19 discovery violations, though no discovery violations have been found against  
20 Defendants in this case. *See* ECF Nos. 60, 68. For example, Plaintiffs seek to  
21 introduce Defendant Alec Peters’ Responses to Plaintiff Paramount Pictures  
22 Corporation and CBS Studios Inc.’s First Set of Request for Production of  
23 Documents, dated May 31, 2016—produced, nearly six months ago—as evidence of  
24 such. Plaintiffs have also continually referenced so-called inadequate productions in  
25 summary judgment filings, and in questioning Mr. Peters after the Court declined to  
26 order further production of any documents. *See* Leiden Decl., Ex. 8 (Peters tr. at  
27 281:14-19); ECF No. 72-2 (Grossman Decl. at ¶ 8); ECF No. 88-1 (Grossman Decl. at  
28 ¶¶ 8,100). Defendant Alec Peters’ Responses to Plaintiff Paramount Pictures

1 Corporation and CBS Studios Inc.’s First Set of Request for Production of Documents  
2 is attached to the concurrently-filed Declaration of Diana Hughes Leiden as Exhibit 4.

3 Courts in this district and others have noted that the purpose of discovery is to  
4 “remove surprise from *trial preparation* so that parties can obtain evidence necessary  
5 to evaluate and resolve their dispute.” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 535  
6 (C.D. Cal. 2005) (emphasis added); *see also United States v. Proctor & Gamble*, 356  
7 U.S. 677, 683 (“The purpose of discovery is to allow a broad search for facts, the  
8 names of witnesses, or any other matters which may aid a party in the preparation or  
9 presentation of his case.”). Indeed, this belated effort to paint Defendants as  
10 uncooperative regarding discovery early in this dispute is simply irrelevant. Plaintiffs  
11 cannot argue with any seriousness that they were prejudiced—this particularly true in  
12 light of the fact that Plaintiffs *twice* deposed Defendant Alec Peters, most recently on  
13 November 2, 2016. No discovery misconduct has been found against Defendants in  
14 this case at all, and certainly not the type that should impact argument on the merits a  
15 at trial.

16 Even still, evidence of the parties’ discovery disputes are not relevant to the  
17 questions of copyright infringement, and thus should not be presented to the jury.  
18 Fed. R. Evid. 401; *see Mformation Techs., Inc. v. Research in Motion Ltd.*, No. C 08-  
19 04990, 2012 WL 2339762, at \*2 (N.D. Cal. Jun 7, 2012) (finding good cause to  
20 exclude evidence of discovery disputes including “evidence pertaining to Plaintiff’s  
21 late production of any source code”). As mentioned, Plaintiffs will likely introduce  
22 such evidence to influence the jury to conclude that one side has tried to gain an  
23 advantage by suppressing or withholding evidence. *Id.* Given that Defendants would  
24 suffer undue prejudice from this irrelevant testimony, which adds no probative value  
25 with respect to Plaintiffs’ copyright claims, the Court should exclude such evidence  
26 under Federal Rules of Evidence 401 and 403.

1 **V. CONCLUSION**

2 For all of the foregoing reasons, Defendants respectfully request that the Court  
3 grant their Motion *in Limine* No. 1.

4

5 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

6

7

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Diana Hughes Leiden  
Kelly N. Oki  
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AXANAR PRODUCTIONS, INC.  
and ALEC PETERS

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7 Attorneys for Defendants,  
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8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

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17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' MOTION *IN LIMINE*  
NO. 2 TO PRECLUDE PLAINTIFFS  
FROM RELYING ON EVIDENCE  
THAT WAS NOT TIMELY  
DISCLOSED UNDER THE COURT'S  
SCHEDULING ORDER;  
MEMORANDUM OF POINTS &  
AUTHORITIES**

Pretrial Conference: January 31, 2017  
Trial Date: January 31, 2017

1 TO THE COURT, PLAINTIFFS AND THEIR COUNSEL OF RECORD:  
 2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon this matter may be  
 3 heard in Courtroom 850 of the Honorable R. Gary Klausner, 255 East Temple Street,  
 4 Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters  
 5 (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs  
 6 from relying on documents and testimony that were withheld during discovery,  
 7 including the works at issue.

8 Plaintiffs should not be permitted to rely on late-produced documents and late-  
 9 disclosed testimony because the probative value of the evidence is outweighed by the  
 10 prejudice to Defendants, who were prevented from taking any discovery on these  
 11 documents. Fed. R. Evid. 401-403. This Motion is based upon this Notice, the  
 12 attached Memorandum of Points and Authorities, the accompanying Declaration of  
 13 Diana Hughes Leiden (“Leiden Decl.”), previously filed documents incorporated by  
 14 reference herein, and upon such other and further evidence and argument as may be  
 15 presented to the Court prior to or at the time of hearing on this motion.

16 This Motion is made following the conference of counsel pursuant to L.R. 7-3  
 17 that took place on December 9, 2016.

18  
 19 Dated: December 16, 2016 **WINSTON & STRAWN LLP**

20  
 21 By: /s/ Erin R. Ranahan  
 22 Erin R. Ranahan  
 23 Diana Hughes Leiden  
 24 Kelly N. Oki  
 Attorneys for Defendants,  
 AXANAR PRODUCTIONS, INC. and  
 ALEC PETERS

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 26  
 27  
 28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar  
4 Productions, Inc. and Alec Peters (“Defendants”) move for an *in limine* order  
5 precluding Plaintiffs Paramount Pictures Corporation and CBS Studios Inc.  
6 (“Plaintiffs”) from relying on at trial any evidence or testimony that was not timely  
7 disclosed in discovery. Specifically, Defendants seek to preclude the introduction of  
8 the allegedly infringed works, certain copyright registrations, and an illustrated  
9 *Prelude to Axanar* script, none of which were produced during the course of  
10 discovery, and instead were lodged with the Court in conjunction with Plaintiffs’  
11 summary judgment motion on November 16, 2016. Defendants also seek to preclude  
12 the testimony of John Van Citters regarding the alleged similarity between Plaintiffs’  
13 works and Defendants’ works because he was not designated on that topic until well  
14 after he was deposed.

15 Defendants will suffer prejudice if this Motion is not granted because Plaintiffs  
16 will be able to rely on evidence improperly withheld from Defendants, while  
17 Defendants will have been denied the opportunity to investigate and test the  
18 documents and testimony that were not disclosed in the discovery period, thereby  
19 foreclosing discovery Defendants could have pursued—including questioning  
20 Plaintiffs’ witnesses during depositions about the works. For these and all the  
21 foregoing reasons, Defendants respectfully request that the Court grant Defendants’  
22 Motion *in Limine* No. 2.

23 **II. RELEVANT FACTUAL BACKGROUND**

24 Discovery closed in this case on November 2, 2016. *See* ECF No. 44.  
25 Plaintiffs continued to produced evidence after the close of discovery in violation of  
26 the Court’s order, attempted to rely on such evidence in support of their summary  
27 judgment motion (*see, e.g.*, ECF No. 72-60), and have listed the evidence on their  
28 proposed exhibit list, specifically: Exhibits 1-18 and 21 of the “Physical Exhibits”

1 listed on Plaintiffs’ trial exhibit list; Exhibits M (illustrated script of *Prelude to*  
2 *Axanar*), VV (copyright registrations for Star Trek motion pictures), WW (copyright  
3 registration for *Garth of Izar* novel), and XX (copyright registration for *Strangers*  
4 *from the Sky* novel) to the 11/16/2016 Grossman Declaration; and Exhibit BBB  
5 (copyright registration for *The Four Years War* supplement to *Star Trek: The Role*  
6 *Playing Game*) to the 11/16/2016 John Van Citters Declaration. See concurrently-  
7 filed Declaration of Diana Hughes Leiden (“Leiden Decl.”) at ¶ 3. All of these  
8 documents were called for in discovery. Leiden Decl., Ex. 1 (Defendants’ First Set of  
9 RFPs to Paramount, RFP Nos. 1, 2, and 6); Ex. 2 (Defendants’ First Set of RFPs to  
10 CBS, RFP Nos. 1, 2, and 6). However, none of these documents were produced to  
11 Defendants during the discovery period, and instead were introduced for the first time  
12 in conjunction with Plaintiffs’ motion for partial summary judgment, attached to the  
13 supporting declarations of David Grossman and John Van Citters. See ECF Nos. 72-2  
14 (Grossman Decl.); 72-15; 72-16; 72-54; 72-55; 72-56 (Exhibits M, VV, WW, and XX  
15 to Grossman Decl.) 72-60 (Van Citters Decl.), 72-62 (Exhibit BBB to Van Citters  
16 Decl.); Leiden Decl. at ¶ 3. Notably, Defendants pointed out the fact that Plaintiffs  
17 had never produced the works at issue nor the copyright registration for *The Four*  
18 *Years War* as part of their evidentiary objections to Plaintiffs’ motion for partial  
19 summary judgment. See ECF No. 92 at 2 (Defendants’ Evidentiary Objections).  
20 Plaintiffs did not deny this or provide any explanation for their failure to do so. See  
21 ECF No. 102-3 (Plaintiffs’ Response to Defendants’ Objections to Evidence  
22 Regarding Plaintiffs’ Motion for Partial Summary Judgment).

23 Plaintiffs identified Mr. Van Citters in Plaintiffs’ initial disclosures as having  
24 knowledge of “[c]ontact with Defendants and licensing of Plaintiffs’ works” only.  
25 Leiden Decl. ¶ 5, Ex. 3 (Plaintiffs’ Initial Disclosures). And while he was designated  
26 as a 30(b)(6) witness to testify regarding certain topics on behalf of CBS, Plaintiffs’  
27 counsel objected at his deposition to all lines of questioning about the creation of the  
28 chart in Plaintiffs’ First Amended Complaint purportedly showing substantial

1 similarity between Plaintiffs' works and the *Axanar* works as privileged. Van Citters  
2 Dep. Tr. at 78:14-80:13 (filed under seal at ECF No. 93-2; sealed document filed at  
3 ECF No. 94-1). Nevertheless, Plaintiffs offered a declaration of Mr. Van Citters in  
4 support of their partial summary judgment motion in which he purported to testify  
5 regarding the similarity between the allegedly infringed works and Defendants'  
6 works. ECF No. 72-60, and Plaintiffs intend to rely on Mr. Van Citters as a witness at  
7 trial on the same topic. Leiden Decl. at ¶ 5.

8 Furthermore, on November 2, 2016 (over a month after Van Citters had been  
9 deposed), Plaintiffs disclosed Mr. Van Citters as a purported expert "regarding matters  
10 that would be considered outside the knowledge of laypersons who are not  
11 knowledgeable about Star Trek works and/or who do not have the experience and  
12 knowledge possessed by Mr. Van Citters regarding the history of the Star Trek  
13 entertainment franchise." Plaintiffs stated that Mr. Van Citters would provide  
14 "expert" opinion testimony, predicated on "his background and experience working  
15 for Plaintiffs ..., and his personal knowledge in the Star Trek works," that  
16 "Defendants' Axanar Works are copied from Plaintiffs' Star Trek Copyrighted Works,  
17 including Klingons, Vulcans, the U.S.S. Enterprise, Garth of Izar, Soval the Vulcan  
18 Ambassador, the planet Vulcan, and the various elements, including the settings,  
19 characters, plots, sequences and themes described in the First Amended Complaint."

### 20 **III. LEGAL STANDARD**

21 Rulings on motions *in limine* are committed to the discretion of the trial court.  
22 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
23 "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
24 and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App'x  
25 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude  
26 evidence where the evidence is not relevant, or where the probative value is  
27 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
28 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse

1 discretion in excluding conclusive, speculative evidence). Even if evidence is  
2 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
3 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
4 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
5 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s  
6 probative value was substantially outweighed by unfair prejudice); *United States v.*  
7 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of  
8 evidence that was low in probative value and could have confused the jury as more  
9 prejudicial than probative under Rule 403); *Dream Games of Ariz., Inc. v. PC Onsite*,  
10 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in  
11 granting plaintiff’s motion *in limine* to exclude evidence based on concerns that it  
12 might improperly influence the jury on the amount of statutory damages to assess  
13 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
14 sufficiently probative information).

15 Furthermore, a party who fails to make a required initial disclosure (such as  
16 disclosing witnesses likely to have information on key topics or producing documents  
17 they intend to rely upon at trial) “is not allowed to use that information or witness to  
18 supply evidence on a motion, at a hearing, or at trial” unless the party’s failure was  
19 “substantially justified” or “harmless.” Fed. R. Civ. P. 37(c)(1); *Hoffman v.*  
20 *Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). Motions *in*  
21 *limine* are appropriate to preclude the introduction at trial of evidence not produced in  
22 discovery. *Reyes v. City of Glendale*, No. CV 05-0253 CAS (MANx), 2009 WL  
23 2579614, at \*4 (C.D. Cal. Aug. 19, 2009); *Lincoln Diagnostics v. Panatrex, Inc.*, No.  
24 07-CV-2077, 2009 WL 3010840, at \*5 (C.D. Ill. Sept. 16, 2009) (“any documents  
25 relevant to the issue of damages that Defendant did not produce prior to the ‘drop  
26 dead’ date . . . could not be presented by Defendant at trial.”).

1 **IV. ARGUMENT**

2 **A. Plaintiffs Should Be Precluded From Relying on Any Evidence That**  
3 **They Failed to Produce During the Discovery Period**

4 After failing to produce the works at issue during the discovery period,  
5 Plaintiffs have stated that they intend to rely on DVDs of the allegedly infringed  
6 works (*i.e.*, the Star Trek Television Series, Star Trek Motion Pictures, and the book  
7 *Garth of Izar*) at trial. Specifically, these constitute Exhibits 1-18 and 21 of the  
8 “Physical Exhibits” listed on Plaintiffs’ trial exhibit list; Exhibits M (illustrated script  
9 of *Prelude to Axanar*), VV (copyright registrations for Star Trek motion pictures),  
10 WW (copyright registration for *Garth of Izar* novel), and XX (copyright registration  
11 for *Strangers from the Sky* novel) to the 11/16/2016 Grossman Declaration; and  
12 Exhibit BBB (copyright registration for *The Four Years War* supplement to *Star Trek:*  
13 *The Role Playing Game*) to the 11/16/2016 John Van Citters Declaration, all of which  
14 were also listed on Plaintiffs’ trial exhibit list. Leiden Decl. at ¶ 3. Plaintiffs should  
15 not be allowed to use discovery materials that were not timely produced during fact  
16 discovery. If Plaintiffs are permitted to introduce at trial this untimely-produced  
17 evidence, Defendants will be severely prejudiced. Plaintiffs will have the benefit of  
18 relying upon evidence improperly withheld from Defendants, which Defendants have  
19 not had adequate opportunity to review, analyze and investigate.

20 **B. Plaintiffs Should Be Precluded From Introducing the Testimony of**  
21 **John Van Citters Regarding Purported Similarity Between**  
22 **Defendants’ Works and the Allegedly Infringed Works**

23 Plaintiffs’ failure to disclose Mr. Van Citters as a witness with knowledge of  
24 any of the topics discussed in his Declaration deprived Defendants of the opportunity  
25 to cross-examine Mr. Van Citters on these topics before he submitted the self-serving  
26 declaration in support of Plaintiffs’ motion. Nor could Plaintiffs provide any  
27 “justification” for failing to disclose Mr. Van Citters on these topics in the many  
28 months between the time due for initial disclosures and Mr. Van Citters’ deposition on

1 September 28, 2016 or the close of discovery on November 2, 2016. Plaintiffs should  
2 be precluded from relying on Mr. Van Citters at trial on the topic of alleged similarity  
3 between Plaintiffs' works and Defendants' works. Fed. R. Civ. P. 37(c)(1); *Yeti by*  
4 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001)  
5 (affirming trial court's exclusion of previously undisclosed evidence where the  
6 defendant failed to meet its burden to show that the nondisclosure was either harmless  
7 or justified).

8 Furthermore, as set forth above, Plaintiffs designated Mr. Van Citters as an  
9 expert "regarding matters that would be considered outside the knowledge of  
10 laypersons who are not knowledgeable about Star Trek works and/or who do not have  
11 the experience and knowledge possessed by Mr. Van Citters regarding the history of  
12 the Star Trek entertainment franchise." Mr. Van Citters does not appear to be  
13 qualified as an expert. He claims to have "seen every Star Trek film, television  
14 episode, and have read the Star Trek books" and to have "reviewed Defendants'  
15 *Prelude to Axanar*" and "Defendants' 'Vulcan Scene' of *Axanar*," (ECF No. 72-60,  
16 Van Citters Decl. ¶¶ 2, 15, 43), but Plaintiffs do not demonstrate that he has  
17 specialized knowledge that would "aid the jury in resolving a factual dispute."  
18 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). Mr. Van Citters'  
19 testimony regarding purported similarity between Plaintiffs' works and Defendants'  
20 works should be precluded for this additional reason.

## 21 **V. CONCLUSION**

22 For all of the foregoing reasons, Defendants respectfully request that the Court  
23 grant their Motion *in Limine* No. 2.

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1 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

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8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
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Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' MOTION *IN LIMINE*  
NO. 3 TO PRECLUDE PLAINTIFFS  
FROM INTRODUCING EVIDENCE  
REGARDING ALLEGEDLY  
INFRINGEMENTS NOT  
IDENTIFIED IN THE FIRST  
AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Pretrial Conference: January 31, 2017  
Trial Date: January 31, 2017

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon as may be heard  
3 before the Honorable R. Gary Klausner, 255 East Temple Street, Los Angeles,  
4 California 90012, Defendants Axanar Productions, Inc. and Alec Peters  
5 (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs  
6 from relying on evidence regarding Plaintiffs’ allegedly infringed works that were not  
7 claimed in the Complaint.

8 This Motion is brought pursuant to Rules 401-403 of the Federal Rules of Civil  
9 Procedure, and is based on this Motion and Notice of Motion, the supporting  
10 documents filed concurrently herewith, previously filed documents incorporated by  
11 reference herein, and upon such oral argument and submissions that may be presented  
12 at or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is  
13 made following the conference of counsel that took place on December 9, 2016.

14 Dated: December 16, 2016

WINSTON & STRAWN LLP

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16 By: /s/ Erin R. Ranahan

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar  
4 Productions, Inc., and Alec Peters (“Defendants”) move for an *in limine* order  
5 precluding Plaintiffs from introducing at trial any testimony or evidence regarding  
6 allegedly infringed works not identified in the Complaint, including a “Role-Playing  
7 Game” that is not even the type of work complained about in the First Amended  
8 Complaint. Plaintiffs should be precluded from introducing evidence about these  
9 works because any probative value is substantially outweighed by a danger of  
10 prejudice to Defendants, waste of time, and/or unnecessary confusion of the issues.  
11 Fed. R. Evid. 401-403. Due to the evidentiary infirmities described herein, the Court  
12 should grant Defendants’ Motion *in Limine*.

13 **II. LEGAL STANDARD**

14 Rulings on motions *in limine* are committed to the discretion of the trial court.  
15 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
16 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
17 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x  
18 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude  
19 evidence where the evidence is not relevant, or where the probative value is  
20 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
21 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
22 discretion in excluding conclusive, speculative evidence). Even if evidence is  
23 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
24 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
25 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
26 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s  
27 probative value was substantially outweighed by unfair prejudice); *United States v.*  
28 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of

1 evidence that was low in probative value and could have confused the jury as more  
2 prejudicial than probative under Rule 403); *E.E.O.C. v. GLC Rests., Inc.*, No. CV05-  
3 618 PCT-DGC, 2007 WL 30269, at \*1 (D. Ariz. Jan. 4, 2007); *Dream Games of Ariz.,*  
4 *Inc. v. PC Onsite*, 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not  
5 abuse its discretion in granting plaintiff’s motion *in limine* to exclude evidence based  
6 on concerns that it might improperly influence the jury on the amount of statutory  
7 damages to assess under 504(c)(1) of the Copyright Act of 1976, because the evidence  
8 did not provide sufficiently probative information).

9 Evidence has probative value only if it has any tendency to make the existence  
10 of any legally necessary proposition in the case more or less likely. Fed. R. Evid.  
11 401-402. Evidence is unfairly prejudicial if it has an “undue tendency to suggest  
12 decision on an improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes, 1972  
13 Proposed Rules. Rule 403 explicitly states that evidence may also be excluded if the  
14 waste of time caused by its introduction outweighs its probative value.

### 15 **III. ARGUMENT**

#### 16 **A. Plaintiffs Should Be Precluded from Relying on Evidence Relating to** 17 **Allegedly Infringed Works That They Failed to Claim in the** 18 **Complaint**

19 Plaintiffs filed two complaints in this case, and neither of them mentioned the  
20 works that are subject to this Motion. Dkt. 1, Dkt. 26, ¶¶ 15-19 (First Amended  
21 Complaint). Plaintiffs’ operative complaint in this case alleges that Defendants  
22 infringed over seven hundred television episodes, twelve motion pictures, and four  
23 novels. *Id.* Plaintiffs described all of these works in the Complaint filed on March 11,  
24 2016, *id.*, and Defendants investigated these works in order to properly assess the case  
25 and prepare a defense. However, Plaintiffs now intend to rely heavily on allegedly  
26 infringed works that they failed to introduce until October 28, 2016—over seven  
27 months later. Dkt. 75-3, (CBS Studios Inc.’s Amended Responses to Interrogatories,  
28 Set One at 1, 3-4, 9); Dkt. 75-4, (Paramount Pictures Corporation’s Amended

1 Responses to Interrogatories, Set One 1, 3-4, 9). These works include *The Four Years*  
2 *War* supplement to *Star Trek: The Role Playing Game* (“Supplement”), which  
3 Plaintiffs certainly had knowledge of at the time they filed the Complaint. Dkt. 91-20  
4 at 8, 10, 15, 17, 19 (Plaintiffs’ Opposition to Defendants’ Motion for Summary  
5 Judgment); Dkt. 72-61 (*The Four Years War* supplement); Dkt. 72-62 (Copyright  
6 Registration to *The Four Years War*).

7 Moreover, Plaintiffs had numerous opportunities to bring up this allegedly  
8 infringed work before they served their interrogatory responses towards the tail end of  
9 the discovery period. Many of Plaintiffs’ witnesses had been deposed previously, and,  
10 specifically, the 30(b)(6) witness of CBS, John Van Citters, who was designated to  
11 testify about how Defendants’ Works allegedly copy Plaintiffs’ Works, was deposed  
12 on September 28, 2016—one month before the discovery responses were served—and  
13 declined to even mention this additional allegedly infringed work that was not claimed  
14 in the Complaint. Instead, Plaintiffs waited to call attention to the work at issue until  
15 Defendants had no more opportunity to depose Plaintiffs’ witnesses as to its contents.

16 Plaintiffs should not be allowed to introduce evidence of allegedly infringed  
17 works beyond those identified in the Complaint. Under Rule 8, a complaint must state  
18 “claim[s] showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The  
19 purpose of this rule is to ensure that a defendant is afforded notice of the claims  
20 asserted so it can properly assess the case and adequately prepare a defense. *Starr v.*  
21 *Baca*, 652 F.3d 1202, 1212-16 (9th Cir. 2011). In the copyright context, because  
22 “each act of infringement triggers a separate federal claim for relief” under the  
23 Copyright Act, a plaintiff’s complaint must identify each work claimed to have been  
24 infringed. *Urbont v. Sony Music Entm’t*, 863 F. Supp. 2d 279, 288 (S.D.N.Y. 2012)  
25 (citing *Kwan v. Schlein*, 634 F.3d 224, 228 (2d Cir. 2011)); *Jaso v. The Coca Cola*  
26 *Co.*, 435 Fed. Appx. 346, 352 (2011) (“each act of infringement gives rise to an  
27 independent claim”) (emphasis in original); *Southern v. All Points Delivery Sys., Inc.*,  
28 No. 04-cv-590, 2006 WL 521501, at \*1 n.1 (N.D. Okla. Mar. 2, 2006) (“because each

1 alleged infringement forms a separate claim, the Court requests more precision from  
2 the parties in future pleadings”); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa.  
3 1979), *aff’d* 612 F.2d 572 (3d Cir. 1979) (holding a complaint must state, *inter alia*,  
4 “which specific original work is the subject of the copyright claim . . . and by what  
5 acts and during what time defendant has infringed the copyright”).

6 Plaintiffs identified copyrighted works such as television episodes and series,  
7 motion pictures, and novels in their complaint, but none of those encompassed *The*  
8 *Four Years War* supplement to *Star Trek: The Role Playing Game*, upon which they  
9 now heavily rely. Plaintiffs cannot now build their case upon an allegedly infringed  
10 work without giving adequate notice to Defendants of a significant source of the  
11 alleged infringement. *Flynn v. Health Advocate, Inc.*, No. Civ. A. 03-3764, 2004 WL  
12 51929, at \*12 n.6 (E.D. Pa. Jan 13, 2004) (dismissing copyright claim under Rule  
13 12(b)(6) because allegations that plaintiff owned “a federal copyright in a collection of  
14 works” did not give notice of “what *specific* original work or works are the subject of  
15 Plaintiffs’ copyright claim”) (emphasis in original); *Sharp v. Patterson*, No. 03 Civ.  
16 8772, 2004 WL 2480426, at \*14 (S.D.N.Y. Nov. 3, 2004) (“[I]n light of . . . the  
17 principle enshrined in Rule 8—namely, to provide defendants fair notice of the claims  
18 against them—a plaintiff suing for copyright infringement may not rest on bare-bones  
19 allegations that infringement occurred. Rather, [plaintiff] must identify the ‘specific  
20 original work [that] is the subject of the claim.’”); *see* 6 Patry on Copyright § 19:6 n.3  
21 (2010) (stating that, for example, “if plaintiffs know 669 sound recordings have been  
22 infringed, they owe a duty of fair notice to specify each one”); *see also La. Pac. Corp.*  
23 *v. James Hardie Bldg. Prods., Inc.*, 2012 WL 5520394, at \*1 (N.D. Cal. Nov. 14,  
24 2012) (holding that plaintiff was required to “identify every trademark which was  
25 allegedly infringed”; stating that this requirement “is necessary to provide Defendant  
26 with adequate notice” because, where the complaint only identifies some of the  
27 allegedly infringed marks, this “leaves Defendant to guess at the others. This is  
28 insufficient.”).

1 Here, any works and infringements at issue should have been identified by  
2 Plaintiffs through the Complaint to comply with due process—not seven months later  
3 in an amended response to a discovery request and after the depositions of key  
4 witnesses for Plaintiffs had already been taken. All of Plaintiffs’ witnesses relevant to  
5 the works at issue in the case had been deposed by the time these amended responses  
6 were served on October 28, 2016. Specifically, the 30(b)(6) witness of CBS, John  
7 Van Citters, who was designated to testify about how Defendants’ Works allegedly  
8 copy Plaintiffs’ Works, was deposed on September 28, 2016—one month before the  
9 discovery responses were served—and declined to even mention this additional  
10 allegedly infringed work that was not claimed in the Complaint. Paramount’s 30(b)(6)  
11 witness, Mr. O’Rourke, had also been deposed a month earlier. Leiden Decl., ¶ 9.  
12 Clearly Defendants were severely prejudiced by being presented with these amended  
13 responses seeking to expand the scope of the case just a few days before the close of  
14 discovery on November 2, 2016. Dkt 44 (Minutes for Scheduling Conference).  
15 Without knowing what specific infringements are at issue, Defendants can neither  
16 fully assess nor investigate the applicable defenses. Moreover, since the additional  
17 work at issue is now prominently featured in Plaintiffs’ claims of infringement,  
18 allowing Plaintiffs to introduce evidence of it when it had been withheld from  
19 Defendants for such a long period of time would be severely prejudicial. Dkt. 91-20  
20 at 8, 10, 15, 17, 19 (Plaintiffs’ Opposition to Defendants’ Motion for Summary  
21 Judgment).

22 Additionally, because each allegedly infringed work constitutes a separate and  
23 distinct legal claim for statutory damages, failure to identify such works is a failure of  
24 notice, and violates due process, Fed. R. Civ. P. 8 and the Copyright Act. Any  
25 evidence of infringements for works beyond those identified in the Complaint should  
26 therefore be excluded.

#### 27 **IV. CONCLUSION**

28 For all of these reasons, the Court should grant Defendants’ Motion *in Limine*



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5 Dated: December 16, 2016

WINSTON & STRAWN LLP

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By: /s/ Erin R. Ranahan

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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' MOTION *IN LIMINE*  
NO. 4 TO PRECLUDE PLAINTIFFS  
FROM RELYING ON EVIDENCE  
REGARDING ITEMS THAT ARE  
UNORIGINAL, IN THE PUBLIC  
DOMAIN, OR FROM THIRD  
PARTIES; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Hearing Date: January 31, 2017  
Pretrial Conference: January 9, 2017  
Trial Date: January 31, 2017

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon thereafter as the  
3 matter may be heard before the Honorable R. Gary Klausner, 255 East Temple Street,  
4 Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters  
5 (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs  
6 from relying on evidence regarding items that are unoriginal, in the public domain, or  
7 from third parties.

8 This Motion is brought pursuant to Rules 401-403 of the Federal Rules of Civil  
9 Procedure, and is based on this Motion and Notice of Motion, the Request for Judicial  
10 Notice, the exhibits attached thereto, the supporting documents filed concurrently  
11 herewith, previously filed documents incorporated by reference herein, and upon such  
12 oral argument and submissions that may be presented at or before the hearing on this  
13 Motion. Pursuant to Local Rule 7-3, this Motion is made following the conference of  
14 counsel that took place on December 9, 2016.

15 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

17 By: /s/ Erin R. Ranahan  
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19 Attorneys for Defendants,  
20 AXANAR PRODUCTIONS, INC.  
21 and ALEC PETERS  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar  
4 Productions, Inc., and Alec Peters (“Defendants”) move for an *in limine* order  
5 precluding Plaintiffs from introducing at trial any evidence regarding items that  
6 should be filtered out because they are unoriginal, in the public domain, or from third  
7 parties. Plaintiffs should be precluded from introducing this evidence because any  
8 probative value is substantially outweighed by a danger of prejudice to Defendants,  
9 waste of time, and/or confusion of the issues. Fed. R. Evid. 401-403. Due to these  
10 and the other evidentiary infirmities described herein, the Court should grant  
11 Defendants’ Motion *in Limine* No. 4.

12 **II. LEGAL STANDARD**

13 Rulings on motions *in limine* are committed to the discretion of the trial court.  
14 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
15 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
16 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x  
17 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude  
18 evidence where the evidence is not relevant, or where the probative value is  
19 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
20 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
21 discretion in excluding conclusive, speculative evidence). Even if evidence is  
22 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
23 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
24 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
25 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s  
26 probative value was substantially outweighed by unfair prejudice); *United States v.*  
27 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of  
28 evidence that was low in probative value and could have confused the jury as more

1 prejudicial than probative under Rule 403); *Dream Games of Ariz., Inc. v. PC Onsite*,  
2 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in  
3 granting plaintiff’s motion *in limine* to exclude evidence based on concerns that it  
4 might improperly influence the jury on the amount of statutory damages to assess  
5 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
6 sufficiently probative information).

7 Furthermore, a party who fails to make a required initial disclosure (such as  
8 disclosing witnesses likely to have information on key topics or producing documents  
9 they intend to rely upon at trial) “is not allowed to use that information or witness to  
10 supply evidence on a motion, at a hearing, or at trial” unless the party’s failure was  
11 “substantially justified” or “harmless.” Fed. R. Civ. P. 37(c)(1); *Hoffman v.*  
12 *Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). Motions *in*  
13 *limine* are appropriate to preclude the introduction at trial of evidence not produced in  
14 discovery. *Reyes v. City of Glendale*, No. CV 05-0253 CAS (MANx), 2009 WL  
15 2579614, at \*4 (C.D. Cal. Aug. 19, 2009); *Lincoln Diagnostics v. Panatrex, Inc.*, No.  
16 07-CV-2077, 2009 WL 3010840, at \*5 (C.D. Ill. Sept. 16, 2009) (“any documents  
17 relevant to the issue of damages that Defendant did not produce prior to the ‘drop  
18 dead’ date . . . could not be presented by Defendant at trial.”).

### 19 **III. ARGUMENT**

#### 20 **A. Plaintiffs Should Be Precluded from Relying on Evidence Regarding** 21 **Items that Should be Filtered Out Because they are Unoriginal, in** 22 **the Public Domain, or from Third Parties**

23 Plaintiffs’ operative complaint in this case emphasizes numerous elements that  
24 have appeared in Plaintiffs’ Works that are not protectable by copyright. These items  
25 include costumes, geometric shapes, words and short phrases, ideas, scenes a faire,  
26 unprotected characters, and elements of works derived from nature, the public domain,  
27 or third parties. Because any mention of these elements would improperly and  
28 unlawfully appear to the jury to expand the proper elements at issue with respect to

1 Plaintiffs' copyright claims, the probative value of such evidence is substantially  
2 outweighed by the danger of unfair prejudice. Moreover, the introduction of such  
3 evidence would confuse the jury by intertwining copyrightable and non-copyrightable  
4 works and would certainly result in a waste of time.

5 To prove copyright infringement, Plaintiffs must show that the “*protectable*  
6 *elements*” of their works, “*standing alone*, are substantially similar” to Defendants’  
7 works. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th  
8 Cir. 2006) (emphasis in original). In making this determination, a court must “filter  
9 out and disregard the non-protectable elements.” *Id.* As such, evidence of these “non-  
10 protectable elements” is irrelevant, and even if it were relevant, its minimal probative  
11 value is outweighed by the unfair prejudice that would result from presenting it to a  
12 jury. The introduction of this evidence also poses a great risk of confusing the issues,  
13 as Plaintiffs seek to introduce numerous items that are not copyrightable to  
14 substantiate their claims.

15 The introduction of evidence of the following non-copyrightable elements  
16 relied upon by Plaintiffs would be severely prejudicial:

17 **1. Costumes**

18 Plaintiffs should not be permitted to introduce evidence of items of clothing that  
19 are not copyrightable, such as a “gold shirt,” “cowl neck,” “green drapes,” and  
20 “robes.” Dkt. 26 (FAC ¶ 46, at 17-19). Under the “useful article” doctrine, clothing  
21 cannot be copyrighted except to the extent there are original designs on the clothing  
22 that can be separated from the function of the clothing, which is not alleged here, and  
23 so any evidence of this clothing would unfairly prejudice Defendants. *Id.*; 17 U.S.C. §  
24 101; *Ent. Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1221  
25 (9th Cir. 1997) Further, a color cannot be copyrighted. 37 C.F.R. § 202.1(a).<sup>1</sup>  
26

27 <sup>1</sup> Plaintiffs also seek to include an image of Mr. Peters wearing the “original Garth”  
28 costume. But this picture is *not* a shot from the Potential Fan Film; Mr. Peters, a  
lifelong Star Trek fan, lawfully purchased the costume for his collection and is shown  
wearing it.

1                                   **2.     Geometric Shapes**

2           Plaintiffs should not be permitted to introduce evidence of geometric shapes to  
3 which they claim copyright ownership because “common geometric shapes cannot be  
4 copyrighted.” *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (citing  
5 U.S. Copyright Office, Compendium II: Copyright Office Practices § 503.02(a)-(b)  
6 (1984) (“Copyright Compendium II”). The U.S. Copyright Office refuses to base  
7 copyright registration on simple and “standard ornamentation,” such as “chevron  
8 stripes,” “a plain, ordinary cross, “common geometric figures or shapes, or “a standard  
9 symbol such as an arrow or a five-pointed star.” Copyright Compendium II  
10 § 503.02(a)-(b).

11           Therefore, the Starfleet Command Insignia (Dkt. 26, FAC ¶ 46, at 18),  
12 “triangular medals on uniforms” (*id.* at 19-20), the United Federation of Planets logos  
13 (simply the letters “UFP” surrounded by stars) (*id.* at 27), Federation logo (*id.* at 28),  
14 Memory Alpha logo (simply the Greek letter “alpha” with the words “Memory  
15 Alpha”) (*id.*), and Klingon logos (simply a three-pointed star) (*id.* at 29), are not  
16 protectable elements and cannot form the basis of a copyright claim. Thus, allowing  
17 evidence of such items would certainly prejudice Defendants without providing any  
18 probative value.

19                                   **i.     Words and Short Phrases**

20           “Words and short phrases such as names, titles, and slogans” are not subject to  
21 copyright. 37 C.F.R. § 202.1(a). Thus, the names Garth of Izar, Soval, Richard  
22 Robau, and John Gill (Dkt. 26, FAC ¶ 46, at 11-12) are not protectable, and neither  
23 are the words Andorians, Tellarites, Romulans, Axanar, Archanis IV, Q’onoS,  
24 Nausicaa, Rigel, Andoria, Tellar Prime, Vulcans, Klingons, Terra (land), Starship  
25 Enterprise, Starfleet, Federation, Starships, Stardate, and Federation or the short  
26 phrase “beaming up.” (*Id.* at 13, 16, 19-21, 26, 30, 33, 35, 38). Thus, allowing  
27 Plaintiffs to introduce evidence of these words and short phrases would prejudice the  
28 Defendants and confuse copyrightable and non-copyrightable issues.

1                    **ii. Elements of Works Derived From Nature, the Public**  
 2                    **Domain, or Third-Party Works**

3                    Plaintiffs should not be permitted to introduce evidence of elements of works  
 4 derived from nature, the public domain, or third-party works because a plaintiff cannot  
 5 claim copyright protection for elements of its works that are not original in the public  
 6 domain. *Feist*, 499 U.S. at 350 (“[c]opyright does not prevent subsequent users from  
 7 copying from a prior author's work those constituent elements that are not original,  
 8 [including] materials in the public domain”). Further, “to the extent a [work] captures  
 9 the characteristics of an object as it occurs in nature, these characteristics are not  
 10 protectible.” *Psihoyos v. The National Geographic Society*, 409 F. Supp. 2d 268, 275  
 11 (S.D.N.Y. 2005). “Even if a work does not occur in nature—[like] a dragon—there is  
 12 no liability if the only similarity between the two works is that they each portray the  
 13 same item, but in a different form.” 4 Nimmer on Copyright § 13.03[B][2].  
 14 Accordingly, evidence of such works would only serve to prejudice Defendants.

15                    Here, Plaintiffs improperly seek to rely on evidence regarding elements derived  
 16 from nature, the public domain, or third-party works, including:

- 17                    • **Vulcans’ appearance** (Dkt. 26, FAC at 15): a species with “pointy ears” is not  
 18 original to Star Trek, and has appeared in many fictional fantasy works  
 19 depicting imaginary humanoid species predating Star Trek, including, but not  
 20 limited to, vampires, elves, fairies, and werewolves,<sup>2</sup> as well as in many animals  
 21 in nature.
- 22                    • **Vulcan** (Dkt. 26, FAC at 14): in Roman mythology, Vulcan is the god of fire  
 23 and metalworking. The first known use of “Vulcan” was in 1513.<sup>3</sup>
- 24                    • **Triangular medals on uniforms** (Dkt. 26, FAC at 19): have been used by  
 25

26 <sup>2</sup> RJN, at ¶ 4 and Ex. D-E. *See, e.g.*, NOSFERATU (Jofa-Atelier Berlin- Johannisthal,  
 27 Prana-Film GmbH (1922); Elf, Merriam Webster, <http://www.merriam-webster.com/dictionary/elf> (last visited Mar. 27, 2016) (defining elves as “a small  
 28 creature in stories usually with pointed ears and magical powers”).

<sup>3</sup> RJN, at ¶ 5 and Ex. F Vulcan, Merriam Webster, <http://www.merriam-webster.com/dictionary/Vulcan> (last visited Mar. 27, 2016).



- 1 military, religious, and other organizations throughout history.<sup>4</sup>
- 2 • **Nausicaa** (Dkt. 26, FAC at 20): is a character in Homer’s *Odyssey*.<sup>5</sup>
- 3 • **Rigel** (*id.*): is the name of a first-magnitude star in the constellation Orion.<sup>6</sup>
- 4 • **Terra**, (*id.*): is the Latin word for “Land.”<sup>7</sup>
- 5 • **Federation logo** (Dkt. 26, FAC at 27-28): is adapted from the United Nations
- 6 flag.<sup>8</sup>
- 7 • **Transporters** (Dkt. 26, FAC at 32): have existed in science fiction since 1877.<sup>9</sup>
- 8 • **Warp drive** (Dkt. 26, FAC at 32): has existed in science fiction as early as
- 9 1945.<sup>10</sup>
- 10 • **Federation** (Dkt. 26, FAC at 33): is the general word to describe “a country
- 11 formed by separate states that have given certain powers to a central
- 12 government while keeping control over local matters” commonly used in
- 13 science fiction and is inspired by the United Nations.<sup>11</sup>
- 14 • **Phasers** (Dkt. 26, FAC at 33): are also known as Heat-Ray weapons, which
- 15 have existed in science fiction since H.G. Wells’ “War of the Worlds” in
- 16 1898.<sup>12</sup>
- 17 • **Bridge** (Dkt. 26, FAC ¶ 66(b)): is a naval term for a ship’s command center
- 18 whose first usage predates the 12th century.<sup>13</sup>

19

20 <sup>4</sup> RJN, at ¶ 6 and Ex. G. See WILLIAM T. R. MARVIN, *THE MEDALS OF THE MASONIC FRATERNITY: DESCRIBED AND ILLUSTRATED* (1880).

21 <sup>5</sup> RJN, at ¶ 7 and Ex. H. Translated by WILLIAM CULLEN BRYANT, *THE ODYSSEY OF HOMER*, James R. Osgood and Co. (1871).

22 <sup>6</sup> RJN, at ¶ 8 and Ex. I. Rigel, Merriam Webster, <http://www.merriam-webster.com/dictionary/Rigel> (last visited Mar. 27, 2016).

23 <sup>7</sup> RJN, at ¶ 9 and Ex. J. Terra, Merriam Webster, <http://www.merriam-webster.com/dictionary/terra> (last visited Mar. 27, 2016).

24 <sup>8</sup> RJN, at ¶ 10 and Ex. K.

25 <sup>9</sup> RJN, at ¶ 11 and Ex. L. Teleportation, Merriam Webster, <http://www.merriam-webster.com/dictionary/teleportation>; see also, NEWSPAPER ARTICLE 1878 (last visited Mar. 27, 2016).

26 <sup>10</sup> RJN, at ¶ 12 and Ex. M. Sten Odenwald, *Who Invented Faster Than Light Travel?*, <http://www.astronomycafe.net/anthol/scifi1.html> (last visited Mar. 28, 2016).

27 <sup>11</sup> RJN, at ¶ 13 and Ex. N. Federation, Merriam Webster, <http://www.merriam-webster.com/dictionary/federation> (last visited Mar. 27, 2015).

28 <sup>12</sup> RJN, at ¶ 14 and Ex. O. H.G. Wells, *War of the Worlds*, Leipzig (1898).

<sup>13</sup> RJN, at ¶ 15 and Ex. P. Bridge, Merriam Webster, <http://www.merriam-webster.com/dictionary/bridge> (last visited Mar. 27, 2016).

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### iii. The Klingon Language

Plaintiffs should not be able to introduce evidence of use of the Klingon language (Dkt. 26, FAC ¶ 46, at 31) because the language, itself, is an idea or a system and is not copyrightable. As the Supreme Court held in the context of a system of bookkeeping, although copyright protects the author's *expression* of the system, it does not prevent others from *using* the system. *Baker v. Selden*, 101 U.S. 99, 101 (1879). Therefore, the introduction of evidence of the use of the Klingon language would only serve to prejudice Defendants, confuse the jury, and waste time.

### iv. Ideas

Plaintiffs should not be able to introduce evidence related to the use of ideas because, "[i]n no case does copyright protection for an original work of authorship extend to any idea...regardless of the form in which it is...illustrated[] or embodied in such work." 17 U.S.C. § 102(b). Rather, "copyright...encourages others to build freely upon the ideas...conveyed by a work." *Feist*, 499 U.S. at 350-41 (citing *Harper & Row*, 471 U.S. at 556-57); *FASA Corp. v. Playmates Toys, Inc.*, 869 F. Supp. 1334, 1351 (N.D. Ill. 1994) (plaintiffs could not claim protection for "general ideas and concepts [such as]...a futuristic, interstellar, battle dominated universe"). In fact, the Star Trek episode "Whom the Gods Destroy" borrows from the work of Henry Wadsworth Longfellow and Edgar Allan Poe.<sup>14</sup>

Consequently, the "mood and theme" of "science fiction action adventure" (FAC ¶¶ 46, 47, at 34, 39) is not protectable and, as such, should not be introduced as evidence. *See Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Group, Inc.*,

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<sup>14</sup> RJN, at ¶¶ 16-19 and Exs. Q-T. *See, e.g.*, "Whom Gods Destroy (Star Trek: The Original Series)," Wikipedia, [https://en.wikipedia.org/wiki/Whom\\_Gods\\_Destroy\\_\(Star\\_Trek%3A\\_The\\_Original\\_Series\)](https://en.wikipedia.org/wiki/Whom_Gods_Destroy_(Star_Trek%3A_The_Original_Series)) (last visited Dec. 15, 2016); "Whom the Gods Would Destroy," Wikipedia, [https://en.wikipedia.org/wiki/Whom\\_the\\_gods\\_would\\_destroy](https://en.wikipedia.org/wiki/Whom_the_gods_would_destroy) (last visited Dec. 15, 2016); "The System of Doctor Tarr and Professor Fether," Wikipedia, [https://en.wikipedia.org/wiki/The\\_System\\_of\\_Doctor\\_Tarr\\_and\\_Professor\\_Fether](https://en.wikipedia.org/wiki/The_System_of_Doctor_Tarr_and_Professor_Fether) (last visited Dec. 15, 2016); "Is 'those whom the gods wish to destroy they first make mad' a classical quotation?," Blog of Roger Pearse, <http://www.roger-pearse.com/weblog/2015/10/31/is-those-whom-the-gods-wish-to-destroy-they-first-make-mad-a-classical-quotation/> (last visited Dec. 15, 2016).

1 443 F. Supp. 291 (D.C.N.Y. 1977) (although toy company “sought to make use of the  
2 themes embodied in” *Star Wars* and its licensed products, “[a] theme is not  
3 protectable...[because] it is only the idea which stands behind a protectible  
4 expression”). Introduction of such evidence would be severely prejudicial, would  
5 confuse the jury, and would waste time.

6 **v. Scènes à Faire**

7 “Scenes-a-faire, or situations and incidents that flow necessarily or naturally  
8 from a basic plot premise, cannot sustain a finding of infringement,” *Cavalier v.*  
9 *Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002), and so introduction of such  
10 evidence is improper. The following elements are unprotectable scènes à faire  
11 because they are staples of science fiction: starships and spacedocks, beaming  
12 up/transporters, warp drive, phasers, command insignia and medals on uniforms,  
13 stardates, Starfleet, and a federation of planets. Dkt. 26 (FAC at 22, 23, 25, 26, 29,  
14 30, 32, 33). Indeed, *Star Wars* makes use of nearly all of these elements. *See*  
15 *Althouse*, 2014 WL 2986939, at \*4 (“these features can be traced back to films like  
16 *Star Wars* and *Terminator*, and are neither original nor protectable”). Introduction of  
17 such evidence is therefore irrelevant and would only serve to prejudice the  
18 Defendants, confuse the jury, and waste time.

19 **vi. Characters Plaintiffs Have Identified Are Not Protected**

20 The Ninth Circuit has explained that copyright protection is not available for  
21 “every comic book, television, or motion picture character”—only for those that are  
22 “especially distinctive.” *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015).  
23 To meet this standard, a character must be “sufficiently delineated” and display  
24 “consistent, widely identifiable traits.” *Id.* Further, “characters that have been ‘lightly  
25 sketched’ and lack descriptions may not merit copyright protection.” *Id.* For  
26 example, courts have held that James Bond, Batman, and Godzilla are characters  
27 protected by copyright. *Id.* at 1020. Here, evidence of minor, unprotected characters  
28 without “especially distinctive” and “widely identifiable traits,” such as Garth of Izar,

1 Soval, Richard Robau, John Gill, Captain Robert April, Chang, and Sarek Dkt, 26  
2 (FAC at 11-12, ¶ 66) should not be introduced.<sup>15</sup> The introduction of such evidence  
3 would only waste the Court’s and the jury’s time, confuse copyrightable and non-  
4 copyrightable issues, and prejudice the Defendants for that reason.

5 **IV. CONCLUSION**

6 For all of these reasons, the Court should grant Defendants’ Motion *in Limine*  
7 No. 4.

8 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

9  
10 By: /s/ Erin R. Ranahan  
11 Erin R. Ranahan  
12 Attorneys for Defendants,  
13 AXANAR PRODUCTIONS, INC.  
14 and ALEC PETERS  
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27 <sup>15</sup> RJN, at ¶¶ 1-3 and Exs. A-C. *See, e.g.*, “Soval Name Meaning,”  
28 <https://www.kidpaw.com/names/soval> (last visited Dec. 5, 2016); “Garth (name),”  
[https://en.wikipedia.org/wiki/Garth\\_\(name\)](https://en.wikipedia.org/wiki/Garth_(name)) (last visited Dec. 5, 2016); “Epsilon  
Bootis,” [https://en.wikipedia.org/wiki/Epsilon\\_Bo%C3%B6tis](https://en.wikipedia.org/wiki/Epsilon_Bo%C3%B6tis) (last visited Dec. 5,  
2016).

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8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19  
20

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' MOTION *IN LIMINE*  
NO. 5 TO PRECLUDE PLAINTIFFS  
FROM RELYING ON EVIDENCE  
CONCERNING PERSONAL  
DRAMA, SMEAR CAMPAIGN, AND  
OTHER IRRELEVANT  
COMMUNICATIONS, INCLUDING  
WITNESSES CHRISTIAN  
GOSSETT, TERRY MCINTOSH;  
MEMORANDUM OF POINTS &  
AUTHORITIES**

Hearing Date: January 31, 2017  
Pretrial Conference: January 9, 2017  
Trial Date: January 31, 2017

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TO THE COURT, PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 31, 2017 or as soon thereafter as this matter may be heard in Courtroom 850 of the Honorable R. Gary Klausner, 255 East Temple Street, Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs from relying on irrelevant testimony and evidence concerning personal drama and otherwise irrelevant statements, including the testimony of Christian Gossett and Terry McIntosh.

Plaintiffs should not be permitted to rely these irrelevant personal attacks and other attempts to smear Defendants because the probative value of the evidence is outweighed by the prejudice to Defendants. Fed. R. Evid. 401-403. This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declaration of Diana Hughes Leiden (“Leiden Decl.”), previously filed documents incorporated by reference herein, and upon such other and further evidence and argument as may be presented to the Court prior to or at the time of hearing on this motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 that took place on December 9, 2016.

Dated: December 16, 2016

**WINSTON & STRAWN LLP**

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Diana Hughes Leiden  
Kelly N. Ōki  
Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC. and  
ALEC PETERS

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) move for an *in limine* order precluding Plaintiffs Paramount Pictures Corporation and CBS Studios Inc. (“Plaintiffs”) from relying on at trial any evidence or testimony relating to irrelevant personal drama, or evidence or testimony intended to personally smear Defendant Alec Peters. Specifically, Defendants seek to preclude the introduction of evidence from, or concerning, two witnesses—Christian Gossett, Terry McIntosh—who have personal scores to settle with Defendant Alec Peters. Defendants also seek to preclude any evidence or testimony the personal relationship Defendant Peters had with Ms. Kingsbury, and other documents or testimony regarding irrelevant personal matters or drama, as it has no bearing on the copyright issues presented for trial.

Defendants will suffer prejudice if this Motion is not granted because Plaintiffs will be able to rely on evidence that will certainly evoke bias, and likely influence the jury, without meeting the minimum standard for such evidence under Federal Rule of Evidence 403. For these and all the foregoing reasons, Defendants respectfully request that the Court grant Defendants’ Motion *in Limine*.

**II. RELEVANT FACTUAL BACKGROUND**

Beginning in 2015, Defendant Alec Peters had concerns and personal disagreements with both Christian Gossett and Terry McIntosh that caused them to disassociate with Axanar Productions and *Axanar*. See ECF No. 90-11 (Peters Decl.).

Mr. Gossett collaborated with Mr. Peters in writing the screenplay for *Prelude to Axanar*, a short mockumentary available for free on YouTube. *Id.*; ECF No. 75-20 (*Prelude to Axanar*). On or around May 2015, Mr. Gossett left the production of *Axanar* and informed Defendants of his departure via a Facebook post. ECF No. 90-11 (Financial Report). Without any evidence, and following several heated conversations, he then later [REDACTED]. *Id.*

1 As for Mr. McIntosh, who dealt with intellectual property issues with respect to  
2 *Prelude*, he [REDACTED]  
3 [REDACTED]. *Id.* In 2016, Mr. McIntosh  
4 subsequently left the production of *Axanar*, [REDACTED]  
5 [REDACTED]  
6 [REDACTED] *Id.*

7 Ms. Kingsbury was the Director of Fulfillment at Axanar Productions ECF No.  
8 72-6 (Grossman Decl., Ex. C (Kingsbury tr. at 114:16-25)). She is the former  
9 girlfriend of Defendant Alec Peters.

### 10 III. LEGAL STANDARD

11 Rulings on motions *in limine* are committed to the discretion of the trial court.  
12 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
13 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
14 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x  
15 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude  
16 evidence where the evidence is not relevant, or where the probative value is  
17 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
18 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
19 discretion in excluding conclusive, speculative evidence). Even if evidence is  
20 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
21 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
22 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
23 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s  
24 probative value was substantially outweighed by unfair prejudice); *United States v.*  
25 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of  
26 evidence that was low in probative value and could have confused the jury as more  
27 prejudicial than probative under Rule 403); *Dream Games of Ariz., Inc. v. PC Onsite*,  
28 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in



1 granting plaintiff’s motion *in limine* to exclude evidence based on concerns that it  
2 might improperly influence the jury on the amount of statutory damages to assess  
3 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
4 sufficiently probative information).

#### 5 **IV. ARGUMENT**

##### 6 **A. The Court Should Exclude All Statements Made By Christian** 7 **Gossett Because They Are Intended to Smear Defendants Axanar** 8 **Productions and Alec Peters**

9 The legal rule for excluding prejudicial evidence under Federal Rule of  
10 Evidence 403 explains that “[t]he court may exclude relevant evidence if its probative  
11 value is substantially outweighed by a danger of one or more of the following: unfair  
12 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or  
13 needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Plaintiffs intend to  
14 offer the testimony of disgruntled director Christian Gossett in order to state, among  
15 other falsehoods, his non-legal *opinion* that Defendants’ *Prelude to Axanar* infringes  
16 upon Star Trek intellectual property. *See* ECF No. 72-5 (Grossman Decl., Ex. C  
17 (Gossett tr. at 185:25-186:8)). Mr. Gossett’s proposed testimony fails to meet the  
18 FRE 403 standard for several reasons.

19 First, it is impermissible lay testimony, and as such, Mr. Gossett’s opinion on  
20 whether Defendants’ Works—*i.e.*, *Prelude to Axanar* and *Axanar*—infringe on  
21 Plaintiffs’ is irrelevant. *See Nationwide Transport Finance v. Cass Information*  
22 *Systems, Inc.*, 523 F.3d 1051 (9th Cir. 2008) (“Testimony that simply tells the jury  
23 how to decide is not considered ‘helpful’ as lay opinion.”).

24 Second, any factual testimony Mr. Gossett would have personal knowledge  
25 of—emails regarding the lease of a studio, preliminary sketches, etc.—has no bearing  
26 on whether the *final* version of *Prelude to Axanar* violates any protections Plaintiffs’  
27 may have with respect to their copyrighted works. Mr. Gossett’s testimony here  
28 would, at best, confuse the jury about the proper facts for consideration in determining

1 Plaintiffs’ copyright claims; at worst, his testimony results in undue prejudice against  
2 Defendants when the facts have no bearing on the ultimate copyright issues left for  
3 resolution. Indeed, Defendants would be severely prejudiced should Plaintiffs be  
4 allowed to present such testimony.

5 The Court should also preclude Mr. Gossett from appearing at trial, and should  
6 exclude all such evidence from Gossett under Federal Rule of Evidence 403.

7 **i. Mr. Gossett’s Personal Feud With Alec Peters Is Irrelevant to**  
8 **Plaintiffs’ Copyright Claims**

9 Even less relevant are the testimony and evidence concerning Mr. Gossett’s  
10 dislike for Defendant Peters—these quite obviously make no fact of consequence  
11 more or less probable as it relates to the copyright issues presented for trial. *See* Fed.  
12 R. Evid. 401. As mentioned, Mr. Gossett left Axanar Productions via a Facebook  
13 post, and continued thereafter *See* Leiden Decl., Ex 8 (Peters tr. at 281:14-19) to

14 [REDACTED]  
15 [REDACTED] Such inflammatory testimony may tend to evoke an  
16 emotional bias against Defendant Peters, and is unduly prejudicial given its minimal  
17 evidentiary impact. Fed. R. Evid. 403. Mr. Gossett was also not mentioned in  
18 Plaintiffs’ Initial Disclosures, which presents another basis to exclude him. *See*  
19 Leiden Decl., Ex. 3 (Plaintiffs’ Rule 26 Disclosures); *Gunchick v. Federal Ins. Co.*,  
20 No. CV 14-1162 RSWL (PJWx), 2015 WL 1781404, at \*5 (C.D. Cal. Apr. 20, 2015)  
21 (excluding witnesses not previously disclosed in Rule 26 disclosures where “no  
22 substantial justification” for failure to disclose was given); *see also Bartko v. Fidelity*  
23 *Nat’l Fin., Inc.*, Case No. CV12-00986-JVS (MLGx), 2013 WL 1211440, at \*4 (C.D.  
24 Cal. Apr. 11, 2013) (“[T]he Court finds that generic, non-specific disclosures are  
25 insufficient to meet the purpose of Rule 26. Absent an exception, these witnesses are  
26 excluded.”). Therefore, all such testimony concerning Mr. Gossett’s personal feud  
27 with Defendant Peters should be excluded under Federal Rule of Evidence 403.

1           **B. Plaintiffs Should Be Precluded From Introducing the Testimony of**  
2           **Terry McIntosh On Relevancy and Prejudicial Grounds**

3           Plaintiffs should likewise be precluded from introducing any testimony or  
4 evidence concerning Terry McIntosh, including his statements concerning whether  
5 Defendants planned to “trademark” Axanar, and other emails between them about  
6 irrelevant matter. *See* ECF No. 72-7 (Grossman Decl., Ex. E (McIntosh tr. at 20:23-  
7 22-15)).

8           Mr. McIntosh was a volunteer at Defendant Axanar Productions; his role  
9 comprised of managing and monitoring Defendants’ social media campaigns. *See*  
10 ECF No. 90-11 (Financial Report). Despite this, Plaintiffs’ have cherry-picked  
11 McIntosh’s statements about irrelevant matters, including “trademarking” Axanar in a  
12 futile attempt to show Defendants’ intended their fan films for commercial use. Dkt.  
13 72 at 13 (Plaintiffs’ Motion for Partial Summary Judgment). However, his testimony  
14 is irrelevant for at least two reasons. First, Defendants did not trademark Axanar,  
15 therefore his speculative statements are not probative of any intended use of  
16 Defendants’ Works. [REDACTED]

17 [REDACTED]  
18 [REDACTED]. Second, no trademark claims are even at issue in this case about “Star  
19 Trek,” let alone Axanar. *See also* Defendants’ Motion *in Limine* No. 6 (concurrently  
20 filed). Given the likelihood jury confusion regarding the relevance of  
21 “trademarking”—or lack thereof, in this instant matter—this evidence should be  
22 precluded on Federal Rule of Evidence 403 grounds.

23           **i. Mr. McIntosh’s Personal Feud With Or Opinions About Alec**  
24           **Peters Are Irrelevant to Plaintiffs’ Copyright Claims**

25           Like Christian Gossett, Mr. McIntosh has made comments concerning his  
26 falling out with Defendant Peters. In particular, Mr. McIntosh has noted that he  
27 blocked Mr. Peters on social media and has [REDACTED]  
28 [REDACTED] all which cast Defendants in a negative light.

1 [REDACTED] Indeed, Mr. McIntosh has also gone on to parrot impermissible  
2 hearsay regarding Defendants' use of funds. *See, e.g.*, ECF No. 72-7 (Grossman  
3 Decl., Ex. E (McIntosh tr. at 52:12-22)). As explained in Defendants' Motion *in*  
4 *Limine* No. 7, this is irrelevant altogether. Even if it were relevant, however, it is  
5 undisputed that Mr. McIntosh worked remotely in Seattle, almost exclusively, during  
6 his tenure with Defendant Axanar Productions, Inc., [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED], *Wicker v. Oregon ex rel. Bureau of Labor*,  
10 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse discretion in  
11 excluding conclusive, speculative evidence).

12 Defendants would be severely prejudiced should Mr. McIntosh be allowed to  
13 parrot information of which he has insufficient knowledge. Thus, the entirety of Mr.  
14 McIntosh's testimony on this point should be precluded under Federal Rule of  
15 Evidence 403.

16 **C. Plaintiffs Should Be Precluded From Introducing Certain Evidence**  
17 **or Testimony Concerning Diana Kingsbury**

18 Plaintiffs' plan to introduce evidence or references to Diana Kingsbury [REDACTED]

19 [REDACTED]  
20 [REDACTED] *See, e.g.*, ECF No. 72 at 13  
21 (Plaintiffs' Motion for Partial Summary Judgment); ECF No. 72-1 (Grossman Decl.,  
22 Ex. A (Peters tr. at 197:12-15)). This type of evidence concerning Defendant Peters'  
23 relationship simply has no bearing on the copyright issues presented for trial, and thus  
24 is irrelevant. *See* Fed. R. Evid. 401. And yet, Plaintiffs seek to suggest—without any  
25 actual evidence—there was some nefarious plot behind *Axanar* because of their  
26 former personal relationship, when in fact the nature of Mr. Peters and Ms.  
27 Kingsbury's personal relationship is wholly irrelevant to the copyright claims and  
28 issues in this case.

1 All evidence, testimony and references concerning Defendant Peters’ personal  
2 relationship with Ms. Kingsbury is irrelevant and would be a waste of time for the  
3 jury, and is unduly prejudicial given its lack of probative value and confusing nature.  
4 Fed. R. Evid. 403. As such, any testimony or evidence concerning Defendant Peters’  
5 “girlfriend” or “former girlfriend” should be excluded under Federal Rule of Evidence  
6 403.

7 **V. CONCLUSION**

8 For all of the foregoing reasons, Defendants respectfully request that the Court  
9 grant their Motion *in Limine* No. 5.

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Dated: December 16, 2016

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8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19  
20  
21

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANT AXANAR  
PRODUCTIONS, INC.'S NOTICE OF  
MOTION AND MOTION *IN LIMINE*  
NO. 6 TO PRECLUDE PLAINTIFFS  
FROM REFERRING TO  
IRRELEVANT SUPERSEDED  
SCRIPTS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing Date: January 31, 2017  
Pretrial Conference: January 9, 2017  
Trial Date: January 31, 2017

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon thereafter as  
3 the matter may be heard before the Honorable R. Gary Klausner of the United States  
4 District Court for the Central District of California, at 255 East Temple Street, Los  
5 Angeles, California, 90012, Defendants Axanar Productions, Inc. and Alec Peters  
6 (collectively, "Defendants") will and hereby do move this Court for an order  
7 restricting the parties, all counsel and witnesses from mentioning, directly or  
8 indirectly, before jurors and prospective jurors from prior, superseded scripts.

9 This Motion *in Limine* No. 6 ("Motion") is brought pursuant to Rules 701-703  
10 of the Federal Rules of Civil Procedure. This Motion is based upon this Motion and  
11 Notice of Motion, the supporting documents filed concurrently herewith, previously  
12 filed documents incorporated by reference herein, and such oral argument and  
13 submissions that may be presented at or before the hearing on this Motion. Pursuant  
14 to Local Rule 7-3, this Motion is made following the conference of counsel that took  
15 place on December 9, 2016.

16

17 Dated: December 16, 2016

WINSTON & STRAWN LLP

18

19

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Andrew S. Jick  
Kelly N. Oki  
Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC.  
and ALEC PETERS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401-403,<sup>1</sup> Defendants Axanar  
4 Productions, Inc. and Alec Peters (collectively, "Defendants") move for an *in limine*  
5 order precluding Plaintiffs from introducing at trial any testimony or evidence  
6 constituting or relating to irrelevant, superseded scripts. Not only would such  
7 evidence be irrelevant and more prejudicial than probative, but also presentation of  
8 such evidence would be a waste of the jury and the Court's time to determine  
9 substantial similarity between the script and some unknown number of Plaintiffs'  
10 works, because there is no risk of that script being made. For these and all the  
11 following reasons, Defendants respectfully request that this Court grant its Motion  
12 *In Limine* No. 6.

13 **II. LEGAL STANDARD**

14 Rulings on motions *in limine* are committed to the discretion of the trial court.  
15 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
16 "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
17 and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed.  
18 App'x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to  
19 exclude evidence where the evidence is not relevant, or where the probative value is  
20 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex*  
21 *rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not  
22 abuse discretion in excluding conclusive, speculative evidence). Even if evidence is  
23 considered relevant, "[t]he court may exclude relevant evidence if its probative  
24 value is substantially outweighed by a danger of . . . unfair prejudice, confusing the  
25 issues, [or] misleading the jury." Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d  
26 1131, 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because

27 \_\_\_\_\_  
28 <sup>1</sup> All further statutory references are to the Federal Rules of Evidence unless  
otherwise noted.



1 evidence's probative value was substantially outweighed by unfair prejudice);  
2 *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district  
3 court's exclusion of evidence that was low in probative value and could have  
4 confused the jury as more prejudicial than probative under Rule 403).

### 5 **III. FACTUAL BACKGROUND**

6 Plaintiffs filed this lawsuit about a film that was not yet made. ECF No. 26  
7 (FAC ¶ 32). At the time Plaintiffs filed this lawsuit in December 2015, Defendants  
8 had prepared most recently version 7.7 of the script for *Axanar*, dated November 26,  
9 2015. ECF No. 94-10 (Decl. of Bill Hunt at ¶ 2). Prior to that, Plaintiffs had  
10 created many versions of the script. Leiden Decl., Ex. 5 (Deposition Transcript of  
11 Bill Hunt ("Hunt Tr.") at 53:15-25). The Court assumed when ruling on  
12 Defendants' motion to dismiss that there was a "final, locked" script that was based  
13 on this Court's assumption that the facts in Plaintiffs' First Amended Complaint  
14 were true, and thus that the Court could look to that script in order to ascertain  
15 substantial similarity and presumably fair use. ECF No. 43 (Order re Defendants'  
16 Motion to Dismiss at 7). But discovery has proven otherwise.

17 After Defendants heard the announcement by J.J. Abrams on May 19, 2016  
18 that the lawsuit "was going away," Defendants, optimistic about this announcement,  
19 began working on a revised draft script, which is the most recent draft and would be  
20 the only *Axanar* draft script that Defendants are still considering proceeding with  
21 producing. Leiden Decl., Ex. 5 (Hunt Tr. at 87:22-88:8). The latest script features  
22 two entirely new characters that were not in version 7.7, an original story, and an  
23 original dialogue. ECF No. 94-10 (Hunt Decl. at ¶¶ 3, 4, 9). The use of Star Trek  
24 characters is minor and transformative from any prior Star Trek work. ECF No. 75-  
25 19 (Peters Decl. at ¶ 16). This draft has 616 changes from the prior draft. ECF No.  
26 94-10 (Hunt Decl. at ¶ 2).

27 Defendants are not planning on proceeding with the "7.7" November 2015  
28 draft. ECF No. 94-10 (Hunt Decl. at ¶ 15). Moreover, Defendants are waiting to

1 obtain guidance from this lawsuit, including what happens with respect to the fair  
2 use defense as applied to *Prelude*, to determine whether breaking up *Axanar* into  
3 four “mockumentary” style pieces would likely also qualify as fair use. ECF No.  
4 75-19 (Peters Decl. at ¶ 13).

#### 5 **IV. ARGUMENT**

6 Courts have held that preliminary works such as draft screenplays are “too  
7 unreliable in determining substantial similarity” as to the final work. *Walker v.*  
8 *Time Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); *See v. Durang*, 711  
9 F.2d 141, 142 (9th Cir. 1983) (plaintiff not allowed discovery of “early drafts”);  
10 *Hudson v. Universal Pictures Corp.*, No. 03-CV-1008(FB)(LB), 2004 WL 1205762,  
11 at \*3 (E.D.N.Y. April 29, 2004) (“The Court is under no obligation to consider the  
12 draft scripts[.]”); *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at \*2  
13 n.2 (C.D. Cal. Oct. 26, 1983) (refusing to consider “draft screenplays or the shooting  
14 script” of movie because they were “not relevant”). Rather, it is “the works as they  
15 were presented to the public” that are relevant, not preliminary internal drafts.  
16 *Walker*, 615 F. Supp. at 434; *see also Chase-Riboud v. DreamWorks, Inc.*, 987 F.  
17 Supp. 1222, 1227 n.5 (C.D. Cal. 1997) (to determine substantial similarity, “the  
18 court need only consider the final version of [defendant’s] film as presented to the  
19 viewing public”); 4 Nimmer on Copyright § 13.03[D] (“[C]ourts have routinely  
20 rejected requests to consider earlier [screenplay] drafts.”).

21 It would be a waste of the jury and the Court’s time to sift through a draft  
22 script when there is no risk that such script will be made. If any script is permitted  
23 for consideration, given that the film over which Plaintiffs filed this lawsuit is not  
24 yet made, it should be the most recent one, and it should also be considered that  
25 Defendants are strongly considering producing *Axanar* in the same, unique  
26 mockumentary style as *Prelude*.

1 **V. CONCLUSION**

2 For all the foregoing reasons, Defendants respectfully request that this Court  
3 grant its Motion *In Limine* No 6.

4  
5 Dated: December 16, 2016

WINSTON & STRAWN LLP

6  
7 By: /s/ Erin R. Ranahan  
8 Erin R. Ranahan  
9 Diana Hughes  
10 Kelly N. Oki  
11 Attorneys for Defendants,  
12 AXANAR PRODUCTIONS, INC.  
13 and ALEC PETERS  
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7 Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC.,  
8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
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14 Plaintiffs,

15 vs.

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an individual; and DOES 1-20,

18 Defendants.  
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Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' MOTION IN LIMINE NO.  
7 TO PRECLUDE INTRODUCTION  
OR MENTION OF CERTAIN OF  
DEFENDANTS' FINANCIAL  
INFORMATION AND  
INACCURATE REFERENCE TO  
"PROFITS" DEFENDANTS  
ALLEGEDLY EARNED;  
MEMORANDUM OF POINTS &  
AUTHORITIES**

Hearing Date: Jan. 31, 2017  
Pretrial Conference: Jan. 9, 2017  
Trial Date: Jan. 31, 2017

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22  
23 **REDACTED VERSION OF DOCUMENT**  
24 **SOUGHT TO BE FILED UNDER SEAL**  
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**TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT on January 31, 2017 or as soon thereafter as this matter may be heard before the Honorable R. Gary Klausner of the United States District Court for the Central District of California, at 255 East Temple Street, Los Angeles, California, 90012, Defendants Axanar Productions, Inc. and Alec Peters (collectively, "Defendants") will and hereby do move the Court for an order restricting the parties, all counsel, and witnesses from introducing or mentioning, directly or indirectly, before jurors and prospective jurors, evidence relating to Defendants' financial information regarding expenditures that have no bearing on Plaintiffs' claims, Defendants' business plans that are unrelated to the works at issue, and reference to any so-called "profits" Defendants allegedly made. Introduction or mention of these items should not be permitted for any purpose, as even assuming they had some limited relevance, which they do not, the probative value of the evidence is far outweighed by potential prejudice to the jury, waste of time, and unnecessary confusion of the issues. Fed. R. Evid. 401-403. Due to these and other evidentiary infirmities described herein, the Court should grant Defendants' Motion.

This Motion is based upon this Notice of Motion and Motion, the Declaration of Diana Hughes Leiden, the exhibits attached thereto, the supporting documents filed concurrently herewith, previously filed documents incorporated by reference herein, and upon such oral argument and submissions that may be presented at or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is made following the conference of counsel that took place on December 9, 2016.

Dated: December 16, 2016

**WINSTON & STRAWN LLP**

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Diana Hughes Leiden  
Kelly N. Oki  
Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC.  
and ALEC PETERS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar  
4 Productions, Inc. and Alec Peters (“Defendants”) move for an *in limine* order  
5 precluding Plaintiffs from introducing at trial any testimony or evidence regarding  
6 Defendants’ irrelevant financial information, including but not limited to evidence  
7 about how Defendants used or intended to use money raised through crowdfunding  
8 campaigns, and Plaintiffs’ mischaracterization of those donations as “profits.” These  
9 issues have absolutely no bearing on whether Defendants infringed on Plaintiffs’  
10 copyrights, and risk prejudicing Defendants and sidetracking the jury from the  
11 primary issues in this case. Introduction of this information at trial would waste the  
12 Court’s and the jury’s time and would confuse the issues while providing little, if any,  
13 probative value. Fed. R. Evid. 403. Thus, Defendants respectfully request that the  
14 Court grant their Motion *in limine* No. 7.

15 **II. ARGUMENT**

16 **A. The Court May Exclude Evidence That is a Waste of Time,**  
17 **Confusing, or More Prejudicial Than Probative**

18 Rulings on motions *in limine* are committed to the discretion of the trial court.  
19 *Campbell Indus. v. M/V/ Gemini Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed.  
20 App’x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to  
21 exclude irrelevant evidence, or to exclude evidence whose probative value is  
22 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*  
23 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
24 discretion in excluding conclusive, speculative evidence). Even if evidence is  
25 considered relevant, “[t]he court may exclude relevant evidence if its probative value  
26 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,  
27 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,  
28 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s

1 probative value was substantially outweighed by unfair prejudice); *United States v.*  
2 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of  
3 evidence that was low in probative value and could have confused the jury as more  
4 prejudicial than probative under Rule 403); *Dream Games of Ariz. Inc. v. PC Onsite*,  
5 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in  
6 granting plaintiffs’ motion *in limine* to exclude evidence based on concerns that it  
7 might improperly influence the jury on the amount of statutory damages to assess  
8 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
9 sufficiently probative information).

10 Evidence is relevant only if “it has any tendency to make a fact more or less  
11 probable than it would be without the evidence, and the fact is of consequence in  
12 determining the action.” Fed. R. Evid. 401. Moreover, even relevant evidence should  
13 be excluded “if its probative value is substantially outweighed by a danger of one or  
14 more of the following: unfair prejudice, confusing the issues, misleading the jury,  
15 undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R.  
16 Evid. 403. Evidence is unfairly prejudicial if it has an “undue tendency to suggest  
17 decision on an improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes, 1972  
18 Proposed Rules. Application of these well-recognized principles dictates that any  
19 evidence of Defendants’ financial information, other than the amount of money  
20 Defendants raised in their crowdfunding campaigns, and any attempt by Plaintiffs to  
21 mischaracterize donations Defendants received as “profit,” be excluded at trial.

22 **B. The Court Should Grant Defendants’ Motion *in Limine* To**  
23 **Exclude the Following Evidence From Trial**

24 Plaintiffs seek to introduce evidence of Defendants’ interim financial  
25 information, and notes of and expenditures and costs at trial to distract from the actual  
26 issue in this case: copyright infringement. Specifically, Plaintiffs seek to introduce  
27 preliminary notes and records that are misleading in that they include both the way  
28 donor money was spent, plus other expenses Defendants were intending to claim on

1 their taxes as costs, and they include interim Quicken notes, which in no way  
2 constitutes a verified accounting of expenditures or reflective of any profits. *See, e.g.*,  
3 ECF No. 72-48 (Exhibit SS to Declaration of David Grossman (“Grossman  
4 Declaration”), Defendants’ Draft Financial Summary). Further, Plaintiffs seek to  
5 introduce a draft marketing plan about potential plans unrelated to the Axanar Works,  
6 which was written by someone who was never deposed. Declaration of Diana Hughes  
7 Leiden (“Leiden Declaration”), Ex. 8 at 236:13-238:25; ECF No. 72-45 (Exhibit PP to  
8 the Grossman Declaration, Defendants’ Draft Marketing Plan). As discussed herein,  
9 the probative value of the evidence at issue in this Motion is substantially outweighed  
10 by the danger of unfair prejudice, misleading or confusing the jury, and by raising  
11 issues and evidence that are not relevant to a trial on copyright infringement. The  
12 probative value is also substantially outweighed by the tremendous waste of time that  
13 would be incurred by the Court, the jury, and the parties if the evidence were  
14 introduced. Due to the extremely low, if any, probative value and the serious risk of  
15 prejudice to the jury and waste of time, the Court should exclude this evidence.

16 **a. The Court Should Exclude Evidence Regarding**  
17 **Defendants’ Alleged Expenditures of the Funds**  
18 **Obtained Through Crowdfunding**

19 “Evidence of a party’s financial condition is generally not relevant and can be  
20 unduly prejudicial as it can distract the jury from the real issues in the case.” *In re*  
21 *Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), 2011 WL 291176,  
22 at \*1 (C.D. Cal. Jan. 25, 2011) (granting plaintiff’s motion *in limine* to exclude  
23 reference to plaintiff’s financials); *Global Health Scis. v. Marconi*, No. SA CV 04-  
24 1486 TJH, 2007 WL 4591679, at \*3 (C.D. Cal. Aug. 21, 2007) (granting defendant’s  
25 motion *in limine* to exclude evidence of defendant’s financials).

26 Throughout this litigation, Plaintiffs have repeatedly attempted to smear  
27 Defendants’ names and imply nefarious motives by falsely and misleadingly stating  
28 that Defendants intended to and did profit off of *Prelude to Axanar*, the *Vulcan Scene*,



1 and the unfinished Potential Fan Film (collectively the “Axanar Works”). For  
2 example, Plaintiffs allege that Defendants improperly spent donor funds by renting  
3 and building out a studio to create the *Axanar* fan film, which Plaintiffs claim may  
4 someday generate profits (it has not to date), even though Plaintiff CBS is currently  
5 profiting from tours of the studio by another fan film creator, James Cawley, that was  
6 built out to exactly replicate the sets of the *Star Trek: Original Series*. ECF No. 75-18  
7 (“The Original Series Set Tour to Open”); Plaintiffs’ Motion for Partial Summary  
8 Judgment (“Plaintiffs’ MPSJ”) at 13, n.5. Plaintiffs also rely on Defendants’  
9 crowdfunding, which collects donations that necessarily predate the alleged  
10 infringements, because it was collected before *Prelude* and *Axanar* were complete.

11 Defendants do not object to Plaintiffs introducing the amount of money  
12 Defendants raised through their crowdfunding campaign. But how Defendants  
13 allegedly spent that money—especially when Plaintiffs’ lawsuit halted the production  
14 of the feature film—has absolutely no relevance to the issue of whether Defendants  
15 infringed Plaintiffs’ copyrights, or any other related issues. Moreover, as Plaintiffs  
16 themselves are not donors to Defendants’ crowdfunding campaign, they have no  
17 standing to object to how Defendants supposedly spent the money raised, and there  
18 are no claims in this action that would render such complaints by donors probative.  
19 Allowing Plaintiffs to continue to scrutinize the expenditures for a work that their  
20 lawsuit halted, and the financials of renting a studio, would provide no probative value  
21 and would undoubtedly prejudice the jury. Introduction of interim financial  
22 information and notes of and expenditures and costs would further confuse the issues,  
23 and could potentially lead the jury to believe that what Defendants spent their  
24 donations on is somehow relevant to Plaintiffs’ claims, which it is not.

25 **b. The Court Should Preclude Plaintiffs From**  
26 **Mischaracterizing Donations Defendants Received as**  
27 **“Profits”**

28 The undisputed facts in this case have demonstrated that Defendants have not

1 made any profits under any accepted definition of the term, and have no intention of  
2 doing so. Defendants' Response to Plaintiffs' Statement of Undisputed Facts  
3 ("RSUF") 85-99. With respect to *Prelude to Axanar*, Defendants raised \$101,000.00  
4 and created the work for \$125,000.00. ECF No. 75-19 (Declaration of Alec Peters) at  
5 ¶ 7. Though Defendants raised \$1,233,964.84 in crowdfunding for the Potential Fan  
6 Film, the production of the film was interrupted by the lawsuit, ECF No. 19  
7 (Stipulation Extending Time to Respond to Complaint), and because Defendants have  
8 had to pay rent for the last year without completing the project [REDACTED]  
9 [REDACTED] ECF No. 94-12 (Defendants'  
10 Response to Plaintiffs' Statement of Uncontroverted Facts), Nos. 85-99, 108.  
11 Defendants have not earned any profits from the Axanar Works, [REDACTED]  
12 [REDACTED]. *Id.*, Nos. 85-99. Though this has been  
13 established through deposition testimony and production of certain financial  
14 information, Plaintiffs continue to insist that Defendants made a "profit" off of the  
15 Axanar Works. Plaintiffs' MPSJ at 6:28, 17:4, 12-13; Plaintiffs' Opposition to  
16 Defendants' Motion for Summary Judgment at 4:11-14; 6:1-7:18; Plaintiffs' Reply in  
17 Support of their Motion for Partial Summary Judgment at 9:3-17. Plaintiffs also  
18 stated that their definition of "profit" expands beyond monetary gain to include  
19 [REDACTED]." Leiden Declaration, Ex. 6 at 82:15-16.

20 As the Copyright Act does not define the term "profit," it "must be assumed to  
21 have its ordinary or usual meaning." *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir.  
22 1981) (citing *Heli-Coil Corp. v. Webster*, 352 F.2d 156, 157 (3d Cir. 1965)). Black's  
23 Law Dictionary defines "profit" as "the excess of revenues over expenditures in a  
24 business transaction." PROFIT, Black's Law Dictionary (10th ed. 2014). Similarly,  
25 while the Copyright Act does not provide a specific definition, it anticipates a similar  
26 calculation of profit. 17 U.S.C. § 504 (West) ("In establishing the infringer's profits,  
27 the copyright owner is required to present proof only of the infringer's gross revenue,  
28 and the infringer is required to prove his or her deductible expenses and the elements

1 of profit attributable to factors other than the copyrighted work.”). All Defendants  
2 have taken in and spent on *Prelude* and *Axanar* are donations for expenditures; they  
3 have never charged, earned, or intended to earn profits from the allegedly infringing  
4 works. ECF No. 94-3 (Declaration of Alec Peters) at ¶¶ 11-21. They have never  
5 charged for the works at all. *Id.* at ¶ 2. Plaintiffs’ expanded definition of “profit” is  
6 neither supported by the plain and ordinary meaning, nor by the Copyright Act. Thus,  
7 allowing Plaintiffs to use their own definition of “profit” would serve no purpose but  
8 to confuse and bias the jury.

9 Moreover, Plaintiffs have not provided any law to support their argument that  
10 anticipated future profits derived from the space leased, and equipment purchased, to  
11 produce an allegedly infringing product are sufficient to show profit from that  
12 allegedly infringing product. Future anticipated profits from a studio leased and built  
13 to create the Axanar Works are not only incalculable, but completely irrelevant to a  
14 copyright infringement analysis. Indeed Plaintiffs admitted they have no evidence

15 that [REDACTED]

16 [REDACTED]

17 [REDACTED] Leiden Declaration, Ex. 6 at 83:21-84:8 Plaintiffs further admitted it  
18 was entirely possible that [REDACTED]

19 [REDACTED]. *Id.* at

20 84:9-13. As Plaintiffs’ use of a completely fabricated and self-serving definition of  
21 “profit” would bias the jury, confuse the issues, and be highly prejudicial to  
22 Defendants, Plaintiffs should be precluded from referring to any “profits” Defendants  
23 made.

24 **III. CONCLUSION**

25 For all the foregoing reasons, Defendants respectfully request that the Court  
26 grant their Motion in Limine No. 7.

1 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

2  
3 By: /s/ Erin R. Ranahan  
4 Erin R. Ranahan  
5 Diana Hughes Leiden  
6 Kelly N. Oki  
7 Attorneys for Defendants,  
8 AXANAR PRODUCTIONS, INC.  
9 and ALEC PETERS  
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7 Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC.,  
8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
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14 Plaintiffs,

15 vs.

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17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
19  
20

Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' NOTICE OF MOTION  
AND MOTION *IN LIMINE* NO. 8 RE  
USE OF "STAR TREK" NAME;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Hearing Date: January 31, 2017  
Pretrial Conference: January 9, 2017  
Trial Date: January 31, 2017

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon thereafter as  
3 the matter may be heard before the Honorable R. Gary Klausner, located at 255 East  
4 Temple Street, Courtroom 850, Los Angeles, California 90012, Defendants Axanar  
5 Productions, Inc. and Alec Peters (collectively, "Defendants") will and hereby do  
6 move this Court for an order restricting Plaintiffs' counsel and all witnesses from  
7 mentioning, directly or indirectly, before jurors and prospective jurors, that  
8 Defendants improperly used the name "Star Trek." This Motion is based on the  
9 grounds that the probative value of allowing this evidence is far outweighed by  
10 potential prejudice to the jury, waste of time, and/or unnecessary confusion of the  
11 issues. Fed. R. Evid. 401-403.<sup>1</sup> Due to these and the additional evidentiary  
12 infirmities described herein, the Court should grant Defendants' Motion *in Limine*  
13 No. 8 ("Motion").

14 This Motion is based upon this Motion and Notice of Motion, the supporting  
15 documents filed concurrently herewith, previously filed documents incorporated by  
16 reference herein, and such oral argument and submissions that may be presented at  
17 or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is  
18 made following the conference of counsel that took place on December 9, 2016.

19

20 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

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22

By: /s/ Erin R. Ranahan  
Erin R. Ranahan  
Diana Hughes Leiden  
Kelly N. Ōki  
Attorneys for Defendants,  
AXANAR PRODUCTIONS, INC. and  
ALEC PETERS

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<sup>1</sup> All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Pursuant to Federal Rules of Evidence 401-403,<sup>2</sup> Defendants Axanar Productions, Inc. and Alec Peters (collectively, "Defendants") move for an *in limine* order precluding Plaintiffs from introducing at trial any testimony, evidence or argument that Defendants have improperly used the name "Star Trek," or otherwise suggesting that the use of the name "Star Trek" is relevant to a substantial similarity analysis. While such complaints would be relevant if this case had any trademark claims, such inferences simply have nothing to do with the alleged *copyright* infringements in this case. Not only would such evidence be irrelevant and more prejudicial than probative, but also presentation of such evidence would be a waste of this Court's time, and would be extremely and irrevocably confusing to a jury. Plaintiffs cannot be permitted to muddy the evidence with unrelated implications of trademark infringement. For these and all the following reasons, Defendants respectfully request that this Court grant its Motion *In Limine* No. 8.

**II. LEGAL STANDARD**

Rulings on motions *in limine* are committed to the discretion of the trial court. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App'x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude evidence where the evidence is not relevant, or where the probative value is outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse discretion in excluding conclusive, speculative evidence). Even if evidence is

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<sup>2</sup> All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

1 considered relevant, “[t]he court may exclude relevant evidence if its probative  
2 value is substantially outweighed by a danger of . . . unfair prejudice, confusing the  
3 issues, [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d  
4 1131, 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because  
5 evidence’s probative value was substantially outweighed by unfair prejudice);  
6 *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district  
7 court’s exclusion of evidence that was low in probative value and could have  
8 confused the jury as more prejudicial than probative under Rule 403).

### 9 **III. ARGUMENT**

#### 10 **A. Any Evidence, Testimony or Argument Regarding** 11 **Defendants’ Use of The Name “Star Trek” Should Be** 12 **Excluded**

13 In an effort to color, cloud, and confuse the views of the Court and the jury in  
14 this case, Plaintiffs repeatedly and consistently refer to Defendants’ actions in terms  
15 of the Star Trek brand or franchise, as though the suggestion that Defendants’  
16 Works are “Star Trek Films” is sufficient to show substantial similarity and,  
17 therefore, copyright infringement.<sup>3</sup> Plaintiffs must be precluded from introducing  
18 evidence regarding Defendants’ use of the Star Trek name or trademark, as such  
19 evidence is irrelevant to the issues in this case. Specifically, Deposition Exhibit  
20 numbers 205, 206, and 207, which feature a Facebook Messenger discussion  
21 between Defendant Peters and a colleague regarding the use of the “Star Trek”  
22 name, should be excluded. Importantly, no reference to the use of Star Trek as a  
23 name or trademark is related to any specific alleged copyright infringements at

24 <sup>3</sup> For example: “...purpose was to make an authentic film that would ‘look and feel  
25 like a true Star Trek movie;” “...sought to create a business model that would  
26 compete with Plaintiffs, distributing high quality, professional ‘Star Trek’ films...;”  
27 “...production that’s going to change the way people view Star Trek;” “...he set out  
28 to create a professional Star Trek movie...” Dkt. 72 at 2 (Plaintiffs’ Motion for  
Summary Judgment); Dkt. 88 at 4-5 (Declaration of David Grossman in Support of  
Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment).



1 issue in this action, and any such use would have little, if any, independent  
2 probative value because Plaintiffs have not alleged any counts of trademark  
3 infringement. Consequently, Plaintiffs should be prohibited from making  
4 arguments as to whether any use of the Star Trek name by Defendants is a violation  
5 of Plaintiffs' copyrights, as such arguments would only be relevant under a theory  
6 of trademark infringement. Accordingly, Plaintiffs should not be permitted to  
7 introduce any evidence regarding Defendants' use of the Star Trek name or title  
8 because it is irrelevant to their claims of copyright infringement. Fed. R. Evid. 401,  
9 402.

10 Additionally, Plaintiffs do not use the name "Star Trek" in any of the works  
11 that Plaintiffs allege are infringing in this case. Plaintiffs have repeatedly and  
12 incorrectly referred to one of Defendants' Works as "Star Trek: Prelude to Axanar."  
13 See, e.g., Dkt. 72 at 4 (Plaintiffs' Motion for Partial Summary Judgment). The  
14 current title of this work is *Prelude to Axanar*. See, e.g., Dkt. 75-19 (*Prelude to*  
15 *Axanar*). And regardless of Defendants' associations of their works with Star Trek,  
16 such has no bearing on this case, as this would at most relate to a claim under  
17 trademark laws, not copyright laws. Therefore, Plaintiffs should be prohibited from  
18 using this incorrect, misleading title for *Prelude to Axanar*, and from making any  
19 arguments that rely on Defendants' alleged improper use of the name "Star Trek."

20 **B. The Probative Value of Any Use By Defendants Of The**  
21 **Name Star Trek Is Outweighed By Substantial Prejudice**

22 Evidence has probative value only if it has any tendency to make the  
23 existence of any legally necessary proposition in the case more or less likely. Fed.  
24 R. Evid. 401-402. Evidence is unfairly prejudicial if it has an "undue tendency to  
25 suggest decision on an improper basis." Fed. R. Evid. 403, Advisory Comm. Notes,  
26 1972 Proposed Rules. Rule 403 explicitly states that evidence may also be excluded  
27 if the waste of time caused by its introduction outweighs its probative value.  
28

1 To the extent evidence or arguments suggesting Defendants’ alleged improper  
2 use of the Star Trek name in association with Defendants’ works could be relevant  
3 to Plaintiffs’ claims, such evidence would be more prejudicial than probative, and  
4 would confuse the issues in this case. *See* Fed. R. Evid. 403. Prejudice suffered by  
5 Defendants from Plaintiffs implying that Defendants are guilty of trademark  
6 infringement, which is not an issue in this case, outweighs any probative value.  
7 Specifically, the allegation of the improper use of “Star Trek: Prelude to Axanar”  
8 would likely cause the jury to improperly consider any explicit association  
9 Defendant has had with Star Trek, resulting in an improper basis upon which to  
10 decide the *copyright* claims at issue in this case. As the introduction of evidence  
11 regarding Defendants’ use of the name Star Trek would be more prejudicial than  
12 probative, its consideration would also be a waste of time.

13 Accordingly, the Court should preclude from introduction any evidence or  
14 testimony regarding Defendants’ use of the name Star Trek.

15 **IV. CONCLUSION**

16 For all the foregoing reasons, Defendants respectfully request that this Court  
17 grant its Motion *In Limine* No. 8.

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Dated: December 16, 2016

**WINSTON & STRAWN LLP**

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AXANAR PRODUCTIONS, INC.,  
8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
13 corporation; and CBS STUDIOS INC., a  
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a  
17 California corporation; ALEC PETERS,  
an individual; and DOES 1-20,

18 Defendants.  
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Case No. 2:15-cv-09938-RGK-E

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' NOTICE OF MOTION  
AND MOTION *IN LIMINE* NO. 9 TO  
PRECLUDE PLAINTIFFS FROM  
REFERENCING THE QUALITY OF  
DEFENDANTS' WORKS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Hearing Date: January 31, 2017  
Pretrial Conference: January 9, 2017  
Trial Date: January 31, 2017

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017 or as soon thereafter as  
3 this matter may be heard in Courtroom 850 of the Honorable R. Gary Klausner,  
4 located at 255 East Temple Street, Los Angeles, California 90012, Defendants  
5 Axanar Productions, Inc. and Alec Peters (collectively, "Defendants") will and  
6 hereby do move this Court for an order restricting Plaintiffs' counsel and all  
7 witnesses from mentioning, directly or indirectly, before jurors and prospective  
8 jurors, that the quality of professional nature of the works impact the copyright  
9 claims in this matter. This Motion is based on the grounds that the probative value  
10 of allowing this evidence is far outweighed by potential prejudice to the jury, waste  
11 of time, and/or unnecessary confusion of the issues. Fed. R. Evid. 401-403.<sup>1</sup> Due to  
12 these and the additional evidentiary infirmities described herein, the Court should  
13 grant Defendants' Motion *in Limine* No. 9 ("Motion").

14 This Motion is based upon this Motion and Notice of Motion, the supporting  
15 documents filed concurrently herewith, previously filed documents incorporated by  
16 reference herein, and such oral argument and submissions that may be presented at  
17 or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is  
18 made following the conference of counsel that took place on December 9, 2016.

19  
20 Dated: December 16, 2016

WINSTON & STRAWN LLP

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22 By: /s/ Erin R. Ranahan

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<sup>1</sup> All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401-403,<sup>2</sup> Defendants Axanar  
4 Productions, Inc. and Alec Peters (collectively, "Defendants") move for an *in limine*  
5 order precluding Plaintiffs from introducing at trial any testimony, evidence or  
6 argument that Defendants' use or planned use of "professionals" in connection with  
7 their works, or the high quality of their works, has any bearing on the issues before  
8 the jury or is relevant to a substantial similarity analysis. The fact that technology  
9 has reached a point where fans and individuals that are not huge corporations are  
10 able to create new, original works that appear to be high quality on a low budget is  
11 not the type of conduct that Plaintiffs have the ability to halt through copyright law.  
12 Plaintiffs' attempts to conflate amateur works with non-infringement and high  
13 quality, professionally-made works as infringing has no basis or support in law. A  
14 work may qualify as fair use and non-infringing regardless of the quality or the  
15 skills and experience that went into creating it. Not only would such evidence be  
16 irrelevant and more prejudicial than probative, but also presentation of such  
17 evidence would be a waste of this Court's time, and would be misleading to a jury.  
18 For these and all the following reasons, Defendants respectfully request that this  
19 Court grant its Motion *In Limine* No. 9.

20 **II. LEGAL STANDARD**

21 Rulings on motions *in limine* are committed to the discretion of the trial court.  
22 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has  
23 "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair  
24 and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed.  
25 App'x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to  
26 exclude evidence where the evidence is not relevant, or where the probative value is

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28 <sup>2</sup> All further statutory references are to the Federal Rules of Evidence unless  
otherwise noted.

1 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex*  
2 *rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not  
3 abuse discretion in excluding conclusive, speculative evidence). Even if evidence is  
4 considered relevant, “[t]he court may exclude relevant evidence if its probative  
5 value is substantially outweighed by a danger of . . . unfair prejudice, confusing the  
6 issues, [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d  
7 1131, 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because  
8 evidence’s probative value was substantially outweighed by unfair prejudice);  
9 *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district  
10 court’s exclusion of evidence that was low in probative value and could have  
11 confused the jury as more prejudicial than probative under Rule 403).

### 12 **III. ARGUMENT**

#### 13 **A. Any Evidence, Testimony or Argument That the Quality of** 14 **Professionalism of Defendants’ Works Is Improper Should** 15 **Be Excluded**

16 Plaintiffs repeatedly complain throughout their briefs and throughout this  
17 case that Plaintiffs acted improperly because they intended to create a high quality,  
18 professional project. But there is nothing to suggest that who works on a project, or  
19 how high quality the work appears, has any impact on whether a work is infringing  
20 or improper under the copyright laws. Plaintiffs should be precluded from  
21 introducing evidence regarding Defendants’ use of and planned use of professionals  
22 in connection with the their Works, as such evidence is irrelevant to the issues in  
23 this case.

24 Plaintiffs have presented not a single case in seeking summary judgment or  
25 opposing summary judgment where the Court has found that the use of  
26 professionals to create a work, which would lead to a higher quality artistic work,  
27 has any bearing on any copyright issues in this case. Indeed, the works that qualify  
28 as fair use are commonly of high quality and made by professionals. See e.g.,

1 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Sofa Entm't, Inc. v.*  
2 *Dodger Prods., Inc.*, 782 F. Supp. 2d 898, 905 (C.D. Cal. 2010); *Northland Family*  
3 *Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 978 (C.D.  
4 Cal. 2012); *Blanch v. Koons* 467 F.3d 244, 247 (2d Cir. 2006). There is no aspect of  
5 substantial similarity where quality comes into play. The “amateur” exception  
6 Plaintiffs appear to advocate for has no support in law.

7       If the high quality of *Prelude to Axanar*, which has been available for free on  
8 YouTube since 2014, was harmful to Plaintiffs, they should have been able to  
9 demonstrate any such harm by now. They have not. Instead, Plaintiffs did not even  
10 send a DMCA takedown notice. Dkt. 87-1 (Defendants’ Response to Separate  
11 Statement at 38). And while it is true that Plaintiffs may not want individuals to be  
12 able to create high quality works that are transformative and so qualify for fair use,  
13 or are otherwise not substantially similar to any of Plaintiffs’ works, copyright law  
14 is not meant to be used as a weapon against technological innovation and high  
15 quality.

16       Further, the fact that an actor that has appeared before in prior Star Trek  
17 works elects to participate in a fan film—unless it violates a specific contract with  
18 that actor which would then be between Plaintiffs and that actor—is not illegal  
19 under California or Federal law. Thus, Plaintiffs’ argument that Defendants infringe  
20 the Vulcan “species” merely because the same actor who appeared in a handful of  
21 Plaintiffs’ works also appears in Defendants’ works fails. Of course, Plaintiffs have  
22 no rights to actor Gary Graham’s identity or features.

23       Consequently, Plaintiffs should be prohibited from making arguments to the  
24 jury or introducing evidence that suggest that Defendants intend to create a work  
25 that looks “professional.” Fed. R. Evid. 401, 402.

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1           **B. The Probative Value of Any Use By Defendants Of**  
2           **Professionals To Create A High Quality Film Is Outweighed**  
3           **By Substantial Prejudice**

4           Evidence has probative value only if it has any tendency to make the  
5 existence of any legally necessary proposition in the case more or less likely. Fed.  
6 R. Evid. 401-402. Evidence is unfairly prejudicial if it has an “undue tendency to  
7 suggest decision on an improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes,  
8 1972 Proposed Rules. Rule 403 explicitly states that evidence may also be excluded  
9 if the waste of time caused by its introduction outweighs its probative value.

10           To the extent evidence or arguments suggesting Defendants’ alleged improper  
11 use of professionals in association with Defendants’ works could be relevant to  
12 Plaintiffs’ claims, such evidence would be more prejudicial than probative, and  
13 would confuse the issues in this case. *See* Fed. R. Evid. 403. Prejudice suffered by  
14 Defendants from Plaintiffs implying that Defendants are acting improperly by using  
15 professionals could lead the jury to believe that such is relevant to a substantial  
16 similarity or transformative consideration. It is not. As the introduction of evidence  
17 regarding Defendants’ use of professionals would be more prejudicial than  
18 probative, its consideration would also be a waste of time.

19           Accordingly, the Court should preclude Plaintiffs from introducing any  
20 argument or testimony suggesting that the professionals used or the quality of  
21 Defendants’ works is improper or has any bearing on the copyright issues at hand.

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1 **IV. CONCLUSION**

2 For all the foregoing reasons, Defendants respectfully request that this Court  
3 grant its Motion *In Limine* No. 9.

4  
5 Dated: December 16, 2016

WINSTON & STRAWN LLP

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By: /s/ Erin R. Ranahan

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