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8 and ALEC PETERS

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

11  
12 **Winston & Strawn LLP**  
333 S. Grand Avenue  
Los Angeles, CA 90071-1543

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.'S AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 1 TO EXCLUDE FINANCIAL  
STATEMENT**

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

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22 **REDACTED VERSION OF DOCUMENT**  
23 **SOUGHT TO BE FILED UNDER SEAL**  
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1           **I. INTRODUCTION**

2           By their Motion *in Limine* No. 1 (“Motion”), Plaintiffs Paramount Pictures  
3 Corporation and CBS Studios, Inc. (“Plaintiffs”) seek to exclude Defendants’  
4 Second Financial Summary (ECF No. 90-12) at trial. As stated in Defendants’  
5 Motion *in Limine* No. 7 (ECF No. 135), Defendants’ interim financial information,  
6 and notes of costs and expenditures have no relevance to Plaintiffs’ copyright  
7 infringement claims. Thus, Defendants do not entirely oppose the relief Plaintiffs  
8 seek in their Motion, as Defendants agree that the Second Financial Summary is not  
9 relevant to a trial on claims of copyright infringement. However, should the Court  
10 find the amount of crowdfunding money raised by Defendants relevant to a  
11 disgorgement of profits analysis, Defendants respectfully request that the Court  
12 admit Defendants’ Second Financial Summary in order to allow Defendants to  
13 demonstrate their deductible expenses, which reflect that they made no profit off of  
14 their works, as the Court recognized in its Order Re: Plaintiffs’ Motion for Partial  
15 Summary Judgment and Defendants’ Motion for Summary Judgment (ECF No.  
16 163), and to give the jury the complete picture, so that they may see a full and  
17 unbiased view of all of information necessary to make a determination at trial.

18           Plaintiffs’ attempt to introduce only the incomplete and misleading First  
19 Financial Summary, but not the more recent and accurate Second Financial  
20 Summary, *both* of which were created for purposes of this litigation, is self-serving,  
21 improper, and would serve no purpose but to bias the jury by providing a fraction of  
22 the financial reality of this case. Moreover, pursuant to Plaintiffs’ Motion *in Limine*  
23 No. 8, both Summaries should be excluded as they were created after this litigation  
24 commenced. Declaration of Erin R. Ranahan (“Ranahan Decl.”) ¶¶ 7, 9. Neither  
25 Financial Summary represents verified or formal accountings. ECF No. 94-3  
26 (Declaration of Alec Peters) ¶ 14. However, to the extent the Court finds any of  
27 Defendants’ expenditures of donor funds relevant at trial, the Second Financial  
28

1 Summary should be introduced to provide a fuller and more accurate picture of  
2 Defendants’ costs and expenditures.

3 **II. FACTUAL BACKGROUND**

4 Throughout this lawsuit, Plaintiffs have continually mischaracterized  
5 donations Defendants received as “profits,” and now seek to introduce at trial some,  
6 but not all, of Defendants’ information regarding donor funds and expenditures,  
7 including only an initial draft of interim costs and expenditures, in support of this  
8 contention. Plaintiffs again mischaracterize facts in their Motion to imply nefarious  
9 motives behind the Second Financial Summary. Contrary to Plaintiffs’ allegations  
10 that Defendants altered their financial information in the Second Financial Summary  
11 in an attempt to hide expenditures, the initial financial summary which Plaintiffs  
12 seek to introduce at trial (the “First Financial Summary”) merely represents  
13 unverified and interim notes of costs incurred by *Axanar* and expenditures prepared  
14 for and provided to Plaintiffs on September 9, 2016 [REDACTED]

15 [REDACTED]  
16 [REDACTED]. Ranahan Decl. ¶¶ 4-5; Declaration of Alec Peters (“Peters Decl.”) ¶¶ 2, 4.  
17 This information was provided over Defendants’ objections to produce financial  
18 information, which Plaintiffs failed to challenge through a motion to compel.

19 Ranahan Decl. ¶ 3. [REDACTED]  
20 [REDACTED]  
21 [REDACTED] *Id.* ¶ 5.

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] *Id.* ¶ 4. At that time, [REDACTED]  
26 [REDACTED] *Id.* ¶ 7; Peters Decl. ¶ 3. [REDACTED]

27 [REDACTED]  
28 [REDACTED]

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1 [REDACTED] Ranahan

2 Decl. ¶ 7; Peters Decl. ¶ 2. [REDACTED]

3 [REDACTED]

4 [REDACTED] Ranahan

5 Decl. ¶ 6.

6 Shortly after producing the First Financial Summary, on October 28, 2016,  
7 Defendants provided Plaintiffs with an updated financial summary (the “Second  
8 Financial Summary”). Ranahan Decl. ¶ 9. The Second Financial Summary accounts  
9 for Mr. Peters’ individual contributions to *Axanar* used in connection with  
10 Defendants’ works, and demonstrates that [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED] *Id.*; Peters Decl. ¶ 6. These facts were not reflected in the First  
14 Financial Summary. Peters Decl. ¶ 5. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] *Id.* ¶ 6.

19 **III. LEGAL STANDARD**

20 Rulings on motions *in limine* are committed to the discretion of the trial court.  
21 *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. Appx. 676, 677 (9th Cir.  
22 2007). District courts may exercise their discretion to exclude irrelevant evidence,  
23 or to exclude evidence whose probative value is outweighed by other considerations.  
24 Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168,  
25 1177-78 (9th Cir. 2008). Evidence is relevant only if “it has any tendency to make a  
26 fact more or less probable than it would be without the evidence, and the fact is of  
27 consequence in determining the action.” Fed. R. Evid. 401. Moreover, “[t]he court  
28 may exclude relevant evidence if its probative value is substantially outweighed by a

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1 danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury.” Fed.  
2 R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131, 1135-36 (9th Cir. 1998)  
3 (overruling denial of motion to exclude because evidence’s probative value was  
4 substantially outweighed by unfair prejudice); *United States v. W.R. Grace*, 504  
5 F.2d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of evidence that  
6 was low in probative value and could have confused the jury as more prejudicial  
7 than probative under Rule 403); *Dream Games of Ariz. Inc. v. PC Onsite*, 561 F.3d  
8 983, 993 (9th Cir. 2009) (finding no abuse of discretion where district court  
9 excluded evidence with potential to improperly influence the jury on the amount of  
10 statutory damages to assess under Section 504(c)(1) of the Copyright Act of 1976,  
11 as the evidence did not provide sufficiently probative information). Evidence is  
12 unfairly prejudicial if it has an “undue tendency to suggest decision on an improper  
13 basis.” Fed. R. Evid. 403, Advisory Comm. Notes, 1972 Proposed Rules.

#### 14 **IV. ARGUMENT**

##### 15 **a. Should The Court Admit Any of Defendants’ Financial** 16 **Information At Trial, The Second Financial Summary Should Be** 17 **Admitted To Provide A Complete And Accurate Picture**

18 Defendants maintain that their financial information is not relevant to  
19 Plaintiffs’ copyright infringement claims, and that the probative value of both  
20 Financial Summaries is outweighed by the danger of unfair prejudice, misleading, or  
21 confusing the jury, especially given that the Court has foreclosed Defendants’ fair  
22 use defense and such financial information is no longer necessary to demonstrating  
23 the “commercial nature” of Defendants’ works. *See* Motion at 3:6-7; ECF No. 135  
24 (Defendants’ Motion *in Limine* No. 7); *In re Homestore.com, Inc. Sec. Litig.*, 2011  
25 WL 291176, at \*1 (C.D. Cal. Jan. 25, 2011) (“Evidence of a party’s financial  
26 condition is generally not relevant and can be unduly prejudicial as it can distract the  
27 jury from the real issues in the case.”). These dangers of unfair prejudice, confusion,  
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1 and presentation of irrelevant evidence would be drastically heightened by  
2 introduction of only the First Financial Summary at trial.

3 This is particularly the case, given that the Court found “Defendants [did] not  
4 profit directly from distributing their works,” which is demonstrated by the Second  
5 Financial Summary. ECF No. 163 (Order Re: Plaintiffs’ Motion for Partial  
6 Summary Judgment and Defendants’ Motion for Summary Judgment) at 10. Indeed,  
7 the donor funds were collected *before* the works were created, and Defendants did  
8 not charge anyone to view *Prelude to Axanar*, which was distributed for free online.  
9 However, should Plaintiffs decide to seek actual damages and disgorgement of  
10 profits under 17 U.S.C. § 504(b), and should the Court allow introduction of the  
11 amount of money Defendants raised through crowdfunding at trial for this purpose,  
12 Defendants would be entitled “to prove [their] deductible expenses and the elements  
13 of profit attributable to factors other than the copyrighted work.” 17 U.S.C. §  
14 504(b). The Second Financial Summary provides information regarding any such  
15 deductible expenses, and demonstrates that Defendants made no profit off of their  
16 works, as recognized by the Court. Thus, it would be misleading and inaccurate for  
17 the jury to consider only the amount of money raised by Defendants, and the First  
18 Financial Summary, when determining damages at trial.

19 Throughout this litigation, Plaintiffs have repeatedly attempted to smear  
20 Defendants’ names and imply nefarious motives by falsely and misleadingly stating  
21 that Defendants intended to and did profit off of their works. Plaintiffs seek to  
22 introduce evidence of Defendants’ interim financial notes of costs and expenditures  
23 in an attempt to support their claims that Defendants “profited” from their works.  
24 Simultaneously, however, Plaintiffs seek to exclude those interim notes Plaintiffs  
25 find unhelpful to their claims, and which demonstrate the amount of money Mr.  
26 Peters personally contributed to *Axanar*. The First Financial Summary and the  
27 Second Financial Summary are confusing to the extent that they include both  
28 expenditures of donor funds, as well as other expenses Defendants intended to claim

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1 on their taxes as costs. Contrary to Plaintiffs’ assertions, both of these Summaries  
2 were prepared for this litigation using draft Quicken notes, which do not constitute a  
3 verified accounting of expenditures, or reflect any “profits.” Allowing Plaintiffs to  
4 continually scrutinize Defendants’ expenditures on a work that their lawsuit halted  
5 by allowing only the First Financial Summary at trial would give the jury an  
6 incomplete, inaccurate, and biased view of Defendants’ finances. Thus, to the extent  
7 the Court finds any of Defendants’ financial information regarding donor  
8 expenditures relevant, Defendants request that the Court admit the Second Financial  
9 Summary, which provides a more accurate list of costs and expenditures related to  
10 Defendants’ works than the First Financial Summary does.

11 **b. If The Jury Considers Defendants’ Financial Information At All,**  
12 **The Second Financial Summary Is Necessary To Providing The**  
13 **Jury With Complete and Accurate Information**

14 A defendant is entitled to a jury trial to determine the amount of statutory  
15 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.  
16 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has  
17 the power to consider factors that might inform them on what they find fair and  
18 “just” when deciding where on the wide scale a plaintiff should be awarded statutory  
19 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344  
20 U.S. 228, 232 (1952). Under the Copyright Act, the amount of available statutory  
21 damages per infringed work increases from a minimum of \$200 where the alleged  
22 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to  
23 \$150,000 depending on whether the infringement was “committed willfully.” 17  
24 U.S.C. § 504(c)(2). And the jury can award anywhere in between.<sup>1</sup>

25  
26 <sup>1</sup> Statutory damages must “bear some relation to actual damages suffered.”  
27 *Van Der Zee v. Greenidge*, 2006 WL 44020, at \*2 (S.D.N.Y. 2006). Otherwise, they  
28 risk running afoul of constitutional principles of due process. *Parker v. Time*  
*Warner*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can  
expand] so far beyond the actual damages suffered that the statutory damages come

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1 The jury “has **wide discretion** in determining the amount of statutory  
2 damages to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th  
3 Cir. 1984) (emphasis added). Neither the statute nor its legislative history provide  
4 guidance on the factors the trier of fact is to consider when making an award of  
5 statutory damages. See 6 Patry on Copyright § 22:174 (2016). In the absence of any  
6 statutory or other guidance, courts have employed the following *non-exhaustive*  
7 factors in determining statutory damages: (1) the expenses saved and the profits  
8 reaped by the defendant, (2) the revenues lost by the plaintiff, (3) the value of the  
9 copyright, (4) the deterrent effect on others besides the defendant, (5) willfulness of  
10 the defendant’s conduct, (6) whether the defendant has cooperated in providing  
11 records to assess the value of the infringing material, (7) the potential for  
12 discouraging the defendant, (8) the conduct and attitude of the parties, (9) any  
13 benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach, Inc. v. Am. Fashion*  
14 *Gift*, 2013 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013); *Peer Int’l Corp. v. Luna*  
15 *Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 Here, should the jury consider Defendants’ financial information at all in  
17 awarding Plaintiffs statutory damages, the Second Financial Summary is relevant to  
18 the first factor, and demonstrating that Defendants did not reap any profit from their  
19 works. Thus, if the jury considers Defendants’ financial information at all at trial,  
20 the Second Financial Summary is necessary to provide the jury with more updated,

21  
22 to resemble punitive damages” and that, under *BMW* and *State Farm*, “it may be that  
23 in a sufficiently serious case the due process clause might be invoked”) (citing *BMW*  
24 *of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million  
25 punitive damages award where the plaintiff obtained a jury award of only \$4,000 in  
26 actual damages, because such punitive damages violated the Due Process Clause of  
27 the Constitution because it was “grossly excessive” compared to the plaintiff’s  
28 actual damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412  
(2003) (reversing punitive damages award of \$145 million as unconstitutionally  
excessive compared to the \$1 million compensatory damages award because there  
must be some proportionality of the punitive award to the plaintiff’s actual harm).



1 accurate, and unbiased information than either the First Financial Summary or the  
2 crowdfunding donations amount can provide.

3 **c. Neither Financial Summary Constitutes Hearsay**

4 Plaintiffs contend that the First Financial Summary was created in the  
5 ordinary course of business and is thus admissible, but that the Second Financial  
6 Summary was created for purposes of this litigation and is thus inadmissible.  
7 Motion at 1:8-11, 4:5-6. Plaintiffs' cite non-authoritative, distinguishable case law  
8 in support of this proposition. *Id.* at 4. In *Peat, Inc. v. Vanguard Research, Inc.*, in a  
9 trial on trade secret misappropriation, defendant objected to plaintiff's presentation  
10 of a "compilation of documents purporting to list [plaintiff's] trade secrets." 378  
11 F.3d 1154, 1158 (11th Cir. 2004). The exhibit at issue was comprised of "numerous  
12 self-serving documents" and "conclusory statements and claims." *Id.* at 1160-61. In  
13 contrast, here, the documents that were used to compile the Second Financial  
14 Summary were kept by Defendants in the ordinary course of business, and were the  
15 *same* as those used to compile the First Financial Summary that Plaintiffs seek to  
16 introduce. Peters Decl. ¶ 7. Moreover, as Mr. Peters drafted both Summaries, they  
17 can easily be authenticated, and Plaintiffs are free to cross-examine him about the  
18 their contents at trial. Thus, as both Summaries represent a mere compilation of  
19 admissible evidence under Fed. R. Evid. 1006, and neither contain argumentative  
20 content, Plaintiffs' attempt to exclude the Second, but not the First Financial  
21 Summary on the basis of hearsay fails.

22 **V. CONCLUSION**

23 For the foregoing reasons, Defendants respectfully request that should the  
24 Court find the amount of money raised by Defendants through crowdfunding efforts  
25 relevant at trial, the Court admit Defendants' Second Financial Summary to  
26 demonstrate Defendants made no profit off of their works, and to provide the jury  
27 with a more accurate and complete summary of Defendants' costs and expenditures  
28 as they relate specifically to their works.

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1 Dated: January 6, 2017

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By: /s/ Erin R. Ranahan

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12 **PARAMOUNT PICTURES**  
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16 **AXANAR PRODUCTIONS, INC.,** a  
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18 **Defendants.**

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 2 TO EXCLUDE SCRIPTS  
CREATED AFTER THE  
LITIGATION WAS FILED AND  
THE TESTIMONY DISCUSSING  
THEM**

19 Pretrial Conference: Jan. 9, 2017  
20 Trial Date: Jan. 31, 2017

1           **I. INTRODUCTION**

2           By their Motion *in Limine* No. 2 (“Motion”), Plaintiffs Paramount Pictures  
3 Corporation and CBS Studios, Inc. (“Plaintiffs”) seek to exclude evidence and  
4 arguments relating to versions of scripts for the potential fan film, *Axanar*, created  
5 by Defendants Axanar Productions Inc. and Alec Peters (“Defendants”) after  
6 litigation was filed. Plaintiffs contend that the most recent scripts toward making  
7 that *Axanar* film, and any testimony regarding them, are somehow not relevant to  
8 this case. Instead, Plaintiffs arbitrarily ask the Court to allow into evidence only an  
9 interim script, created after the “locked” script they alleged in the FAC, and before  
10 the most recent June 2016 script.

11           But Plaintiffs’ Motion simply ignores what Defendants have repetitively  
12 stated and what discovery has confirmed: no “locked” version of the script from  
13 June 2015 for the *Axanar* full-length film exists, and in any event, the version  
14 Plaintiffs seeks to prop up has been superseded by a more recent script. Plaintiffs’  
15 copyright infringement claim is for the *Axanar* film—not a particular script. The  
16 later versions of the scripts would be relevant to show that Defendants Works’ are  
17 not substantially similar to Plaintiffs’ Works and that Defendants did not willfully  
18 infringe on Plaintiffs’ Works. Accordingly, Plaintiffs’ Motion should be denied and  
19 the Court should allow Defendants to admit such evidence and testimony  
20 concerning these subsequent versions of the script at trial.

21           **II. FACTUAL SUMMARY**

22           This case was filed on December 29, 2015. (Declaration of Jennifer Jason  
23 (“Jason Decl.”), ¶ 3.) Plaintiffs’ original complaint made no reference to any script,  
24 but was about the unmade *Axanar* film. (Compl., Dkt. 1.) After Defendants moved  
25 to dismiss on the grounds that the *Axanar* film had not yet been made and therefore  
26 a claim regarding *Axanar* was premature (Defendants’ first motion to dismiss at 10,  
27 Dkt. 20), Plaintiffs amended their complaint to add reference to the “script” in an  
28 attempt to defeat the prematurity argument, to show there was some aspect of the

1 unmade film *Axanar* was “fixed” in tangible medium. (FAC ¶ 7.) Plaintiffs’ FAC  
2 alleges that its claims to the “feature film” is “based on the *Axanar* Script, *or a*  
3 *version thereof*” and defines the “*Axanar* Works” as *Prelude to Axanar*, the *Axanar*  
4 Motion Picture, ***and all versions of the Axanar Script . . .***” (FAC ¶ 2) (emphasis  
5 added.)

6 Nevertheless, Plaintiffs now seek to arbitrarily cut off consideration of “all  
7 versions” of the *Axanar* script, and in particular the most recent version, even  
8 though there is no chance the superseded November 2015 script Plaintiffs seek to  
9 introduce—and limit the jury’s consideration to—will be used to make *Axanar*.

10 There are at least 40 total versions of the *Axanar* script. (Declaration of Alec  
11 Peters in Support of Defendants’ Mot. for Summary Judgment (“Peters Decl.”) ¶ 13,  
12 Dkt. 75-19.) While Defendants announced on Facebook in August 2015 that “there  
13 was a fully revised and locked script,” Defendants have since repeatedly reiterated  
14 that they are not currently committed to using any of the existing scripts for *Axanar*,  
15 and have not decided what format, length and substance the potential film will take  
16 when presented to the public. (*Id.*) The November 26, 2015 script, that Plaintiffs  
17 seek to isolate, was written several months after the Facebook declaration of a  
18 “locked script.” (FAC ¶ 36.)

19 Given various delays and constantly-evolving plot changes, Defendants still  
20 do not even have a “final shooting script” for *Axanar*. (Declaration of Alec Peters in  
21 Opposition to Plaintiffs’ Mot. for Summary Judgment ¶ 29, Dkt No. 90-10.) The  
22 most recent revision to the script for the unmade *Axanar*, revision 10.0-NX, dated  
23 July 1, 2016, contains 57 characters, only seven of which have appeared previously  
24 in any official Star Trek episode, film, or other work. *Id.* While Defendant Peters  
25 was not aware of this script at the time of his first deposition, many revisions  
26 occurred even without his knowledge. (Peters Decl. ¶ 14.) The *Axanar* writer, Bill  
27 Hunt, testified about it, which he created in response to statements by Plaintiffs’  
28 producer and director that the lawsuit was “going away.” (*See* Declaration of Amy

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1 Stern in Support of Defendants’ Oppositions to Plaintiffs’ Motions *in Limine*, Ex. 1  
2 (Hunt Tr. 87:23-88:8), concurrently filed.) Mr. Peters testified about the most recent  
3 script during his second deposition, and submitted declarations about their latest  
4 plans regarding the *Axanar* script since. At present, Defendants are not fully  
5 committed to proceeding on any of the existing scripts, and have considered a  
6 number of options for moving forward with the unmade *Axanar* film, including  
7 making a number of short “mockumentary” style episodes. (Peters Decl. ¶ 14.)

8 **III. LEGAL STANDARD**

9 Rulings on motions *in limine* are committed to the discretion of the trial court.  
10 *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. Appx. 676, 677 (9th Cir.  
11 2007). District courts may exercise their discretion to exclude irrelevant evidence,  
12 or to exclude evidence whose probative value is outweighed by other considerations.  
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17 may exclude relevant evidence if its probative value is substantially outweighed by a  
18 danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury.” Fed.  
19 R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131, 1135-36 (9th Cir. 1998).

20 **IV. ARGUMENT**

21 **a. The Subsequent *Axanar* Scripts Are Relevant to Substantial**  
22 **Similarity**

23 The evidence of scripts created after litigation is directly relevant to a  
24 substantial similarity analysis. In order to determine whether there is substantial  
25 similarity between Plaintiffs’ Works and the allegedly infringing Potential Fan Film,  
26 the jury must first be able to compare the relevant works. *See, e.g., Funky Films,*  
27 *Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). This includes  
28 comparing the two works for similarities in ‘the plot, themes, dialogue, mood,

1 setting, pace, characters, and sequence of events.” *Gilbert v. New Line Prods., Inc.*,  
 2 No. CV 09-02231 RGK, 2009 WL 7422458, at \*2 (C.D. Cal. Nov. 16, 2009)  
 3 (Klausner, J.). Preliminary works such as draft screenplays are generally “too  
 4 unreliable in determining substantial similarity” as to the final work. *Id.*

5 If any script should be used as a substitute to analyze whether the *unmade*  
 6 *Axanar* film is substantially similar to Plaintiffs’ works, the most recent version of  
 7 the script, revision 10.0-NX, dated July 1, 2016, should be used, or at least  
 8 available, for the jury’s substantial similarity analysis.

9 Moreover, allowing introduction of multiple versions of the script, many of  
 10 which differ substantially from both Plaintiffs’ Works and the November 26, 2015  
 11 script, supports Defendants’ contention that comparing that superseded script to  
 12 Plaintiffs’ Works for purposes of substantial similarity is pointless.

13 **b. The Subsequent *Axanar* Scripts Are Also Relevant Because They**  
 14 **Are Probative of the Originality of Defendants’ Works**

15 The subsequent *Axanar* scripts are also probative of the original expression of  
 16 Defendants’ Works. Only if works are substantially similar when taken as a whole  
 17 is a finding of copyright infringement proper. *Cavalier v. Random House, Inc.*, 297  
 18 F.3d 815, 824 (9th Cir. 2002). Although Plaintiffs would prefer to cherry-pick from  
 19 the three-minute *Vulcan Scene* as evidence of infringement, the law demands more  
 20 for its substantial similarity analysis. *See* Dkt. No. 163 at 4.

21 Introducing the later *Axanar* scripts will further illustrate the dissimilarities in  
 22 “the plot, themes, dialogue, mood, setting, pace, characters, and sequence of  
 23 events” between Plaintiffs’ Works and Defendants’ Works. *Gilbert v. New Line*  
 24 *Prods., Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at \*2 (C.D. Cal. Nov. 16,  
 25 2009) (Klausner, J.). Specifically, the latest script, dated July 1, 2016, contains 50  
 26 original characters (of a total 57 characters) and is set in the same unique timeframe  
 27 as *Prelude*, which is unexplored in any of Plaintiffs’ Works; the latest script also  
 28 provides further context regarding the originality of Defendants’ plot and character

1 development—all of which are relevant (and more probative than the November 26,  
2 2015 script) when it comes to analyzing whether the unmade *Axanar* infringes on  
3 any of Plaintiffs’ copyrights.

4 **c. The Subsequent *Axanar* Scripts Are Also Relevant To Damages**

5 The subsequent versions of *Axanar* script are also relevant to Plaintiffs’  
6 willful infringement claim and to statutory damages. While the Copyright Act does  
7 not define the term “willful,” the Ninth Circuit has held that the term means “with  
8 knowledge that the defendant’s conduct constitutes copyright infringement.” *United*  
9 *Fabrics Intern., Inc. c. G-III Apparel Group, Ltd.*, No. CV13-00803-ODW (AJWx),  
10 2013 WL 7853485, at \*5 (C.D. Cal. Dec. 27, 2013) (citing *Peer Int’l Corp. v. Pausa*  
11 *Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990); *Columbia Pictures*  
12 *Television v. Krypton Broad.*, 106 F.3d 284, 293 (9th Cir. 1997) *rev’d on other*  
13 *grounds sub nom.*; *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998);  
14 *cv. Danjaq LLC v. Sony Corp.*, 263 F.2d 942, 957-58 (9th Cir. 2001)). Under the  
15 Copyright Act, the amount of available statutory damages per infringed work  
16 increases from a minimum of \$200 where the alleged infringement was “innocent,”  
17 to a minimum of \$750 to a maximum of \$30,000 to \$150,000 depending on whether  
18 the infringement was “committed willfully.” 17 U.S.C. § 504(c)(2). And the jury  
19 can award anywhere in between.<sup>1</sup>

20  
21 <sup>1</sup> Statutory damages must “bear some relation to actual damages suffered.”  
22 *Van Der Zee v. Greenidge*, 2006 WL 44020, at \*2 (S.D.N.Y. 2006). Otherwise, they  
23 risk running afoul to constitutional principles of due process. *Parker v. Time*  
24 *Warner*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can  
25 expand] so far beyond the actual damages suffered that the statutory damages come  
26 to resemble punitive damages” and that, under *BMW* and *State Farm*, “it may be that  
27 in a sufficiently serious case the due process clause might be invoked”) (citing *BMW*  
28 *of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million  
punitive damages award where the plaintiff obtained a jury award of only \$4,000 in  
actual damages, because such punitive damages violated the Due Process Clause of  
the Constitution because it was “grossly excessive” compared to the plaintiff’s  
actual damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412  
(2003) (reversing punitive damages award of \$145 million as unconstitutionally



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1 The jury “has **wide discretion** in determining the amount of statutory  
2 damages to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th  
3 Cir. 1984) (emphasis added). Neither the statute nor its legislative history provide  
4 guidance on the factors the trier of fact is to consider when making an award of  
5 statutory damages. See 6 Patry on Copyright § 22:174 (2016). In the absence of any  
6 statutory or other guidance, courts have employed the following *non-exhaustive*  
7 factors in determining statutory damages: (1) the expenses saved and the profits  
8 reaped by the defendant, (2) the revenues lost by the plaintiff, (3) the value of the  
9 copyright, (4) the deterrent effect on others besides the defendant, (5) willfulness of  
10 the defendant’s conduct, (6) whether the defendant has cooperated in providing  
11 records to assess the value of the infringing material, (7) the potential for  
12 discouraging the defendant, and (8) the conduct and attitude of the parties; (9) any  
13 benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach, Inc. v. Am. Fashion*  
14 *Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013;  
15 *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 The subsequent versions of the *Axanar* script demonstrate that Defendants’  
17 have gone to great lengths—both before and since this lawsuit commenced—to stay  
18 within the tolerated realm of fan films. This is highly relevant to Defendants’ state  
19 of mind while creating the *Axanar* Works, which is in turn highly relevant to the  
20 jury’s assessment of innocence or willfulness, and factors (5), (7) and (8) above. All  
21 versions of the *Axanar* script show that Defendants never repeated or derived from  
22 any of Plaintiffs’ original storyline; instead, Defendants’ Works are distinct from  
23 Plaintiffs’ Works in time period, plot, dialogue, theme, and most characters.  
24 Defendants’ efforts to revise the script and reduce concerns subsequent to the  
25 lawsuit offers further evidence regarding Defendants’ good faith in this regard.

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27  
28 excessive compared to the \$1 million compensatory damages award because there  
must be some proportionality of the punitive award to the plaintiff’s actual harm).

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**V. CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’ Motion and allow Defendants to introduce evidence and testimony of later versions of the *Axanar* script.

Dated: January 6, 2017

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

11  
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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.**

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 3 TO EXCLUDE TESTIMONY  
OR DOCUMENTS BY J.J. ABRAMS  
AND JUSTIN LIN AND THEIR  
PUBLIC STATEMENTS, OR  
ANYTHING RELATED TO THEIR  
PUBLIC STATEMENTS OR  
DOCUMENTS REGARDING THIS  
MATTER**

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

1           **I. INTRODUCTION**

2           By their Motion *in Limine* No. 3 (“Motion”), Plaintiffs Paramount Pictures  
3 Corporation and CBS Studios, Inc. (“Plaintiffs”) seek to exclude evidence and  
4 testimony relating to public statements made by J.J. Abrams and Justin Lin—the  
5 directors and producers of the certain Star Trek Films. Plaintiffs contend that  
6 because Messers. Abrams and Lin are not employees or authorized representatives  
7 of Plaintiffs, their statements are irrelevant. However, Defendants Axanar  
8 Productions Inc. (“Axanar Productions”) and Alec Peters (“Peters”) do not seek to  
9 introduce Abrams’ or Lin’s statements as statements of party-opponents under Rule  
10 801. Rather, Defendants seek to introduce their testimony as probative evidence of  
11 Star Trek fan film culture, which is directly relevant to Plaintiffs’ willful  
12 infringement claim and to the determination of the amount of any actual or statutory  
13 damages.

14           **II. FACTUAL SUMMARY**

15           In March 2016, Justin Lin, the director of the most recent Star Trek motion  
16 picture, *Star Trek Beyond*, publicly commented on this case, stating: “[t]his is  
17 getting ridiculous! I support the fans. Trek belongs to all of us.” Declaration of  
18 Kelly N. Oki In Support of Defendants’ Motion for Summary Judgment (“Oki  
19 Decl.”), Ex. 11 (Lin Tr. at 17:17-25).)

20           Shortly thereafter, in May 2015, J.J. Abrams, who directed and/or produced  
21 the three most recent Star Trek movies, publicly stated that he and Justin Lin  
22 “realized this [case] was not an appropriate way to deal with the fans.” (Oki Decl.,  
23 Ex. 12 (Abrams Tr. at 20:23-21:13).) Moreover, Abrams stated that “fans should be  
24 celebrating [Star Trek]. Fans of Star Trek are part of this world. So [Justin] went to  
25 the studio and pushed them to stop this lawsuit and now, within the next few weeks,  
26 it will be announced this is going away, and that fans would be able to continue  
27 working on their project.” *Id.*

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1 In the 1976 book *Star Trek: The New Voyages*, Gene Roddenberry, creator of  
2 the original Star Trek Series, stated:

3 We were particularly amazed when thousands, then tens of thousands  
4 of people began creating their own personal Star Trek adventures.  
5 Stories, and paintings, and sculptures, and cookbooks. And songs, and  
6 poems, and fashions. And more. The list is still growing. It took some  
7 time for us to fully understand and appreciate what these people were  
8 saying. Eventually we realized that there is no more profound way in  
9 which people could express what Star Trek has meant to them than by  
10 creating their own very personal Star Trek things.

11  
12 Because I am a writer, it was their Star Trek stories that especially  
13 gratified me. I have seen these writings in dog-eared notebooks of fans  
14 who didn't look old enough to spell "cat." I have seen them in  
15 meticulously produced fanzines, complete with excellent artwork.  
16 Some of it has even been done by professional writers, and much of it  
17 has come from those clearly on their way to becoming professional  
18 writers. Best of all, all of it was plainly done with love.

19  
20 It is now a source of great joy for me to see their view of Star Trek,  
21 their new Star Trek stories, reaching professional publication here. I  
22 want to thank these writers, congratulate them on their efforts, and wish  
23 them good fortune on these and further of their voyages into other  
24 times and dimensions. Good writing is always a very personal thing  
25 and comes from the writer's deepest self. Star Trek was that kind of  
26 writing for me, and it moves me profoundly that it has also become so  
27 much a part of the inner self of so many other people.

28

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1 The public statements made by the recent directors of Star Trek not only echo  
2 Roddenberry’s sentiment, but are extremely probative of why Peters would believe  
3 Plaintiffs’ would tolerate his attempt at creating Star Trek fan fiction. Defendants  
4 previously made this point in the parties’ Joint Stipulation Regarding Defendants’  
5 Motion to Compel Discovery From Plaintiffs, stating that the public statements  
6 made by Messrs. Abrams and Lin “will demonstrate that Defendants reasonably  
7 believed – and actually were – operating within the enduring tradition of *Star Trek*-  
8 inspired works of fan fiction, which have been long tolerated and encouraged by  
9 Plaintiffs since the inception of the *Star Trek* franchise. (Dkt. 55 at 41.) After  
10 considering the arguments made by both parties, the Court compelled Plaintiffs’ to  
11 produce Messrs. Abram and Lin to testify as to this subject matter. (Minute Order,  
12 Dkt. 60.) Their statements that “Trek belongs to all of us,” and that “fans would  
13 [soon] be able to continue working on their project” certainly suggest that there was  
14 a common understanding in the Star Trek fan film community that Defendants’  
15 activities fell squarely in line with the tolerated Star Trek tradition.

16 Indeed, Defendants relied on this statement in creating the most recent script.  
17 Hunt testified: “[W]hen the goal is you’re trying to make the project as good as it  
18 can be, Rob [Burnett] and I never stopped working on it. I mean, we stopped  
19 physically working on the script at the end of December, when the lawsuit  
20 happened, but we kept talking about it and we kept coming up with ideas. And then  
21 in – I want to say May or June, when J.J. Abrams made his announcement that the  
22 lawsuit was perhaps going to be dropped, I think Rob [Burnett] contacted me, and  
23 we thought, why don’t we work on it a little bit more so we can be ready?”  
24 Declaration of Amy Stern in Support of Defendants’ Oppositions to Plaintiffs’  
25 Motions *in Limine*, Ex. 1 (Hunt Tr. at 87:13-88:8), concurrently filed.)

26 Messers. Lin and Abrams testified [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED] Abrams testified [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Additionally, both Messers. Lin and Abrams testified [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 Ultimately, Plaintiffs’ director and producer [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 **III. LEGAL STANDARD**

16 Rulings on motions *in limine* are committed to the discretion of the trial court.  
17 *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. Appx. 676, 677 (9th Cir.  
18 2007). District courts may exercise their discretion to exclude irrelevant evidence,  
19 or to exclude evidence whose probative value is outweighed by other considerations.  
20 Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168,  
21 1177-78 (9th Cir. 2008). Evidence is relevant only if “it has any tendency to make a  
22 fact more or less probable than it would be without the evidence, and the fact is of  
23 consequence in determining the action.” Fed. R. Evid. 401.

24 **IV. ARGUMENT**

25 **a. Evidence and Testimony Concerning Abrams’ and Lin’s Public**  
26 **Statements Are Directly Relevant to Star Trek Fan Film Culture**

27 In its January 3, 2016 Order (“Order”) on the parties’ motions for summary  
28 judgment, the Court acknowledged that “Star Trek has a long history of fan films

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1 that stayed free from copyright disputes.” Dkt. No. 163 at 14. In finding that a  
2 determination on willful infringement was inappropriate on summary judgment, the  
3 Court also stated that “Peters’ belief that the *Axanar* Works were noncommercial  
4 fan films in light his understanding from CBS that it would tolerate such films  
5 creates an issue of his state of mind that must be adjudicated by the jury.” *Id.*

6 To state it another way, the jury must determine whether Peters could have  
7 believed that Plaintiffs would tolerate Defendants’ Works. This requires evidence  
8 of the unique relationship that the Star Trek franchise (and those closely associated  
9 with it) has with its fans. Specifically, there is a documented history of unlicensed  
10 fan films and creative works that unabashedly borrow from Plaintiffs’ Works. *See*  
11 Dkt. No. 75-26. These films, some of which feature characters from Plaintiffs’  
12 Works and exact replicas of Star Trek movie sets, have long been encouraged by  
13 creators of the Star Trek franchise. *Id.* Indeed, Gene Roddenberry, creator of the  
14 original Star Trek Series, stated in 1976 that “there is no more profound way in  
15 which people could express what Star Trek has meant to them than by creating their  
16 own very personal Star Trek [fan fiction].”

17 The public statements made by the recent directors of Star Trek not only echo  
18 Roddenberry’s sentiment, but are extremely probative of why Peters would believe  
19 Plaintiffs’ would tolerate his attempt at creating Star Trek fan fiction. Their  
20 statements that “Trek belongs to all of us,” and that “fans would [soon] be able to  
21 continue working on their project” certainly suggest that there was a common  
22 understanding in the Star Trek fan film community that Defendants’ Works fell  
23 squarely in line with the tolerated Star Trek tradition.<sup>1</sup> Given this unique  
24 relationship between Star Trek and its fans, the public statements made by Lin and  
25 Abrams are directly probative of why Peters would believe Defendants’ Works did

26 <sup>1</sup> To this point, Plaintiffs’ contention that Abrams and Lin lack foundation regarding  
27 Star Trek fan film culture is without merit. *See U.S. Salt, Inc. v. Broken Arrow, Inc.*,  
28 563 F.3d 687, 690 (8th Cir. 2009) (“[P]erceptions based on industry experience, is a  
sufficient foundation for lay opinion testimony.”)



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1 not constitute willful infringement and, as a consequence, evidence concerning their  
2 statements should be admitted. *See Sharper Image Corp. v. Honeywell Intern., Inc.*,  
3 222 F.R.D. 621, 631 (N.D. Cal. 2004) (noting that “courts have acknowledged that a  
4 considerable number of circumstance-specific factors or circumstances could be  
5 probative of whether a defendant’s infringement should be deemed willful”).

6 **b. Evidence and Testimony Concerning Abrams’ and Lin’s Public**  
7 **Statements Are Also Directly Relevant to Statutory Damages**

8 This evidence is also relevant to the statutory damages inquiry—if the jury  
9 finds that the infringement was committed willfully, the award of statutory damages  
10 may be increased to \$150,000. *See* 17 U.S.C. § 504(c)(2). The Supreme Court has  
11 found that in copyright cases, the jury has the power to consider factors that might  
12 inform them on what they find fair and “just” when deciding where on the wide  
13 scale a plaintiff should be awarded statutory damages in a copyright case. *F.W.*  
14 *Woolworth Co. v. Contemporary Arts. Inc.*, 344 U.S. 228, 232 (1952) (quoting *L.A.*  
15 *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)). Revenues  
16 lost by plaintiffs have been considered relevant as part of a list of non-exhaustive  
17 factors for the jury to consider. *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp.  
18 560, 568 (S.D.N.Y. 1995).

19 The takeaway from Abrams’ and Lin’s public statements—specifically, that  
20 their support for Star Trek fan works is indicative of a fan culture that tolerates  
21 works like Defendants’—are probative regarding damages. Moreover, the fact that  
22 Plaintiffs’ Star Trek producer and director [REDACTED]  
23 [REDACTED] may aid the jury in  
24 exercising their wide discretion in determining the proper level of damages. Peters  
25 would be severely prejudiced should they not be able to fully detail the relationship  
26 the Star Trek franchise has with its fans. As such, Plaintiffs’ Motion should be  
27 denied.  
28

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court deny  
3 Plaintiffs' Motion and allow Defendants to introduce evidence and testimony of  
4 statements and opinions of J.J. Abrams and Justin Lin.

5 Dated: January 6, 2017

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6  
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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  
20  
21

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION *IN LIMINE*  
NO. 4 TO EXCLUDE TESTIMONY  
OR DOCUMENTS BY REECE  
WATKINS**

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

1 **I. INTRODUCTION**

2 Mr. Reece Watkins was an Axanar donor who personally spent more money on  
3 official merchandise sold by Plaintiffs as a result of watching *Prelude to Axanar*,  
4 which reinvigorated his love for Star Trek. Mr. Watkins also personally polled  
5 Axanar donors about the same issue through a Facebook post, and received nothing  
6 but positive feedback similar to his own experience. Plaintiffs have not presented any  
7 witness or donor to counter Mr. Watkins' position, or to testify that they spent less on  
8 official Star Trek products or consumption because they viewed or donated to  
9 Defendants' Works. Nevertheless, Plaintiffs want to prevent the jury from hearing  
10 directly from a donor who can testify about his own experience. The Court should  
11 permit Mr. Watkins to testify because his testimony and Facebook post represent the  
12 opinion of a lay witness with specific knowledge relevant to the question of damages,  
13 a critical consideration for the jury in this case, as well as the benefit Plaintiffs  
14 received from the free promotion provided by Defendants' Works. Therefore, the  
15 Court should permit Defendants to introduce testimony from Mr. Watkins to the jury.

16 **II. SUMMARY OF FACTS**

17 Mr. Watkins is a fan of the Star Trek franchise, a member of the Axanar Fan  
18 Group on Facebook, and a donor to Defendants' Works. Dkt. 75-28 (Decl. of Reece  
19 Watkins). Prior to viewing Plaintiff Paramount Pictures' *Star Trek: Beyond*, Mr.  
20 Watkins viewed Defendants' work *Prelude to Axanar* for free. *Id.* Viewing *Prelude*  
21 *to Axanar* revived Mr. Watkins' passion for the Star Trek franchise and inspired him  
22 to purchase the collector's edition of *Star Trek: Beyond* on pre-order and official, Star  
23 Trek-licensed props and costumes, including The Original Series [TOS] phaser,  
24 communicator, and tricorder, an Anovos tunic, and Blue-Ray remasters. *Id.* Mr.  
25 Watkins credits his experience of watching *Prelude to Axanar* as his inspiration for  
26 making these purchases. *Id.*

27 On October 25, 2016, Mr. Watkins authored a Facebook post in the Axanar  
28 Facebook group in which he praised *Prelude to Axanar* for renewing his interest in the

1 Star Trek franchise. Dkt. 75-29 (Watkins Facebook post). The post garnered fifty-six  
2 responses from other members of the Axanar Fan Group, and not one of them  
3 presented a counter or negative response. *Id.*

4 Defendants designated Mr. Watkins in their amended initial disclosures as  
5 having knowledge relevant to his own experience and that of other fans whose  
6 consumption of official Star Trek works and merchandise increased thanks to  
7 Defendants' Works. Defendants have designated Mr. Watkins to testify at trial about  
8 his personal experience as an Axanar donor and a Star Trek fan.

9 **III. ARGUMENT**

10 **A. Mr. Watkins is Free to Provide Opinion Testimony as a Lay Witness**

11 Contrary to Plaintiffs' contentions, opinion testimony from Mr. Watkins is  
12 admissible under the Federal Rules of Evidence. According to Federal Rule of  
13 Evidence 602, "[a] witness may testify to a matter only if evidence is introduced  
14 sufficient to support a finding that the witness has personal knowledge of the matter.  
15 Evidence to prove personal knowledge may consist of the witness's own testimony."  
16 Where lay witnesses give their opinions, their testimony should be limited to those  
17 opinions that are rationally based on their perceptions and are helpful to clearly  
18 understanding their testimony or to determining a fact in issue. Fed. R. Evid. 701.

19 In his testimony, Mr. Watkins will share his personal experience with  
20 Defendants' Works and how they encouraged him to engage with Plaintiffs' Works in  
21 a new way. Dkt. 75-28 (Decl. of Reece Watkins). Mr. Watkins thus speaks only to a  
22 matter of which he has personal knowledge in a way that will assist the jury in  
23 assessing the claims and defenses at issue.

24 Even if Mr. Watkins speaks to the comments made on Facebook about the  
25 positive impact Defendants' Works have had on Plaintiffs' Works, such comments  
26 will be framed by his own personal experience and firsthand knowledge. *Id.* Thus,  
27 Plaintiffs cannot claim that Mr. Watkins "risks usurping the function of the jury"  
28

1 when the Federal Rules of Evidence clearly allow lay witnesses to present their  
2 personal opinions based on their personal knowledge.

3 **B. Mr. Watkins' Testimony Will Not Include Inadmissible Hearsay**

4 Additionally, Plaintiffs' contention that Mr. Watkins' testimony includes  
5 inadmissible hearsay is incorrect, as Mr. Watkins is free to testify about the positive  
6 feedback he received to his post on Facebook. Dkt. 75-28 (Decl. of Reece Watkins).

7 Hearsay is a statement made by an out-of-court declarant that is offered into  
8 evidence to prove the truth of the matter asserted. Fed R. Evid. 801. Plaintiffs claim  
9 that testimony from Mr. Watkins regarding the comments made in response to his  
10 Facebook post constitutes hearsay because it is offered for its truth, but this is  
11 incorrect. Mr. Watkins cannot speak to the activities of the people who replied to his  
12 post, but he can speak to the personal knowledge he has of the feedback that he  
13 received. This testimony concerns only Mr. Watkins' understanding and  
14 interpretation of the widespread response he got as opposed to any of the actions of  
15 the people who provided that response. The feedback will not be used to establish the  
16 "truth of the matter asserted" in any of those specific comments, but only to  
17 demonstrate Mr. Watkins' experience receiving fifty-six comments to his Facebook  
18 post with only positive responses. Dkt. 75-29 (Watkins Facebook post).

19 Given that Defendants are not offering testimony of the responses to Mr.  
20 Watkins' Facebook to prove the truth of those responses, Plaintiffs' claim that such  
21 testimony constitutes hearsay and should therefore be excluded is unsuccessful.

22 **C. Mr. Watkins' Testimony is Relevant**

23 Plaintiffs wrongly assert that Mr. Watkins's testimony is irrelevant, anecdotal,  
24 and unduly prejudicial. Rather, Mr. Watkins testimony concerning his personal  
25 experience with the works of Plaintiffs and Defendants is relevant to the jury's  
26 evaluation of damages and in no way prejudices Plaintiffs.

27 Evidence is relevant if it has any tendency to make the existence of any fact that  
28 is of consequence to the determination of the action more or less probable than it

1 would be without such evidence. Fed. R. Evid. 401. Accordingly, any evidence that  
2 assists the jury in the damages analysis is relevant, and one factor to be considered is  
3 the effect of Defendants' Works upon the market for or value of Plaintiffs' Works. 1  
4 M. Nimmer, Copyright § 13.05[A], p. 13–76 (1984).

5 It is understandable why Plaintiffs would not want the jury to hear about Mr.  
6 Watkins' experience, as Mr. Watkins will testify that watching Defendants' work  
7 *Prelude to Axanar* rekindled his interest in Plaintiffs' Works and inspired him to  
8 purchase Plaintiffs' merchandise. Dkt. 75-28 (Decl. of Reece Watkins). However,  
9 the jury is entitled to hear any evidence that assists in its evaluation of damages. The  
10 evaluation of statutory damages is especially important in this case.

11 A defendant is entitled to a jury trial to determine the amount of statutory  
12 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.  
13 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has  
14 the power to consider factors that might inform them on what they find fair and “just”  
15 when deciding where on the wide scale a plaintiff should be awarded statutory  
16 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344  
17 U.S. 228, 232 (1952) (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249  
18 U.S. 100, 106 (1919)). Under the Copyright Act, the amount of available statutory  
19 damages per infringed work increases from a minimum of \$200 where the alleged  
20 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to  
21 \$150,000 depending on whether the infringement was “committed willfully.” 17  
22 U.S.C. § 504(c)(2). And the jury can award anywhere in between.<sup>1</sup>

23 <sup>1</sup> Statutory damages must “bear some relation to actual damages suffered.” *Van Der*  
24 *Zee v. Greenidge*, 2006 WL 44020, at \*2 (S.D.N.Y. 2006). Otherwise, they risk  
25 running afoul to constitutional principles of due process. *Parker v. Time Warner*, 331  
26 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can expand] so far  
27 beyond the actual damages suffered that the statutory damages come to resemble  
28 punitive damages” and that, under *BMW* and *State Farm*, “it may be that in a  
sufficiently serious case the due process clause might be invoked”) (citing *BMW of*  
*North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million  
punitive damages award where the plaintiff obtained a jury award of only \$4,000 in  
actual damages, because such punitive damages violated the Due Process Clause of  
the Constitution because it was “grossly excessive” compared to the plaintiff’s actual  
damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003)

1 The jury “has wide discretion in determining the amount of statutory damages  
2 to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)  
3 (emphasis added). Neither the statute nor its legislative history provide guidance on  
4 the factors the trier of fact is to consider when making an award of statutory damages.  
5 *See* 6 Patry on Copyright § 22:174 (2016). In the absence of any statutory or other  
6 guidance, courts have employed the following non-exhaustive factors in determining  
7 statutory damages: (1) the expenses saved and the profits reaped by the defendant, (2)  
8 the revenues lost by the plaintiff, (3) the value of the copyright, (4) the deterrent effect  
9 on others besides the defendant, (5) willfulness of the defendant’s conduct, (6)  
10 whether the defendant has cooperated in providing records to assess the value of the  
11 infringing material, (7) the potential for discouraging the defendant, and (8) the  
12 conduct and attitude of the parties; (9) any benefit to Plaintiffs from Defendants’  
13 conduct. *See e.g., Coach, Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZK, 2013  
14 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013); *Peer Int’l Corp. v. Luna Records, Inc.*,  
15 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 Mr. Watkins’ testimony is therefore relevant because it reflects the benefits and  
17 free promotion Plaintiffs enjoy from Defendants’ Works and the longstanding  
18 tradition of Star Trek fan fiction. Although Plaintiffs are correct that Mr. Watkins,  
19 himself, is only one consumer, Plaintiffs have not been able to present a single  
20 consumer who can testify to the contrary or corroborate the hypothetical harm that  
21 Plaintiffs claimed to have suffered.

22 The Ninth Circuit requires far more than mere speculation to show market  
23 harm. In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit disapproved the  
24 district court’s “reason[ing]” that users who could download images “free of  
25 charge...are less likely to pay for a download, and [that] the availability of [such]...  
26 images would harm [plaintiff’s] market” for licensing. 508 F.3d 1146, 1168 (9th Cir.

27  
28 (reversing punitive damages award of \$145 million as unconstitutionally excessive compared to the \$1 million compensatory damages award because there must be some proportionality of the punitive award to the plaintiff’s actual harm).



1 2007). Rather, in the absence of a finding that users had actually downloaded such  
2 images for competing uses, “[t]his potential harm to [plaintiff’s] market remain[ed]  
3 hypothetical.” *Id.*

4 Not only does the potential harm to Plaintiffs’ market here remain hypothetical,  
5 but it is also contradicted by Mr. Watkins’ testimony, which is direct evidence that  
6 Plaintiffs have reaped substantial benefits from precisely the type of fan-created work  
7 that *Axanar* exemplifies. Mr. Watkins’ testimony contradicts any alleged adverse  
8 effect on the market and demonstrates instead that Plaintiffs have seen the very  
9 opposite – an increase in revenue. All of this evidence is not only relevant, but  
10 necessary, to the evaluation of statutory damages.

11 Additionally, contrary to Plaintiffs’ claims, the probative value provided by  
12 such evidence is substantial, as it speaks to the impact of Defendants’ Works on the  
13 market for Plaintiffs’ Works. Since the jury is free to weigh the evidence as they see  
14 fit, Plaintiffs’ concern that the evidence is “too anecdotal” is unwarranted. Plaintiffs’  
15 Motion *in Limine* No. 4, p. 4. Moreover, Mr. Watkins may support Defendants’  
16 Works, but he has also been a loyal fan of Plaintiffs’ Works since long before  
17 Defendants’ Works came into existence. Dkt. 75-28 (Decl. of Reece Watkins). Thus,  
18 his mere showing of support for Defendants’ Works does not warrant the exclusion of  
19 his testimony for risk of prejudice.

20 **IV. CONCLUSION**

21 For all of these reasons, the Court should deny Plaintiffs’ Motion *in Limine* No.  
22 4 to exclude testimony or documents by Reece Watkins.

23  
24 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

25  
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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.'S AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION *IN LIMINE*  
NO. 5 TO EXCLUDE TESTIMONY  
AND DOCUMENTS OF JONATHAN  
LANE**

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

1 **I. INTRODUCTION**

2 Mr. Lane is a long-time Star Trek fan with an extensive knowledge of Star  
3 Trek fan fiction who has been involved in the production of multiple fan film  
4 projects, including *Prelude to Axanar*. In furtherance of his Star Trek fandom, Mr.  
5 Lane has published a great deal of Star Trek content on his website “Fan Film  
6 Factor” (fanfilmfactor.com) and has created a document titled “A History of Star  
7 Trek fan films” summarizing the myriad fan films and related projects that have  
8 been produced over the past 50 years.

9 Mr. Lane’s involvement with the Axanar Works as well as his extensive  
10 knowledge of and experience with Star Trek and fan productions places him in a  
11 unique position to provide the jury with evidence related to fan films generally. The  
12 proliferation of Star Trek fan films helps to further the inference of Defendant  
13 Peters’ state of mind when he was creating the Axanar Works; namely, that Mr.  
14 Peters believed that he was operating within the tolerated realm of Star Trek fan film  
15 culture that has been long celebrated.

16 Mr. Lane’s testimony is thus squarely relevant to the question of whether any  
17 infringement by Defendants was innocent or willful, as well as to the jury’s wide  
18 discretion in assessing the amount of any damages. For these and all the following  
19 reasons, Defendants respectfully request that this Court deny Plaintiffs’ Motion *In*  
20 *Limine* No. 5 and permit Defendants to introduce testimony and documents from  
21 Mr. Lane to the jury.

22 **II. SUMMARY OF FACTS**

23 Defendants designated Mr. Lane in their initial disclosures as a fact witness to  
24 testify at trial about his personal knowledge regarding Star Trek fan fiction and his  
25 work with Defendant Axanar Productions, Inc. Declaration of Amy M. Stern  
26 (“Stern Decl.”) at ¶ 2. On September 7, 2016, Defendants produced to Plaintiffs the  
27 fan film summary that Mr. Lane submitted with his declaration. Stern Decl. at ¶ 3.  
28

1 Mr. Lane is a Star Trek Fan and donor to Defendant Axanar Productions, Inc.  
2 Dkt. 75-25 (Decl. of Jonathan Lane). From 1997 to 2004, Mr. Lane worked as a  
3 freelance Star Trek expert, and in that capacity served as a consultant for employees  
4 of Viacom Consumer Products, the division of Plaintiff Paramount that managed the  
5 Star Trek properties at that time. Lane Decl. at ¶ 3. He also worked with licensees  
6 of Star Trek properties on the recommendation of his contacts at Viacom. *Id.*  
7 During his time as a Star Trek expert consultant, Mr. Lane spent hundreds of hours  
8 working on numerous Star Trek projects at the behest of its owners. *Id.*

9 Mr. Lane has personally participated in the production of three different Star  
10 Trek fan film projects, and has been a volunteer with Defendant Axanar  
11 Productions, during which he worked with Defendant Peters. Lane Decl. at ¶ 6.

12 In January 2016, Mr. Lane created an “Executive Summary” titled “A History  
13 of Star Trek fan films” based on his extensive knowledge about, and personal  
14 experience watching and writing about, Star Trek fan fiction. *Id.* Due to the nature  
15 of his involvement with Star Trek fan productions generally and Defendants  
16 specifically, Mr. Lane is able to speak knowledgeably about Star Trek fan films, and  
17 to provide the jury with background about the proliferation and evolution of Star  
18 Trek fan films.

19 **III. ARGUMENT**

20 **A. Mr. Lane is Permitted to Provide Opinion Testimony as a Lay**  
21 **Witness**

22 As supported by Plaintiffs’ own arguments in their motion, opinion testimony  
23 from Mr. Lane is admissible under the Federal Rules of Evidence. According to  
24 Federal Rule of Evidence 602, “[a] witness may testify to a matter only if evidence  
25 is introduced sufficient to support a finding that the witness has personal knowledge  
26 of the matter. Evidence to prove personal knowledge may consist of the witness’s  
27 own testimony.” Where lay witnesses give their opinions, their testimony should be  
28 limited to those opinions that are rationally based on their perceptions and are

1 helpful to clearly understanding their testimony or to determining a fact in issue.  
2 Fed. R. Evid. 701.

3 Here, Mr. Lane will be asked to provide information from his own firsthand  
4 knowledge and personal experience regarding Star Trek fan films and his work with  
5 Axanar Productions, Inc., as well as regarding his work for Plaintiffs. In his  
6 testimony, Mr. Lane will share his personal experience working with Defendant  
7 Peters and observing a large number of fan film productions. Dkt. 75-25 (Decl. of  
8 Jonathan Lane). To the extent that Mr. Lane provides opinion testimony regarding  
9 the existence of a multitude of Star Trek fan films or his prior work as a Star Trek  
10 consultant, such testimony will be rationally based on his personal perceptions, and  
11 will be helpful to the jury in determining whether any copyright infringement in this  
12 case was innocent or willful. The Federal Rules of Evidence specifically allow lay  
13 witnesses to present personal opinion testimony based on personal knowledge; thus,  
14 Mr. Lane will not risk “usurping the function of the jury,” and this Court should not  
15 limit his testimony.

16 **B. Mr. Lane’s Testimony Will Not Include Inadmissible Hearsay**

17 Plaintiffs theorize without specific support that the “History of Star Trek fan  
18 films” document created by Mr. Lane must be at least partially based on hearsay and  
19 cannot possibly be based on Mr. Lane’s own observations and knowledge. Indeed,  
20 Plaintiffs assert that Mr. Lane has not claimed “personal knowledge of any specific  
21 fact presented, nor does he explain how he came to know the contents of this  
22 document” notwithstanding Mr. Lane’s own declaration that he created the executive  
23 summary based on his “extensive knowledge about, and following of, Star Trek fan  
24 fiction. Dkt. 75-25 (Decl. of Jonathan Lane). Indeed, Mr. Lane’s “History of Star  
25 Trek fan films” is not hearsay because it would not be offered into evidence to prove  
26 the truth of the matter asserted – that it is a 100% accurate summary of the history of  
27 Star Trek fan films. Rather, Mr. Lane’s creation of the executive summary  
28

1 demonstrates that he has a great deal of experience observing Star Trek fan film  
2 productions and supports his testimony regarding that experience.

3 Apart from the “History of Star Trek fan films,” Mr. Lane’s testimony  
4 regarding his many years of involvement with Star Trek fan films, including the  
5 Axanar Works, will be based on his personal experience and observations, and is  
6 therefore also not inadmissible hearsay.

7 With respect to Plaintiffs’ concerns that Mr. Lane will testify about  
8 inadmissible personal opinions or reviews of the specific fan films, that is not the  
9 nature of the testimony that Defendants intend to rely on, except to the extent that it  
10 draws comparisons based on Mr. Lane’s personal knowledge to features that  
11 Plaintiffs have complained about with respect to Defendants’ works, such as  
12 fundraising and quality.

13 Plaintiffs can raise any specific hearsay objections at trial, but there is no basis  
14 to include Mr. Lane or the report he prepared on that basis.

15 **C. Mr. Lane’s Testimony Is Relevant to Mr. Peters’ State of Mind,**  
16 **Including Whether Any Infringement Was Innocent or Willful**

17 One January 3, 2017, this Court issued an order denying Plaintiffs’ Motion for  
18 Partial Summary Judgment and Defendants’ Motion for Summary Judgment (the  
19 “MSJ Order”). Dkt. 163. Pursuant to the MSJ Order, an issue that remains to be  
20 decided by a jury includes—if there is substantial similarity found by the jury  
21 between works—whether the Defendants’ conduct was willful. *Id.* As this Court  
22 noted:

23 To prove ‘willfulness’ under the Copyright Act, the plaintiff must  
24 show (1) that the defendant was actually aware of the infringing  
25 activity, or (2) that the defendant’s actions were the result of ‘reckless  
26 disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights.”  
27 *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir.  
28 2016). One “who reasonably and in good faith believes [his conduct

1 does not constitute copyright infringement], is not ‘willful’. . . .”  
2 *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228  
3 (9th Cir. 2012) (quoting 4 Melville B. Nimmer & David Nimmer,  
4 *Nimmer on Copyright* § 14.04 (Matthew Bender rev. ed. 2012)).

5 Furthermore, deciding willfulness “requires an assessment of a defendant’s  
6 state of mind...” *Friedman*, 833 F.3d at 1186.

7 Evidence is relevant if it has any tendency to make the existence of any  
8 legally necessary proposition in the case more or less likely. Fed. R. Evid. 401-402.  
9 Plaintiffs argue that their decision not to proceed against the multitude of fan films  
10 that existed prior to the Axanar Works “has no bearing on liability.” Plaintiffs’  
11 Motion *in Limine* No. 5, p. 3. However, the very fact that Plaintiffs did not take  
12 legal action against the vast majority of other fan films created in the past 50 years,  
13 including other works in which Defendant Peters and Mr. Lane were involved, is  
14 extremely relevant to the issue of willfulness as it speaks directly to Defendant  
15 Peters’ state of mind while he was developing and promoting the Axanar Works. *See*  
16 MSJ Order at 14 (“**Here, Star Trek has a long history of fan films that stayed**  
17 **free from copyright disputes. (Lane Decl. Ex. 1, ECF No. 75-26.) . . .** Thus,  
18 Peters’ belief that the *Axanar* Works were noncommercial fan films in light of his  
19 understanding from CBS that it would tolerate such films creates an issue of his state  
20 of mind that must be adjudicated by the jury.” (emphasis added)).

21 Indeed, the introduction of Mr. Lane’s testimony and documentary evidence is  
22 crucial to the jury’s understanding of Mr. Peters’ state of mind, and assessing Mr.  
23 Peters’ state of mind is a required step in the jury’s deciding willfulness, which is  
24 certainly not a waste of time as it is one of the only two issues remaining at trial.

25 There is no need to analyze whether any of the other fan films are actually  
26 infringing, because that is not relevant to Mr. Peters’ state of mind—he was relying  
27 on Plaintiffs’ inaction against any of these fan films collectively (even where Mr.  
28 Peters brought issues to Plaintiffs’ attention), and Plaintiffs cannot deny the reality

1 of the context in which Defendants created their works. In any event, Mr. Lane’s  
2 testimony can be limited by time, but his anticipated testimony can be expected to  
3 provide, and his summary provides, a useful narrative for the jury to consider with  
4 respect to the fan film history that this Court has deemed relevant to this case.

5 Accordingly, the Court should allow the testimony by and the Executive  
6 Summary created by Mr. Lane.

7 **D. Mr. Lane’s Testimony Is Relevant To Damages**

8 A defendant is entitled to a jury trial to determine the amount of statutory  
9 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.  
10 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has  
11 the power to consider factors that might inform them on what they find fair and  
12 “just” when deciding where on the wide scale a plaintiff should be awarded statutory  
13 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344  
14 U.S. 228, 232 (1952) (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249  
15 U.S. 100, 106 (1919)). Under the Copyright Act, the amount of available statutory  
16 damages per infringed work increases from a minimum of \$200 where the alleged  
17 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to  
18 \$150,000 depending on whether the infringement was “committed willfully.” 17  
19 U.S.C. § 504(c)(2). And the jury can award anywhere in between.<sup>1</sup>

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20 <sup>1</sup> Statutory damages must “bear some relation to actual damages suffered.”  
21 *Van Der Zee v. Greenidge*, 2006 WL 44020, at \*2 (S.D.N.Y. 2006). Otherwise, they  
22 risk running afoul to constitutional principles of due process. *Parker v. Time*  
23 *Warner*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can  
24 expand] so far beyond the actual damages suffered that the statutory damages come  
25 to resemble punitive damages” and that, under *BMW* and *State Farm*, “it may be that  
26 in a sufficiently serious case the due process clause might be invoked”) (citing *BMW*  
27 *of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million  
28 punitive damages award where the plaintiff obtained a jury award of only \$4,000 in  
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the Constitution because it was “grossly excessive” compared to the plaintiff’s  
actual damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412  
(2003) (reversing punitive damages award of \$145 million as unconstitutionally



1           The jury “has **wide discretion** in determining the amount of statutory  
2 damages to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th  
3 Cir. 1984) (emphasis added). Neither the statute nor its legislative history provide  
4 guidance on the factors the trier of fact is to consider when making an award of  
5 statutory damages. See 6 Patry on Copyright § 22:174 (2016). In the absence of any  
6 statutory or other guidance, courts have employed the following *non-exhaustive*  
7 factors in determining statutory damages: (1) the expenses saved and the profits  
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9 copyright, (4) the deterrent effect on others besides the defendant, (5) willfulness of  
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11 records to assess the value of the infringing material, (7) the potential for  
12 discouraging the defendant, and (8) the conduct and attitude of the parties; (9) any  
13 benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach, Inc. v. Am. Fashion*  
14 *Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013;  
15 *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16           As detailed above, Mr. Lane’s testimony is highly relevant to Mr. Peters’ state  
17 of mind while creating the Axanar Works, which is in turn highly relevant to the  
18 jury’s assessment of innocence or willfulness, and factors (2), (5), (7), (8), and (9)  
19 above. Because the jury can award the lowest, the highest, or anywhere in between,  
20 based on all sorts of factors or anything the jury considers relevant to get to a just  
21 result, testimony about the Star Trek fan film culture must come in from somewhere.  
22 The idea that the jury would need to personally view all of these fan films or cannot  
23 get an understanding from someone who has seen and documented the existence of  
24 these fan films (which Plaintiffs do not dispute), is simply not practical.

25           Therefore, Mr. Lane’s testimony is necessary to any damages calculation in  
26 this case. Furthermore, Mr. Lane will testify to the existence of many other Star Trek  
27  
28  
excessive compared to the \$1 million compensatory damages award because there  
must be some proportionality of the punitive award to the plaintiff’s actual harm).

1 fan productions that were not prevented or even addressed by Plaintiffs, which is  
2 relevant to the question of damages as it demonstrates (1) that Plaintiffs did not  
3 believe these productions caused significant damage to the value of their works and  
4 (2) that Plaintiffs arguably embraced the free promotional value of a robust fan  
5 production tradition.

6 Thus, it is crucial that the jury hear testimony from, and review the document  
7 created by, Mr. Lane.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, Defendants respectfully request that this Court  
10 deny Plaintiffs' Motion *In Limine* No. 5 and admit the testimony and documents of  
11 Jonathan Lane.

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Dated: January 6, 2017

**WINSTON & STRAWN LLP**

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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  
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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*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION *IN LIMINE*  
NO. 6 TO EXCLUDE TESTIMONY  
AND DOCUMENTS REGARDING  
STAR TREK FAN FILMS**

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

1 **I. INTRODUCTION**

2 Though Defendants' Works were created or conceived by die-hard Star Trek  
3 fans to celebrate their love for Star Trek in the longstanding tradition of Star Trek fan  
4 films, Plaintiffs seek to beam out of reality and prevent the jury from hearing about  
5 the context in which Defendants' projects were created. Evidence relating to Star  
6 Trek fan films, including evidence relating to Plaintiffs' failure to file suit against  
7 other creators of fan films, is admissible because it is highly relevant to the issue of  
8 innocent intent and willfulness, which have a significant impact on the amount of  
9 available statutory damages. The backdrop of the rich fan fiction culture is also  
10 highly relevant to various other of Defendants' affirmative defenses, including  
11 implied license and waiver. In fact, this Court has acknowledged Star Trek's "long  
12 history of fan films" and stated, "[Defendant] Peters' belief that the *Axanar* Works  
13 were fan films in light of his understanding from CBS that it would tolerate such fan  
14 films creates an issue of his state of mind that must be adjudicated by the jury." Dkt.  
15 163 at 14 (Order re Plaintiffs' Motion for Partial Summary Judgment and Defendants'  
16 Motion for Summary Judgment ("Order")). Defendants are thus entitled to present  
17 evidence relating to Star Trek fan films that permits the jury to reach a conclusion on  
18 this issue.

19 **II. FACTUAL BACKGROUND**

20 Gene Roddenberry encouraged the creation of fan fiction, and was honored that  
21 fans were so passionate about Star Trek that they were inspired to create their own fan  
22 works to celebrate it. Dkt. 77-2 at 48 (Defendants' Statement of Uncontroverted Fact  
23 in Support of Motion for Summary Judgment ("SUF")). In the 1976 book *Star Trek:  
24 The New Voyages*, Mr. Roddenberry stated in the Foreword that he "realized that there  
25 is no more profound way in which people could express what Star Trek has meant to  
26 them than by creating their own very personal Star Trek [fan fiction]." *Id.* Since this  
27 statement, a substantial number of films have been created by fans without any  
28 complaint by Plaintiffs, some using characters from Plaintiffs' Works and exact

1 replicas of Star Trek movie sets. *Id.* at 49. For over 50 years, Plaintiffs have tolerated  
2 and even encouraged a community of fandom and fan fiction surrounding Star Trek.  
3 *Id.* at 50.

4 Defendants seek to include evidence regarding this history of fan fiction  
5 because it is critical to the analysis of the claims and defenses at issue. Specifically,  
6 Defendants seek to offer a summary of the history of Star Trek fan films provided by  
7 non-party witness Mr. Jonathan Lane based on his extensive knowledge about and  
8 following of such works. Dkt. 75-25 (Decl. of Jonathan Lane).

9 Defendants will also present the expert testimony of Mr. Christian Tregillis,  
10 CPA, ABV, CFF, CLP, who prepared an expert report with an economic analysis of  
11 the damages Plaintiffs are alleged to have suffered as a result of Defendants' Works,  
12 including Plaintiffs' lack of actual damages, and the positive impact and lack of harm  
13 caused by Star Trek fan films (including Defendants' Works) on Plaintiffs' Works.

14 Additionally, Defendants will present the expert testimony of Dr. Henry  
15 Jenkins, the Provost's Professor of Communication, Journalism, Cinematic Art, and  
16 Education at the University of Southern California, who prepared a report to shed light  
17 on the culture surrounding Star Trek fan fiction, both generally and as applied to  
18 Defendants' Works.

19 Though Plaintiffs have attempted to avoid the reality of the tradition and culture  
20 surrounding Star Trek fan fiction by pointing to certain public comments made by  
21 Defendants that distinguish the quality of their works from other fan films, Plaintiffs  
22 ignore the ample evidence in which Plaintiffs, Defendants, and third parties have  
23 referred to Defendants' works as fan films. Defendants even went to great lengths to  
24 make sure their works fell within the tolerated realm of fan fiction as Defendants  
25 understood it at the time. Dkt. 87-1 at 118 (Defendants' Statement of Additional,  
26 Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment  
27 ("SAMF")). While Defendants communicated an intent to raise the bar with respect  
28 to the *quality* of fan films, there is ample evidence, and dozens of communications,

1 that demonstrate that Defendants expressly still considered their works to be fan films.  
2 Dkt. 87-1 at 103. (Defendants' Response to Plaintiffs' Statement of Uncontroverted  
3 Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("RSUF")).  
4 *Plaintiffs*, along with third parties, have also repeatedly referred to Defendants' Works  
5 as fan films. Dkt. 87-1 at 103 (RSUF); Dkt. 87-1 at 119 (SAMF). Defendants  
6 believed that their works were fan films because they were created by fans and were  
7 given away for free. *Id.* at Dkt. 87-1 at 103 (RSUF).<sup>1</sup>

8 Additionally, Plaintiffs had previously entered into a deal with James Cawley, a  
9 well-known creator of Star Trek fan fiction, permitting him to offer commercial tours  
10 of the set of his Star Trek fan film. Dkt. 75-10 at 33:25-42:21 (Deposition of  
11 Elizabeth D. Kalodner). Mr. Cawley had invited Defendant Mr. Peters to portray the  
12 Star Trek character Garth of Izar in one of Mr. Cawley's fan films, and Plaintiffs'  
13 treatment of Mr. Cawley is incompatible with their treatment of Mr. Peters and his  
14 understanding of what is acceptable with respect to building out a fan film studio.

15 All of this testimony is therefore highly relevant, and Defendants should be  
16 permitted to introduce it to the jury.

### 17 **III. ARGUMENT**

#### 18 **A. Evidence of Plaintiffs' Encouragement of Star Trek Fan Films and** 19 **Relationship with Other Fan Film Creators is Relevant to the Issue** 20 **of Damages and is Critical to the Analysis of Statutory Damages**

21 Contrary to the Plaintiffs' claims, evidence relating to Star Trek fan films is  
22 legally relevant in this case. Evidence is relevant if it has any tendency to make the  
23 existence of any fact that is of consequence to the determination of the action more or  
24 less probable than it would be without such evidence. Fed. R. Evid. 401. As damages  
25 are at issue in this case, any evidence that assists the jury in their analysis of damages  
26 is relevant.

27 \_\_\_\_\_  
28 <sup>1</sup> There has been no agreed to definition of what a "fan film" is in this case, as  
demonstrated by Plaintiffs' own discovery responses, in which Plaintiffs object that  
the phrase "fan film" is ambiguous. Dkt. 87-1 at 119 (SAMF).

1 A defendant is entitled to a jury trial to determine the amount of statutory  
2 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.  
3 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has  
4 the power to consider factors that might inform them on what they find fair and “just”  
5 when deciding where on the wide scale a plaintiff should be awarded statutory  
6 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344  
7 U.S. 228, 232 (1952) (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249  
8 U.S. 100, 106 (1919)). Under the Copyright Act, the amount of available statutory  
9 damages per infringed work increases from a minimum of \$200 where the alleged  
10 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to  
11 \$150,000 depending on whether the infringement was “committed willfully.” 17  
12 U.S.C. § 504(c)(2). And the jury can award anywhere in between.<sup>2</sup>

13 Plaintiffs have alleged that Defendants willfully infringed upon their copyrights  
14 in creating their works. This allegation is directly tied to the issue of damages.  
15 Moreover, the Court has acknowledged that Star Trek fan film culture may have  
16 shaped Mr. Peters’ interpretation of any alleged copyright infringement since his  
17 “actions demonstrate a respect for Plaintiffs’ intellectual property that makes a finding  
18 of willfulness on summary judgment inappropriate.” Dkt. 163 at 14 (Order).

19 Innocent infringement occurs where the infringer “was not aware and had no  
20 reason to believe that his or her acts constituted an infringement of copyright.” *United*

21  
22 <sup>2</sup> Statutory damages must “bear some relation to actual damages suffered.” *Van Der*  
23 *Zee v. Greenidge*, 2006 WL 44020, at \*2 (S.D.N.Y. 2006). Otherwise, they risk  
24 running afoul to constitutional principles of due process. *Parker v. Time Warner*, 331  
25 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can expand] so far  
26 beyond the actual damages suffered that the statutory damages come to resemble  
27 punitive damages” and that, under *BMW* and *State Farm*, “it may be that in a  
28 sufficiently serious case the due process clause might be invoked”) (citing *BMW of*  
*North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million  
punitive damages award where the plaintiff obtained a jury award of only \$4,000 in  
actual damages, because such punitive damages violated the Due Process Clause of  
the Constitution because it was “grossly excessive” compared to the plaintiff’s actual  
damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003)  
(reversing punitive damages award of \$145 million as unconstitutionally excessive  
compared to the \$1 million compensatory damages award because there must be some  
proportionality of the punitive award to the plaintiff’s actual harm).

1 *Fabrics*, 2013 WL 7853485, at \*5 (citing 17 U.S.C. § 504(c)(2)). Innocent  
2 infringement *lowers* the floor of statutory damages to \$200 per work. 17 U.S.C. §  
3 504(c)(2)).

4 A finding of willful infringement would allow Plaintiffs, within the Court’s  
5 discretion, to obtain up to \$150,000 in statutory damages per infringing act. 17 U.S.C.  
6 § 504(c)(2). The evidence relating to Star Trek fan films sought to be introduced by  
7 Defendants and excluded by Plaintiffs is therefore directly relevant to these  
8 allegations of willful infringement and to Defendants’ affirmative defenses, including  
9 waiver, acknowledgement, ratification, consent, and acquiescence.

10 While the Copyright Act does not define the term “willful,” the Ninth Circuit  
11 has held that the term means “with knowledge that the defendant’s conduct constitutes  
12 copyright infringement.” *United Fabrics Intern., Inc. c. G-III Apparel Group, Ltd.*,  
13 No. CV13-00803-ODW (AJWx), 2013 WL 7853485, at \*5 (C.D. Cal. Dec. 27, 2013)  
14 (citing *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir.  
15 1990); *Columbia Pictures Television v. Krypton Broad.*, 106 F.3d 284, 293 (9th Cir.  
16 1997) *rev’d on other grounds sub nom.*; *Feltner v. Columbia Pictures Television*, 523  
17 U.S. 340 (1998); *cv. Danjaq LLC v. Sony Corp.*, 263 F.2d 942, 957-58 (9th Cir.  
18 2001)).

19 The jury “has wide discretion in determining the amount of statutory damages  
20 to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)  
21 (emphasis added). Neither the statute nor its legislative history provide guidance on  
22 the factors the trier of fact is to consider when making an award of statutory damages.  
23 *See* 6 Patry on Copyright § 22:174 (2016). In the absence of any statutory or other  
24 guidance, courts have employed the following non-exhaustive factors in determining  
25 statutory damages: (1) the expenses saved and the profits reaped by the defendant, (2)  
26 the revenues lost by the plaintiff, (3) the value of the copyright, (4) the deterrent effect  
27 on others besides the defendant, (5) willfulness of the defendant’s conduct, (6)  
28 whether the defendant has cooperated in providing records to assess the value of the



1 infringing material, (7) the potential for discouraging the defendant, and (8) the  
2 conduct and attitude of the parties; (9) any benefit to Plaintiffs from Defendants'  
3 conduct. *See e.g., Coach, Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZK, 2013  
4 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013); *Peer Int'l Corp. v. Luna Records, Inc.*,  
5 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

6 Plaintiffs' documents and communications regarding fan films and guidelines  
7 demonstrate that Defendants reasonably believed – and actually were – operating  
8 within the enduring tradition of Star Trek-inspired works of fan fiction, which have  
9 been long tolerated and encouraged by Plaintiffs since the inception of the Star Trek  
10 franchise. Dkt. 127-2 (Star Trek Fan Film Guidelines); Dkt. 127-3 (History of Star  
11 Trek Fan Films); Dkt. 144-18 (Email from Alec Peters to Elizabeth Kalodner and  
12 John Van Citters about Defendants' Works).

13 This evidence also reveals Plaintiffs' tacit acknowledgement that works of fan  
14 fiction like Defendants' have no negative impact on the market for Plaintiffs' Works.  
15 Although Plaintiffs may be correct that this evidence relating to other fan films, alone,  
16 is not determinative as to whether Defendants engaged in copyright infringement, they  
17 ignore that this evidence is highly relevant to the damages analysis and Defendants'  
18 affirmative defenses.

19 Moreover, Plaintiffs' concern that the introduction of evidence relating to other  
20 fan films would be an unnecessary burden on the jury's time and the Court's resources  
21 is unwarranted. Defendants do not intend to conduct "dozens of miniature trials" in  
22 their introduction of this defense, (Plaintiffs' Motion *in Limine* No. 6, p. 3), but rather  
23 will be judicious in introducing the evidence necessary to demonstrate that Plaintiffs'  
24 history with Star Trek fan films and their creators contradicts any allegations of  
25 willful infringement. Because this evidence of other Star Trek fan films is highly  
26 relevant, it should be permitted.

1           **B. Evidence of Other Fan Films Is Also Relevant To Defendants’**  
2           **Affirmative Defenses Including Waiver and Implied License**

3           The culture of Star Trek fan fiction is highly relevant to Defendants’ affirmative  
4 defenses, including waiver and implied license.

5           Evidence of the Star Trek fan film culture is critical to the discussion of these  
6 affirmative defenses. The waiver defense requires a showing of Plaintiffs’ intentional  
7 relinquishment of a right with knowledge of its existence and the intent to relinquish  
8 it. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001), *aff’d after remand*,  
9 284 F.3d 291 (9th Cir. 2002). With regard to implied license, Defendants must prove  
10 that Plaintiffs have given a license or their consent or acquiescence, express or  
11 implied, to Defendants to use Plaintiffs’ Works. *See Elvis Presley Enters., Inc. v.*  
12 *Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991); *Effects Assocs., Inc. v. Cohen*,  
13 908 F.2d 555, 558 (9th Cir. 1990).

14           Like other Star Trek fan fiction created over the years and as is embedded  
15 within the culture, Defendants’ Works take inspiration from Star Trek to create an  
16 original story. Fan stories are not just “extensions,” “continuations” or “extra  
17 episodes” of the original series. *Id.* at 6. Rather, fan creations are expressed through  
18 the construction of new stories. *Id.* Defendants’ Works are merely a part of and  
19 founded on this longstanding culture, and testimony relating this history is relevant to  
20 Defendants’ affirmative defenses. Moreover, Defendants have no ambitions of  
21 competing against Plaintiffs’ Works in movie theaters, on television, over premium  
22 streaming services, or to otherwise sell their Works for profit, all of which aligns with  
23 the idea behind Star Trek fan fiction and Defendants’ frame of mind at the time of its  
24 creation. Dkt. 75-6 at 4 (Report of Henry Jenkins).

25           Thus, any evidence of Plaintiffs’ previous tolerance and encouragement of fan  
26 fiction and the way that it is has been embraced since Gene Roddenberry created the  
27 Star Trek franchise is pivotal in proving these defenses and should therefore be  
28 permitted.

1           **C. The Probative Value of Evidence Relating to Other Fan Films is not**  
2           **Substantially Outweighed by the Danger of Unfair Prejudice and**  
3           **Poses No Risk of Confusion for the Jury**

4           Plaintiffs’ claim that any evidence relating to Star Trek fan films should be  
5 excluded because its probative value is substantially outweighed by the danger of  
6 unfair prejudice to Plaintiffs and the risk of confusing the jury. However, these claims  
7 again depend on Plaintiffs’ accusation that Defendants intend to conduct “mini-trials”  
8 relating to every work of Star Trek fan fiction. Plaintiffs’ Motion *in Limine* No. 6, p.  
9 3. Rather, this evidence is highly relevant to the question of damages and willful  
10 infringement, and the jury is capable of distinguishing between the work at issue and  
11 evidence of other works introduced to show Plaintiffs’ longstanding acceptance and  
12 encouragement of Star Trek fan films.

13           Furthermore, Plaintiffs cannot aim to exclude any evidence of Star Trek fan  
14 films by stating that the use of the term fan fiction has no impact on the copyright  
15 infringement analysis (Plaintiffs’ Motion *in Limine* No. 6, p. 1) and then arguing only  
16 paragraphs later that it is somehow significant that Defendants once declined to refer  
17 to their work as a fan film. *Id.* at 3.

18           Regardless, evidence of other fan films risks neither prejudicing Plaintiffs nor  
19 confusing the jury and should therefore be permitted.

20 **IV. CONCLUSION**

21           For all of these reasons, the Court should deny Plaintiffs’ Motion *in Limine* No.  
22 6 to exclude evidence relating to other Star Trek fan films.

24 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

25  
26 By: /s/ Erin R. Ranahan  
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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 **Winston & Strawn LLP**  
333 S. Grand Avenue  
Los Angeles, CA 90071-1543

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.**

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC.'S AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 7 TO EXCLUDE TESTIMONY  
AND DOCUMENTS DISCUSSING  
PETERS' UNRELATED WORK  
REGARDING STAR TREK PROPS**

19 Pretrial Conference: Jan. 9, 2017  
20 Trial Date: Jan. 31, 2017

Winston & Strawn LLP  
333 S. Grand Avenue  
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1           **I. INTRODUCTION**

2           Plaintiffs Paramount Pictures Corporation and CBS Studios, Inc.  
3 (“Plaintiffs”) wish to simply ignore the reality of the history between Plaintiffs and  
4 Defendant Alec Peters. Specifically, Plaintiffs’ motion in limine #7 (“Motion”)   
5 seeks to exclude evidence and arguments relating to Mr. Peters’ prior engagement  
6 with Plaintiffs, including the time and effort Mr. Peters’ volunteered to CBS in  
7 connection with the archiving and auction of Star Trek props and costumes under  
8 the arguments that such evidence is not relevant and is prejudicial. However,  
9 Plaintiffs do not want the jury to know about relevant history and communications  
10 between Plaintiffs and Mr. Peters. Indeed, evidence of Mr. Peters’ history and work  
11 with Plaintiffs is highly relevant to Defendants’ state of mind, in particular  
12 Defendants’ innocent intent and lack of willfulness, which impacts the  
13 determination of statutory damages sought by Plaintiffs. Accordingly, Plaintiffs’  
14 Motion should be denied and the Court should allow Defendants to admit such  
15 evidence and testimony at trial.

16           **II. FACTUAL SUMMARY**

17           Alec Peters was retained by Plaintiff CBS Studios, Inc. (“CBS”) to assist with  
18 the auctioning of Star Trek costumes and props. Declaration of Jennifer Jason  
19 (“Jason Decl.”), ¶¶ 4-5, Exs. A, B. Mr. Peters further volunteered his time and  
20 efforts to assist CBS with its prop and costume archives. *Id.* These interactions  
21 established relationships between Mr. Peters and the same witnesses that Plaintiffs  
22 have designated in this case, including John Van Citters, Liz Kalodner and Bill  
23 Burke. Dkt. 151 (Joint Witness List). Through these relationships, Mr. Peters kept  
24 an open dialogue about his own endeavors, as well as the actions of other third  
25 parties that he felt may be violating Plaintiffs’ rights. Declaration of Amy Stern  
26 (“Stern Decl.”), ¶ 6, Ex. 3 (Email from Elizabeth D. Kalodner); ¶ 7, Ex. 4 (Email  
27 from John Van Citters). Moreover, these communications showed that Plaintiffs  
28 considered Mr. Peters a “good guy” and trusted his expertise regarding Star Trek, as

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1 well as exploited his services as a volunteer as Plaintiffs believed that Mr. Peters  
2 would “give an honest assessment”. Stern Decl. ¶ 5, Ex. 2 (Email from Elizabeth D.  
3 Kalodner). The context provides insights into the history of the relationship of the  
4 very same parties at issue in this case.

5 Indeed, this court already found in its order denying the parties’ respective  
6 summary judgment motions that the prior communications between the parties,  
7 including Mr. Peters reporting of third parties conduct with respect to intellectual  
8 property, is relevant to Mr. Peters’ state of mind. Dkt. 163 at 14 (Order re Plaintiffs’  
9 Motion for Partial Summary Judgment and Defendants’ Motion for Summary  
10 Judgment (“Order”)).

### 11 III. LEGAL STANDARD

12 Rulings on motions *in limine* are committed to the discretion of the trial court.  
13 *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. Appx. 676, 677 (9th Cir.  
14 2007). District courts may exercise their discretion to exclude irrelevant evidence,  
15 or to exclude evidence whose probative value is substantially outweighed by the  
16 danger of unfair prejudice. Fed. R. Evid. 401-403; *Dream Games of Arizona, Inc. v.*  
17 *PC Onsite*, 561 F.3d 983 (9th Cir. 2008). Evidence is relevant only if “it has any  
18 tendency to make a fact more or less probable than it would be without the evidence,  
19 and the fact is of consequence in determining the action.” Fed. R. Evid. 401.  
20 Moreover, “[t]he court may exclude relevant evidence if its probative value is  
21 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).

### 24 IV. ARGUMENT

#### 25 a. Mr. Peters’ History and Work with Plaintiffs Are Relevant To 26 Show That Defendants’ Conduct Was Innocent and Does Not 27 Constitute Willful Infringement, Thereby Impacting The Available 28 Measure of Statutory Damages

1 Mr. Peters' prior dealings with Plaintiffs, including the nature and length of  
2 Mr. Peters' history and relationship with Plaintiffs, are highly relevant to the  
3 determination of whether Mr. Peters' potential actions were willful. Where alleged  
4 infringement is innocent, or where the court finds that the "infringer was not aware  
5 and had no reason to believe that his or her acts constituted an infringement of  
6 copyright," the Copyright Act provides for statutory damages "in a sum of not less  
7 than \$200. 17 U.S.C. § 504(c)(1). Where a defendant is found to have committed  
8 willful infringement, the court in its discretion can award statutory damages up to  
9 \$150,000. 17 U.S.C. § 504(c)(2)). However, a defendant that may be an innocent  
10 infringer is subject to a lower statutory damage minimum. *Id.*

11 In determining the adequate amount of statutory damages, a jury can consider  
12 the circumstances of the infringement. *PC Onsite*, 561 F.3d at 992 (citing *Peer Int'l*  
13 *Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990)). "A  
14 determination of willfulness requires an assessment of a defendant's state of mind."  
15 *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016).

16 Mr. Peters' history working with Plaintiffs is important to establish the  
17 circumstances of Defendants' actions; specifically that Defendants were not likely to  
18 know or have reason to know that Plaintiffs would consider Defendants' actions as  
19 an infringement. As such, evidence and related testimony regarding Mr. Peters'  
20 prior work for Plaintiff CBS is highly relevant to Defendants' knowledge, intent,  
21 and reasonable beliefs regarding his actions.

22 Plaintiffs' allegations that such evidence and testimony would be prejudicial  
23 is unfounded. Mr. Peters' work on prop and costume archiving and auctions is  
24 clearly differentiable from the creation of a film, both in the nature of the action and  
25 the time period in which it took place. This evidence can be easily presented to the  
26 jury as relevant background, and in a way will not be genuinely confusing, and is  
27 directly related to Defendants' lack of intent or willfulness.

## 28 V. CONCLUSION

1 For the foregoing reasons, Defendants respectfully request that the Court deny  
2 Plaintiffs' Motion and allow Defendants to introduce evidence and testimony of Mr.  
3 Peters' prior history and work for CBS.

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Dated: January 6, 2017

WINSTON & STRAWN LLP

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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  
20  
21

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION *IN LIMINE*  
NO. 8 TO EXCLUDE TESTIMONY,  
DOCUMENTS OR OTHER  
EVIDENCE CREATED OR MADE  
AFTER THE COMPLAINT IN THIS  
LITIGATION**

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

1 **I. INTRODUCTION**

2 Though Plaintiffs' lawsuit alleges that Defendants have infringed their  
3 copyrights based on an unmade, in progress, *Axanar* fan film, Plaintiffs' Motion *in*  
4 *Limine* No. 8 ("Motion") would curiously like to freeze the relevant time of evidence  
5 in this matter to the day Plaintiffs filed their lawsuit. But Plaintiffs are not consistent  
6 with respect to this position, as they seek to introduce evidence that post-dates the  
7 filing of the Complaint that they believe favors them, yet ask the Court to prevent the  
8 jury from hearing about events that took place after the lawsuit was filed that are  
9 favorable to Defendants. But as explained herein, and to the extent this has already  
10 been explained in Defendants' Oppositions to Plaintiffs' Motions *in Limine* Nos. 1, 2,  
11 3, this information is relevant to the jury's consideration of substantial similarity,  
12 innocent infringement or willfulness, and/or any assessment as to the amount of any  
13 damages. As all of these facts and evidence are more probative than prejudicial, the  
14 Court should deny Plaintiffs' effort to keep this relevant information from the jury.

15 **II. FACTUAL BACKGROUND**

16 Since this lawsuit was filed, several events have transpired that Plaintiffs do not  
17 want the jury to hear about, including: (i) that their own director and producer came  
18 out publicly against the lawsuit, and made the announcement that the "lawsuit was  
19 going away" to promote Star Trek at the fan 50<sup>th</sup> Anniversary Event and to promote  
20 their latest film, *Star Trek Beyond*; (ii) after Defendants requested it, Plaintiff CBS  
21 issued fan film guidelines in mid-2016; (iii) Defendants revised the *Axanar* script after  
22 hearing J.J. Abrams' announcement that the lawsuit was "going away" in mid-2016;  
23 (iv) while complaining about Defendants renting a studio to make their fan film,  
24 Plaintiffs entered into a commercial agreement with James Cawley, a fan film  
25 producer who produced fan films in which Mr. Peters played the role of *Garth of Izar*,  
26 to allow fans to pay to tour the fan film set that, without original authorization,  
27 meticulously recreated in the sets in exact same manner as *Star Trek: The Original*  
28 *Series*; and (v) Defendants promoted extensively, through social media, official Star

1 Trek works, including *Star Trek: Beyond*.

2        Though Plaintiffs ask the Court to shield the jury from post-lawsuit evidence  
3 that does not help them, at the same time, Plaintiffs have included all sorts of exhibits  
4 for trial that were created *after* the lawsuit, including (1) Defendants’ first breakdown  
5 of donor funds, expenditures and costs, which was created in connection with  
6 Defendants’ efforts to settle this case, and which Plaintiffs seek to introduce (while  
7 seeking to exclude a similar subsequently produced report made in the same manner  
8 as the first one); (2) public postings by Defendants following the filing of the lawsuit;  
9 and (3) emails from Defendants after the lawsuit was filed. (*See e.g.*, Plaintiffs’  
10 Exhibit List, Exs. 61, 73, 77, 78, 80, 120).

11        In what appears to be a rehash compilation of their Motions *In Limine* Nos. 1, 2,  
12 and 3, Plaintiffs apparently believe this repetitive Motion was necessary.

13 **III. ARGUMENT**

14 **A. Post-Lawsuit Evidence Is Relevant to the Issue of Innocent or Willful**  
15 **Intent, and the Analysis of Statutory Damages**

16        Evidence is relevant if it has any tendency to make the existence of any fact that  
17 is of consequence to the determination of the action more or less probable than it  
18 would be without such evidence. Fed. R. Evid. 401. As damages will be at issue in  
19 this trial, any evidence that assists the jury in their analysis of damages is relevant.

20        Plaintiffs have alleged that Defendants willfully infringed upon their copyrights  
21 in creating their works. This allegation is directly tied to the issue of damages. In  
22 finding factual issues for the jury on the issue of willfulness, the Court has  
23 acknowledged that Star Trek fan film culture may have shaped Defendants’ state of  
24 mind because Mr. Peters’ “actions demonstrate a respect for Plaintiffs’ intellectual  
25 property that makes a finding of willfulness on summary judgment inappropriate.”  
26 Dkt. 163 at 14 (Order). A finding of willful infringement would allow Plaintiffs,  
27 within the Court’s discretion, to obtain up to \$150,000 in statutory damages per  
28 infringed work. 17 U.S.C. § 504(c)(2). Innocent infringement occurs where the

1 infringer “was not aware and had no reason to believe that his or her acts constituted  
2 an infringement of copyright.” *United Fabrics Int’l, Inc. v. G-III Apparel Grp., Ltd.*,  
3 No. CV13-00803-ODW (AJWx), 2013 WL 7853485, at \*5 (C.D. Cal. Dec. 27, 2013)  
4 (citing 17 U.S.C. § 504(c)(2)). Innocent infringement *lowers* the floor of statutory  
5 damages to \$200 per work. 17 U.S.C. § 504(c)(2)).

6       Regardless of whether the floor and ceiling for available statutory damages are  
7 lowered or raised by a finding of innocent infringement or willfulness, the jury “has  
8 wide discretion in determining the amount of statutory damages to be awarded.”  
9 *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). Courts have  
10 employed the following non-exhaustive factors in determining statutory damages: (1)  
11 the expenses saved and the profits reaped by the defendant, (2) the revenues lost by  
12 the plaintiff, (3) the value of the copyright, (4) the deterrent effect on others besides  
13 the defendant, (5) willfulness of the defendant’s conduct, (6) whether the defendant  
14 has cooperated in providing records to assess the value of the infringing material, (7)  
15 the potential for discouraging the defendant, and (8) the conduct and attitude of the  
16 parties; and (9) any benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach,*  
17 *Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at \*2 (C.D.  
18 Cal. Mar. 12, 2013); *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568  
19 (S.D.N.Y. 1995).

20       Plaintiffs do not cite a single case to support their contention that everything  
21 that happened after the date they decided to file their Complaint bears no relevance to  
22 this action. Plaintiffs claim that any evidence made or created after the lawsuit was  
23 filed should be precluded because its probative value is substantially outweighed by  
24 the danger of unfair prejudice to Plaintiffs and the risk of confusing the jury.  
25 However, Plaintiffs do not articulate what these dangers are, or how any of this  
26 information will confuse the jury. Nor could Plaintiffs seek a wholesale exclusion of  
27 all post-lawsuit evidence, as their case is largely based on an *unmade* fan film. And  
28 when they believe it favors them, Plaintiffs have sought to introduce evidence that

1 occurred after the lawsuit, including a financial summary, emails, and public postings.  
2 *See e.g.*, Plaintiffs’ Exhibit List, Exs. 61, 73, 77, 78, 80, 120).

3 As set forth below, each of the five categories of evidence that post-dates the  
4 filing of the Complaint is relevant.

5 **1. J.J. Abrams’ and Justin Lin’s Comments Are Relevant**

6 For the reasons set forth in Defendants’ Opposition to Motion *In Limine* No. 3,  
7 the testimony and exhibits relating to Justin Lin and J.J. Abrams are relevant to  
8 Defendants’ state of mind in creating the most recent script, as well as the extent to  
9 which Plaintiffs have been actually damaged, or where on the range of statutory  
10 damages the jury should decide to award any damages. It is clear that Plaintiffs used  
11 J.J. Abrams’ statements about the lawsuit going away to *promote* Star Trek, making  
12 the announcement at a 50<sup>th</sup> anniversary event for fans on the Paramount lot where  
13 Defendant Alec Peters was one of the fans present.

14 **2. The Fan Film Guidelines Are Relevant**

15 Plaintiffs’ introduction of the fan film guidelines (which were released  
16 immediately following J.J. Abrams’ announcement that the lawsuit was “going  
17 away”) after suing Defendants support the inference that prior to that time, Defendants  
18 reasonably believed—and actually were—operating within the enduring tradition of  
19 Star Trek-inspired works of fan fiction, which have been long tolerated and  
20 encouraged by Plaintiffs since the inception of the Star Trek franchise. *See* ECF No.  
21 127-2 (Star Trek Fan Film Guidelines); ECF No. 127-3 (History of Star Trek Fan  
22 Films); ECF No. 144-18 (Email from Alec Peters to Elizabeth Kalodner and John Van  
23 Citters about Defendants’ Works). Evidence and testimony relating to the Star Trek  
24 fan film guidelines, which came out in 2016, is also relevant to support an inference  
25 that Plaintiffs have not suffered any damages. To the extent substantial similarity is  
26 found by the jury, Plaintiffs’ general attitude and latest approach to fan fiction also  
27 helps to inform the jury regarding the level of appropriate statutory damages given  
28 that Plaintiffs obviously do recognize the promotional value and benefit from

1 celebrating fan film activity.

2 **3. Plaintiffs' Venture with Fan Film Maker James Cawley Is**  
3 **Relevant**

4 The commercial venture Plaintiff CBS entered into with fan film producer  
5 James Cawley, which was announced publicly after the lawsuit was filed, is also  
6 relevant to damages and Defendants' good faith state of mind with respect to the fan  
7 film studio Defendants built out in preparation for making fan films and continued to  
8 rent throughout this lawsuit. While Plaintiffs have attempted to malign Defendants'  
9 fan film studio as an inappropriate venture funded with donor money, Plaintiffs'  
10 contrary actions when it comes to Mr. Cawley shows that Plaintiffs have previously  
11 *rewarded* other fan film makers for creating their own studio to make fan films, by  
12 virtue of entering into a venture with Mr. Cawley for commercial tours of that studio.

13 **4. Post-Lawsuit Scripts Are Relevant**

14 As explained in Defendants' Opposition to Plaintiffs' Motion *In Limine* No. 2,  
15 the evidence of scripts created after this litigation was filed is directly relevant to a  
16 substantial similarity analysis. In order to determine whether there is substantial  
17 similarity between Plaintiffs' works and the allegedly infringing potential fan film  
18 *Axanar*, the jury must first be able to compare the relevant works. *See, e.g., Funky*  
19 *Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). This  
20 includes comparing the two works for similarities in 'the plot, themes, dialogue,  
21 mood, setting, pace, characters, and sequence of events.'" *Gilbert v. New Line Prods.,*  
22 *Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at \*2 (C.D. Cal. Nov. 16, 2009)  
23 (Klausner, J.). Preliminary works such as draft screenplays are generally "too  
24 unreliable in determining substantial similarity" as to the final work. *Id.* If any script  
25 should be used as a substitute to analyze whether the unmade *Axanar* film is  
26 substantially similar to Plaintiffs' works, the most recent version of the script, revision  
27 10.0-NX, dated July 1, 2016, should be used, or at least available, for the jury's  
28 substantial similarity analysis. Further, as already explained in Defendants'

1 Opposition to Plaintiffs’ Motion *In Limine* No. 2, the more recent script is relevant to  
2 any damages assessment.

3 **5. Defendants’ Updated Expenditures Are Relevant if the Court**  
4 **Allows Plaintiffs to Introduce Defendants’ First Financial**  
5 **Summary**

6 Defendants already explained in Opposition to Plaintiffs’ Motion *in Limine* No.  
7 1 why the Second Financial Summary produced by Defendants should come in if the  
8 Court accepts Plaintiffs’ strained theory of Defendants’ “profits” for a disgorgement  
9 of profits analysis. Otherwise, as explained therein, Defendants believe that Plaintiffs  
10 have no standing to challenge the manner in which donor funds were spent on a work  
11 that was halted as a result of the lawsuit.

12 **IV. CONCLUSION**

13 For all of these reasons, and for all the reasons discussed in Defendants’  
14 Oppositions to Plaintiffs’ Motions *In Limine* Nos. 1, 2, and 3, the Court should deny  
15 Plaintiffs’ Motion *in Limine* No. 8 to exclude testimony, documents, or other evidence  
16 created or made after the Complaint in this litigation.

17  
18 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

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

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

Plaintiffs,

vs.

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

Defendants.

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
 PRODUCTIONS, INC., AND ALEC  
 PETERS' OPPOSITION TO  
 PLAINTIFFS' MOTION *IN LIMINE*  
 NO. 9 TO EXCLUDE TESTIMONY  
 OF CHRISTIAN TREGILLIS**

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



1 **I. INTRODUCTION**

2 Plaintiffs do not dispute that Defendants’ expert Christian Tregillis is eminently  
3 qualified to testify regarding the financial issues in this case that are directly relevant  
4 to Plaintiffs’ claimed damages. In their Motion *in Limine*, Plaintiffs attempt to  
5 exclude Mr. Tregillis’ testimony based primarily on the fact that Plaintiffs have failed  
6 to come up with one iota of evidence of any actual lost profits or concrete harm that  
7 they have suffered as a result of Defendants’ alleged infringement and instead intend  
8 to present a baseless hypothetical argument to the jury that those who donated to the  
9 creation of *Prelude to Axanar* and *Axanar* did not spend that same money consuming  
10 Plaintiffs’ Star Trek works. Defendants should be permitted to rebut this dubious  
11 theory with an expert knowledgeable in the fields of economics and accounting. And  
12 in an unsurprising move given the complete lack of evidence of any lost profits,  
13 Plaintiffs indicate that they will rely on an outdated and unverified financial summary,  
14 hundreds of pages long, that Defendant Alec Peters created for purposes of this  
15 litigation, to attempt to prove that Defendants profited from the creation of the *Axanar*  
16 works. Particularly if this or any financial summary is admitted into evidence, Mr.  
17 Tregillis should be permitted to testify that Defendants’ expenditures exceeded the  
18 donations received, and is clearly qualified to do so.

19 Furthermore, Plaintiffs’ argument that Mr. Tregillis is unqualified to offer  
20 opinions on the benefits of fan films generally, and the *Axanar* works in particular, to  
21 Plaintiffs is meritless. Again, Plaintiffs do not dispute that Mr. Tregillis’ background  
22 in accounting, economics, and finance qualifies him to testify regarding these topics,  
23 but rather claim that Mr. Tregillis must be an expert in Star Trek and the movie  
24 industry in order to opine about the financial benefits to movie studios engendered by  
25 fan-made films and media. This is not the case.

26 Because Mr. Tregillis’ opinions are relevant to Plaintiffs’ claimed damages,  
27 based upon sufficient facts and his specialized knowledge, and will assist the jury in  
28 understanding the financial realities of this case and assessing Plaintiffs’ damages,

1 Plaintiffs’ Motion *in Limine* No. 9 should be denied in its entirety.

2 **II. LEGAL STANDARD**

3 Federal Rule of Evidence 702 permits a witness “who is qualified as an expert  
4 by knowledge, skill, experience, training, or education” to “testify in the form of an  
5 opinion or otherwise if: (a) the expert’s ... specialized knowledge will help the trier of  
6 fact to understand the evidence or to determine a fact in issue; (b) the testimony is  
7 based on sufficient facts or data; (c) the testimony is the product of reliable principles  
8 and methods; and (d) the expert has reliably applied the principles and methods to the  
9 facts of the case.” *Id.* Mr. Tregillis is more than qualified to testify as an expert under  
10 this standard.

11 **III. ARGUMENT**

12 **A. Mr. Tregillis’ Specialized Knowledge Qualifies Him As An Expert**

13 Mr. Tregillis has degrees in economics, finance, and accounting, is licensed as a  
14 Certified Public Accountant in two states, is accredited in Business Valuation and  
15 certified in Financial Forensics by the American Institute of Certified Public  
16 Accountants, and has a professional licensing certification from the Licensing  
17 Executives Society. He has over 25 years of experience in financial consulting and  
18 investigations, analyzing financial, accounting, economic, statistical, and market  
19 issues, primarily in regard to disputes and valuations. *See* ECF No. 165 (Defendants’  
20 summary of Mr. Tregillis’ qualifications and testimony). As such, Mr. Tregillis has  
21 specialized knowledge that will assist the jury in assessing Plaintiffs’ damages, if any.  
22 Plaintiffs do not dispute Mr. Tregillis’ qualifications.

23 **B. Mr. Tregillis’ Testimony Rebutting Plaintiffs’ Claims of Lost Profits**  
24 **and Defendants’ Purported Profits Are Squarely Relevant to Both**  
25 **Actual and Statutory Damages**

26 **1. Mr. Tregillis’ Testimony Is Relevant to Actual Damages**

27 Plaintiffs have not yet elected to seek to recover either statutory or actual  
28 damages in this case. If Plaintiffs ultimately elect to seek their actual damages, they

1 will have to prove either (1) the amount of money adequate to compensate them for  
2 the reduction of fair market value of the works caused by the infringement or (2)  
3 Defendants’ profits resulting from the infringement. *See* 17 U.S.C. § 504(b). It is  
4 certainly true that Plaintiffs have not provided any evidence whatsoever of any lost  
5 profits or revenues as a result of Defendants’ alleged infringement. However,  
6 Plaintiffs have indeed put forth a *theory* of hypothetical lost profits—that monies  
7 donated to fund the making of *Axanar* and *Prelude to Axanar* were funds necessarily  
8 not spent on Plaintiffs’ Star Trek works—that Mr. Tregillis’ testimony will rebut. *See*  
9 Declaration of Jennifer Jason, Ex. B (hereinafter, “Tregillis Report”) ¶ 61 (citing  
10 Paramount’s damages theory: “Any dollar that a donor spends on *Axanar* is a dollar  
11 that they do not have for authorized Star Trek merchandise or products.”); *id.* ¶¶ 62,  
12 64. Indeed, in coming to his conclusion that there is zero evidence of any such  
13 diverted funds, Mr. Tregillis analyzed, among other things, documents related to  
14 Defendants’ fundraising campaigns, noting that several individuals made multiple  
15 small donations, rebutting Plaintiffs’ zero-sum damages theory. *Id.* ¶ 64. His  
16 testimony on that point alone would be helpful to the jury, as the alternative is to show  
17 the jury a 167-page document with hundreds of donor names and amounts.

18 And Mr. Tregillis also offers expert testimony regarding the lack of any profits  
19 Defendants made from the free distribution of their works. Plaintiffs have indicated  
20 that they will rely Mr. Peters’ unverified and interim notes of donations, costs and  
21 expenditures related to crowdfunding campaigns to attempt to prove that Defendants  
22 somehow “profited” from the free distribution of their works. *See* Mot. at 5; *see also*  
23 Plaintiffs’ Mot. *in Limine* No. 1 (seeking to exclude a second, updated and more  
24 accurate financial summary).<sup>1</sup> Curiously, at the same time, Plaintiffs seek to exclude  
25 Defendants’ financial and accounting expert to rebut their claims that the funds  
26 donated to the creation of the *Axanar* Works exceeded Defendants’ expenses

27  
28 <sup>1</sup> Plaintiffs’ repeated claim that the second financial summary was somehow altered  
lacks any merit for the reasons set forth in Defendants’ Opposition to Plaintiffs’  
Motion *in Limine* No. 1.

1 associated with their production.

2 Neither of the financial summaries are relevant to this case, given that the Court  
3 found “Defendants [did] not profit directly from distributing their works.” ECF No.  
4 163 (Order Re: Plaintiffs’ Motion for Partial Summary Judgment and Defendants’  
5 Motion for Summary Judgment) at 10. However, should Plaintiffs decide to seek  
6 actual damages and disgorgement of profits at trial under 17 U.S.C. § 504(b), and  
7 should the Court allow introduction of the amount of money Defendants raised  
8 through crowdfunding at trial, Defendants would be entitled “to prove [their]  
9 deductible expenses and the elements of profit attributable to factors other than the  
10 copyrighted work” by the testimony of Mr. Tregillis. 17 U.S.C. § 504(b). And any  
11 claim that Mr. Tregillis examined the “wrong” financial summary (*i.e.*, the more  
12 correct one) is eviscerated by the fact that Plaintiffs are free to question Mr. Tregillis  
13 about the unverified and interim notes that they claim are more relevant at his  
14 deposition.

15 For these reasons, Mr. Tregillis’ testimony is directly relevant to determining  
16 the amount of Plaintiffs’ actual damages (if any).

## 17 **2. Mr. Tregillis’ Testimony Is Relevant to Statutory Damages**

18 Mr. Tregillis’ testimony would also be relevant to determining the appropriate  
19 amount of statutory damages, in the event Plaintiffs so elect. Statutory damages must  
20 “bear some relation to actual damages suffered.” *Van Der Zee v. Greenidge*, 2006 WL  
21 44020, at \*2 (S.D.N.Y. 2006) (factors a court may consider in computing statutory  
22 damages include the “revenues lost by the Plaintiffs [and] the value of the copyright”);  
23 *Muppets Studio, LLC v. Pacheco*, CV 12-7303 JGB FFMX, 2013 WL 2456617, at \*1  
24 (C.D. Cal. June 6, 2013); 4 Nimmer on Copyright § 14.04 [B][1][a] (2005) (“the  
25 determination of statutory damages within the applicable limits may turn upon such  
26 factors as . . . the revenues lost by the plaintiffs as a result of the defendant’s conduct  
27 ...”).

28 The jury “has wide discretion in determining the amount of statutory damages

1 to be awarded, *constrained only by the specified maxima and minima.*” *Harris v.*  
2 *Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (emphasis added). The trier  
3 of fact must be guided by “what is just in the particular case ... considering the nature  
4 of the copyright, the circumstances of the infringement and the like.” *F.W.*  
5 *Woolworth*, 344 U.S. at 232. Courts have considered the following factors as relevant  
6 to informing a jury’s determination of statutory damages: (1) the expenses saved and  
7 the profits reaped, (2) the revenues lost by the plaintiff, (3) the value of the copyright,  
8 (4) the deterrent effect on others besides the defendant, (5) whether the defendant’s  
9 conduct was willful, (6) whether a defendant has cooperated in providing particular  
10 records from which to assess the value of the infringing material produced, (7) the  
11 potential for discouraging the defendant, and (8) the conduct and attitude of the  
12 parties. *Coach, Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZX, 2013 WL 950938,  
13 at \*2 (C.D. Cal. Mar. 12, 2013); *Coach, Inc. v. Diva Shoes & Accessories*, No. 10–  
14 5151 SC, 2011 WL 1483436, at \*6 (N.D. Cal. Apr. 19, 2011); *see also, Bryant v.*  
15 *Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010).

16 Indeed, consideration of a defendant’s profits and the plaintiff’s lost revenues  
17 are often key factors in determining appropriate statutory damages. *See Adobe Sys.,*  
18 *Inc. v. Tilley*, C 09-1085 PJH, 2010 WL 309249, at \*5 (N.D. Cal. Jan. 19, 2010)  
19 (“courts . . . have considered whether the amount of damages requested bears a  
20 ‘plausible relationship’ to the plaintiff’s actual damage”); *Rovio Entm’t Ltd v. Royal*  
21 *Plush Toys, Inc.*, No. C 12-5543 SBA, 2014 WL 1153780, at \*2 (N.D. Cal. Mar. 20,  
22 2014) (awarding a statutory damages amount that was “plausible” based on actual  
23 damages because “courts . . . have considered whether the amount of damages  
24 requested bears a ‘plausible relationship’ to the plaintiff’s actual damage.”).

25 It is critical that the jury be permitted to hear relevant evidence relating to  
26 factors that courts have found inform the jury’s broad discretion in determining a just  
27 amount of statutory damages, and Mr. Tregillis provides testimony to assist the jury in  
28 this assessment. Given the due process concerns with awarding statutory damages

1 that bear no relation to actual damages, Defendants would be entitled to present Mr.  
2 Tregillis to provide economic analysis of Plaintiffs’ overall lack of evidence regarding  
3 actual damages even if Plaintiffs ultimately elect to seek to recover statutory damages.  
4 Mr. Tregillis, with his extensive economic background and experience in cases like  
5 this, will be able to provide testimony to the jurors about the financial realities of this  
6 case to aid in their determination.

7 Plaintiffs concede that Mr. Tregillis’ background qualifies him to render  
8 opinions on Plaintiffs’ purported “lost profits” (or lack thereof) and Defendants’  
9 profits, but argue that “his testimony on those subjects is unsupported by data.” Mot.  
10 at 4. Plaintiffs curiously note that “Tregillis does not conclude that no money destined  
11 for Plaintiffs’ products was given to Defendants instead” but rather “states that he is  
12 not aware of any information that money was diverted.” *Id.* at 4. That is precisely the  
13 basis of Mr. Tregillis’ opinion—after reviewing the relevant evidence and testimony,  
14 Mr. Tregillis concluded that there was nothing to support Plaintiffs’ damages theory.  
15 Defendants should not be penalized for Plaintiffs’ failure to come up with any  
16 evidence to support their damages theory.

17 **C. Mr. Tregillis is Qualified to Render an Opinion that Defendants’**  
18 **Works Benefitted, Rather than Harmed, Plaintiffs**

19 While conceding that his testimony is relevant to the case, Plaintiffs argue that  
20 Mr. Tregillis is not qualified to render opinions that: (1) fan films generally benefit  
21 commercial film studios; and (2) that Defendants’ works benefitted Plaintiffs. *See*  
22 Mot. at 1-5. Plaintiffs’ position is that in order to render these opinions, Mr. Tregillis  
23 must be an expert in “the Star Trek films and television series,” “an expert in the film  
24 or television business,” and/or “a fan of Plaintiffs’ products.” *Id.* at 2. While Mr.  
25 Tregillis does not claim to be an expert in those fields, his *opinions*—rather than the  
26 facts underlying them—are predicated on his specialized knowledge of accounting,  
27 economics, and licensing.

28 In rendering his opinion that fan films generally—and Defendants’ works in

1 particular—benefit official studio releases and film franchises, Mr. Tregillis relied  
2 upon the following: Plaintiffs’ box office and DVD revenues (Tregillis Report ¶¶ 10-  
3 11), evidence of continued interest in Star Trek (*id.* ¶¶ 13-23), the amount of money  
4 raised by Defendants’ crowdfunding efforts (*id.* ¶¶ 25-30), the popularity of other fan  
5 films (*id.* ¶ 31), shrinking box office revenues and the studios’ attempts to use box sets  
6 and marketing to garner interest in existing franchises (*id.* ¶¶ 33-39), studios’ use of  
7 social media to market existing franchises and promote their upcoming films (*id.* ¶¶  
8 40-47), Defendants’ testimony regarding the value of social media in generating  
9 revenue from their intellectual property (*id.* ¶ 48), Defendants’ testimony regarding  
10 fan films (*id.* ¶ 55), and recognition from those associated with new Star Trek reboot  
11 movies that fan films are beneficial and do not harm Plaintiffs (*id.* ¶¶ 56-57).

12 Mr. Tregillis then applied his specialized knowledge in accounting, economics,  
13 and finance to conclude—based on this evidence—that “fan films generally benefit  
14 official studio releases and film/story franchises, and that the Axanar Works have  
15 benefited Star Trek and Plaintiffs.” *Id.* ¶ 63. Looking beyond Plaintiffs’ rhetoric,  
16 their complaint about Mr. Tregillis’ testimony appears to be that he is not an expert in  
17 the evidence that he considered, not that he is unqualified to render the opinions. If  
18 Plaintiffs’ argument was accepted, damages expert would almost never be qualified to  
19 testify because they would have to be an expert in the subject matter of the case or the  
20 parties’ businesses.

21 Finally, Plaintiffs’ argument that Mr. Tregillis is not qualified to render his  
22 opinion because “Tregillis incorrectly assumes that *Prelude to Axanar* is a ‘fan film’”  
23 is both factually inaccurate and has zero relevance to this issue. *Id.* at 3-4. Mr.  
24 Tregillis’ opinion is that films and online series and episodes created by fans of Star  
25 Trek benefit the studios by generating further interest in a franchise, translating into  
26 better performance of the studios’ new films and series. *See, e.g.*, Tregillis Report ¶¶  
27 25, 31, 63. This has nothing to do with whether the fan-made productions are labeled  
28 “fan films” or “professional films.” Plaintiffs are free to cross-examine Mr. Tregillis

1 and could have introduced their own evidence as to why Defendants' high-quality  
2 works have harmed, rather than benefitted, them (though they did not come up with  
3 anything). The fact that the *Axanar* works were created by one of Star Trek's biggest  
4 fans, rather than Plaintiffs, is not a faulty assumption but rather an undisputed fact.

5 **IV. CONCLUSION**

6 For all of these reasons, the Court should deny Plaintiffs' Motion *in Limine* No.  
7 9 to exclude the testimony of Christian Tregillis in its entirety.

8  
9 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

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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' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 10**

Hon. Robert G. Klausner

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

1           **I. INTRODUCTION**

2           Plaintiffs’ Motion *in Limine* No. 10 seeks, on specious grounds, to exclude  
3 evidence and testimony from Defendants’ expert witness Professor Henry Jenkins  
4 concerning three topics. Not only are Plaintiffs’ objections baseless, they are  
5 irrelevant: Dr. Jenkins will not be offering testimony on those topics. Plaintiffs offer  
6 *no* objections concerning the *relevant* topics upon which Dr. Jenkins *will* testify—  
7 topics that are highly relevant to key trial issues, and are squarely within Dr. Jenkins’s  
8 area of expertise.

9           Dr. Jenkins will offer expert testimony to provide essential context for the  
10 jury’s evaluation of Plaintiffs’ damages theories. As this Court has recognized, *Star*  
11 *Trek*’s “long history of fan films that stayed free from copyright disputes” will be a  
12 key fact in the jury’s determination of willfulness, as well as whether any  
13 infringement was innocent. ECF 163 at 14. An understanding of this “long history”  
14 will assist the jury in assessing the reasonableness of Alec Peters’s belief that the  
15 *Axanar* works, as “noncommercial fan films,” were noninfringing or “tolerate[d]”  
16 uses. *Id.* Dr. Jenkins’s expertise on this topic, based on more than a quarter century of  
17 active research as one of the leading scholars in this area, is indisputable.

18           Plaintiffs fail even to address, much less object to, Dr. Jenkins’s projected  
19 testimony on this topic. Instead, Plaintiffs ask the Court to preclude Dr. Jenkins from  
20 addressing three topics that he will *not* testify on: the *economic* “impact of fan-  
21 produced films on Plaintiffs”; the legal standard for fair use under copyright law; and  
22 (confusingly) whether Plaintiffs have the right to sue for infringement. Plaintiffs’  
23 objections on these topics are not only irrelevant but spurious: they grossly  
24 mischaracterize Dr. Jenkins’s statements in his Report in an apparent attempt to  
25 prevent Dr. Jenkins from testifying even on relevant topics. The Court should deny  
26 Plaintiffs’ Motion in its entirety

27  
28

1           **II. LEGAL STANDARD**

2           Federal Rule of Evidence 702 permits a witness “who is qualified as an expert  
3 by knowledge, skill, experience, training, or education” to “testify in the form of an  
4 opinion or otherwise if: (a) the expert’s ... specialized knowledge will help the trier of  
5 fact to understand the evidence or to determine a fact in issue; (b) the testimony is  
6 based on sufficient facts or data; (c) the testimony is the product of reliable principles  
7 and methods; and (d) the expert has reliably applied the principles and methods to the  
8 facts of the case.” *Id.* Dr. Jenkins is manifestly qualified to testify as an expert under  
9 this standard.

10           **III. ARGUMENT**

11           **A. Dr. Jenkins is Qualified as an Expert and His Testimony Is Relevant**  
12           **and Will Assist the Jury**

13           **1. Dr. Jenkins’s Specialized Knowledge Qualifies Him as an**  
14           **Expert**

15           Dr. Jenkins is one of the founding fathers of academic study of science fiction  
16 fandom, fan fiction, and fan cultural productions, a subject he has studied and written  
17 on extensively for more than a quarter century. He is the author of seventeen books;  
18 his seminal 1992 book *Textual Poachers: Television Fandom and Participatory*  
19 *Culture* helped to launch the academic study of fandom and fan cultures, and has been  
20 cited in more than forty law journal articles. Topics related to fans and fandom,  
21 including Star Trek fandom, figure prominently in his scholarly research and writings.  
22 Dr. Jenkins has been on the faculty of MIT and the University of Southern California,  
23 where he is currently Provost’s Professor of Communications, Journalism, Cinematic  
24 Art, and Education. He also serves on the editorial boards of the two most prominent  
25 academic journals in the discipline (*Transformative Works and Cultures* and *The*  
26 *Journal of Fandom Studies*).

27           As further discussed below, Dr. Jenkins is uniquely qualified to assist the jury  
28 by testifying concerning the historical and ongoing relationships between the creators

1 and producers of Star Trek, and Star Trek fans; Plaintiffs' history and practice of  
2 tolerating and sanctioning fan fiction, fan film, and other fan uses of aspects of Star  
3 Trek; the social value and productivity of fan creations; and the perceived benefits to  
4 Plaintiffs of fan works such as those of Defendants.

5           **2. Dr. Jenkins's Specialized Knowledge Will Assist the Jury in**  
6           **Determining Willfulness and Innocent Infringement, and**  
7           **Assessing Plaintiffs' Damages**

8           This Court has ruled that "the determination of willfulness must be left to the  
9 jury." ECF 163 at 13. A defendant "who reasonably and in good faith believes his  
10 conduct does not constitute copyright infringement, is not 'willful.'" ECF 163 at 13  
11 (alterations and citations omitted). Similarly, a defendant claiming innocent  
12 infringement "must demonstrate not only a good faith belief that the infringement was  
13 innocent, but that his belief was reasonable." *Broad. Music, Inc. v. Arlos*, 682 F. Supp.  
14 1, 2 (D. Mass. 1986); *United Fabrics Int'l, Inc. v. G-III Apparel Grp., Ltd.*, No. CV13-  
15 00803-ODW AJWX, 2013 WL 7853485, at \*6 (C.D. Cal. Dec. 27, 2013) ("the  
16 applicable standard ... is whether Defendants[] had a good faith, reasonable belief that  
17 their conduct was innocent.").

18           Thus, to determine whether Peters's conduct was willful or innocent, the jury  
19 must assess the *reasonableness* of his "belief that the Axanar works were  
20 noncommercial fan films" and his "understanding... that [CBS] would tolerate such  
21 films." ECF 163 at 14. The jury must also determine whether Peters's belief was held  
22 in good faith.

23           As the Court notes, Peters's belief was heavily informed by the undisputed fact  
24 that "Star Trek has a long history of fan films that stayed free from copyright  
25 disputes." *Id.* Understanding this "long history" and its current state will be critical to  
26 the jury's determination of both the reasonableness and good faith of Peters's belief.  
27 Dr. Jenkins's expert testimony will assist the jury by "provid[ing] a context for  
28 understanding the current state of *Star Trek* fan filmmaking, and ... the complicated

1 history of close partnership and collaboration between the commercial rights holders  
2 and the grassroots fan community.” ECF 142-3 at 2 (“Jenkins Report” or “Report”)<sup>1</sup>.  
3 As discussed above, is a topic on which Dr. Jenkins is indisputably an expert.

4 Dr. Jenkins’s testimony is also directly relevant to the jury’s calculation of the  
5 amount of statutory or actual damages. The jury “has wide discretion in determining  
6 the amount of statutory damages to be awarded.” *Harris v. Emus Records Corp.*, 734  
7 F.2d 1329, 1335 (9th Cir. 1984) (emphasis added). As the trier of fact, it must be  
8 guided by “what is just in the particular case ... considering the nature of the  
9 copyright, the circumstances of the infringement and the like.” *F.W. Woolworth*, 344  
10 U.S. at 232. Among other factors relevant to a jury’s determination of statutory  
11 damages are: whether the defendant’s conduct was willful or innocent, and “the  
12 conduct and attitude of the parties.” 17 U.S.C. § 504(c)(2); *Coach, Inc. v. Am. Fashion*  
13 *Gift*, CV 12-07647-MWF RZX, 2013 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013);  
14 *Coach, Inc. v. Diva Shoes & Accessories*, No. 10–5151 SC, 2011 WL 1483436, at \*6  
15 (N.D. Cal. Apr. 19, 2011); *see also, Bryant v. Media Right Prods., Inc.*, 603 F.3d 135,  
16 144 (2d Cir. 2010). In addition, to the extent Plaintiffs’ failure to take action (legal or  
17 otherwise) against Defendants’ works was informed by this history and practice of fan  
18 engagement, that fact will be relevant to the issue of whether Plaintiffs failed to act to  
19 mitigate their alleged damages. Information about such history and practice will assist  
20 the jury in its determination of the amount of Plaintiffs’ damages.

21 **3. Dr. Jenkins’s testimony is based on sufficient facts or data and**  
22 **is the product of reliable principles and methods**

23 Contrary to Plaintiffs’ arguments, Dr. Jenkins’s Report is based on ample “facts  
24 or data” that are fully addressed in the Report, including his more than a quarter  
25 century of research and writing in precisely this area. (Indeed, the subtitle of his  
26 seminal 1992 book on the subject, *Textual Poachers*, is “Television Fandom and

27 <sup>1</sup> For consistency, since the Report has now been filed multiple times in this action,  
28 page references refer to pages of the Report itself, not to any particular electronically  
filed PDF version of the Report in the Court’s docket.

1 Participatory Culture.”) Dr. Jenkins has published scholarly books on Star Trek  
 2 fandom,<sup>2</sup> patterns of media consumption among fans,<sup>3</sup> and the interaction between  
 3 “old” and “new” media.<sup>4</sup> All of this is plainly set forth in his Report, as is a list of the  
 4 sources he directly relied on in forming his opinions.

5 Plaintiffs’ objection that Dr. Jenkins “does not indicate what data he relied on to  
 6 support his assumptions” is based on a serious mischaracterization of the Report and  
 7 the testimony Dr. Jenkins will offer. Plaintiffs’ insistence that any opinion must be  
 8 based on “financial records,” “data,” or “market” research, is misguided and  
 9 misleading. As discussed below, Dr. Jenkins does not (and never did) purport to offer  
 10 an *economic* analysis of the “dollar value” of fan fiction, fan films, or fan engagement  
 11 generally. Rather, as Plaintiffs’ own cherry-picked quote shows, Dr. Jenkins’s Report  
 12 and testimony describe the “equilibrium [that] had emerged in recent years” between  
 13 copyright owners and fans, and offers his expert opinion about the basis for and  
 14 meaning of that “equilibrium.” *Compare* Motion at 2 *with, e.g.,* Report at 3 (“the  
 15 media industry has learned to value fan engagement **as a social currency** at a moment  
 16 of increased media options and declining consumer commitment”; noting industry  
 17 description of “fans as ‘inspirational consumers’... who promote and advocate for the  
 18 brand”) (emphasis added, internal quotation marks omitted).

19 **B. Plaintiffs’ Objections to Dr. Jenkins’s Testimony on Particular**  
 20 **Topics Lack Merit**

21 **1. Dr. Jenkins Does Not Purport to Offer Economic Analysis**

22 First, Plaintiffs speculate (incorrectly) that Dr. Jenkins will offer testimony  
 23 concerning the *financial* “impact of fan-produced films on Plaintiffs.” Motion at 2.  
 24 Not so. Contrary to Plaintiffs’ attempt to spin Dr. Jenkins’s Report, Dr. Jenkins does  
 25 not purport to opine on financial issues or the market effect of fan films, nor offer

26 <sup>2</sup> *Science Fiction Audiences: Watching Star Trek and Doctor Who*, 1995. Jenkins  
 27 Report at 1.

28 <sup>3</sup> *Fans, Bloggers, and Gamers: Media Consumers in the Digital Age*, 2006. *Id.*

<sup>4</sup> *Convergence Culture: Where Old and New Media Collide*, 2006; *Spreadable Media: Creating Meaning and Value in a Networked Culture*, 2013. *Id.*

1 economic testimony or analysis. Nor does he—nor did his Report—purport to offer an  
 2 economic opinion on the financial or economic “effect, or non-effect” of fan fiction  
 3 generally. Rather, as shown by his Report—which offers his expert opinion based on  
 4 more than a quarter century of study and scholarly research and authorship of at least  
 5 seventeen books—Dr. Jenkins will “provide an overview of fan cultural production  
 6 around *Star Trek*, which provides a context for understanding the current state of *Star*  
 7 *Trek* fan filmmaking, and suggests the complicated history of close partnership and  
 8 collaboration between the commercial rights holders and the grassroots fan  
 9 community.” ECF 75-6 at 2.

10 **2. Dr. Jenkins Does Not Purport to Offer a Legal Opinion on Fair**  
 11 **Use**

12 Plaintiffs next argue—misleadingly and incorrectly—that Dr. Jenkins’s expert  
 13 opinion on whether *Prelude to Axanar* is “transformative” of elements of *Star Trek* is  
 14 a *legal* opinion about fair use. Motion at 3-4. It is no such thing. Unsurprisingly, the  
 15 ordinary English word “transformative” is a scholarly term of art in Dr. Jenkins’s field  
 16 of study. To provide just one example ready to hand, one of the “two most prominent  
 17 academic journals in this space” is named *Transformative Works and Cultures*—and  
 18 Dr. Jenkins serves on its editorial board. Report at 1. The mere fact that this ordinary  
 19 English word is also used as a legal term in copyright law, does not transform Dr.  
 20 Jenkins’s expert opinion on a subject within his area of expertise into a “legal  
 21 opinion.”<sup>5</sup>

22 In any event, the Court’s January 3, 2017 Order renders moot Plaintiffs’  
 23 objections to any potential testimony concerning fair use. ECF 121 (holding that  
 24 Defendants are not entitled to the fair use defense). With the fair use defense no longer  
 25 an issue in this case, there is *no* risk that any use of the term “transformative” by Dr.

26 \_\_\_\_\_  
 27 <sup>5</sup> Symptomatic of Plaintiffs’ confusion is their repeated insistence that Dr. Jenkins  
 28 “opine[s] on transformativeness.” Mot. at 3-4. Unlike the *academic* term  
 “transformative,” the *legal* term of art “transformativeness” appears nowhere in  
 Dr. Jenkins’s Report.

1 Jenkins will confuse or mislead the jury.

2 **3. Dr. Jenkins’s Testimony Concerning Fan Films Is Relevant**

3 Finally, Plaintiffs make the puzzling argument that Dr. Jenkins’s knowledge  
4 and expert opinions concerning fan films is categorically “legally irrelevant” because  
5 “Plaintiffs’ decision as to which infringing parties to sue has no bearing on the  
6 determination of whether Defendants engaged in copyright infringement.” Motion  
7 at 6. Plaintiffs fail to explain what relevance this *non sequitur* has to Dr. Jenkins’s  
8 Report or testimony, which will provide the jury with context that will assist them in  
9 determining whether any potential infringement by Defendant was willful or  
10 innocent—issues that go to damages, not infringement. As discussed above, Dr.  
11 Jenkins’s testimony concerning fan films, fan culture, and the history of the  
12 relationships between rights owners and fans, is directly relevant to this area and to  
13 the jury’s calculation of damages.

14 To the extent Dr. Jenkins’s expert knowledge and opinions concerning fan films  
15 in general informs his testimony and expert opinions, and to the extent it “provides a  
16 context for understanding the current state of Star Trek fan filmmaking, and also  
17 suggests the complicated history of close partnership and collaboration between the  
18 commercial rights holders and the grassroots fan community,” it is directly relevant to  
19 this case and will assist the jury. At all events, there is no basis to categorically  
20 preclude any such testimony.

21 **IV. CONCLUSION**

22 Plaintiffs make *no* objections to any aspects of Dr. Jenkins’s expertise, the  
23 contents of his Report, or his likely testimony, that are relevant to the issues of  
24 willfulness, innocent infringement, and damages. There is no dispute that Dr. Jenkins  
25 is highly qualified as an expert on the topics he will testify on, nor any dispute that his  
26 expertise “will help the trier of fact to understand the evidence or to determine fact in  
27 issue” on these topics. FRE 702. And Plaintiffs’ objections to testimony that they  
28 merely speculate—incorrectly—Dr. Jenkins may offer, are based on



1 mischaracterizations and misinterpretations of his Report. The Court should deny  
2 Plaintiffs' Motion in Limine No. 10.

3  
4  
5 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

6 By: /s/ Erin R. Ranahan  
7 Erin R. Ranahan  
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9 AXANAR PRODUCTIONS, INC.  
10 and ALEC PETERS  
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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
a Delaware corporation,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

23 Defendants.  
24

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 1 TO PRECLUDE  
PLAINTIFFS FROM RELYING  
ON EVIDENCE CONCERNING  
ALLEGED DISCOVERY  
VIOLATIONS**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios  
3 Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants  
4 Axanar Productions, Inc. and Alec Peters (collectively, “Defendants”) to preclude  
5 Plaintiffs from relying on evidence concerning alleged discovery violations.

6 **I. INTRODUCTION**

7 By their motion in limine, Defendants seek to exclude from evidence the fact  
8 that Alec Peters failed to produce emails, between himself and his colleagues and  
9 collaborators, relating to his copying of the Star Trek works, and relating to his  
10 production of the Axanar Works. Further, Defendants’ motion seeks to exclude  
11 evidence that Peters failed to turn over his public statements, which are inconsistent  
12 with his post-litigation testimony, or his social media posts and communications that  
13 conflict with positions he has taken in this litigation. Evidence of this nature is not  
14 overly prejudicial to Defendants and is relevant to Plaintiffs’ claims because it is  
15 probative of Peters’ knowledge of the infringing nature of the Axanar Works.  
16 Further, Peters’ failure to turn over virtually all of the evidence that conflicts with  
17 his post-litigation arguments and positions is highly relevant to his credibility as a  
18 witness, and must be admitted.

19 **II. FACTS**

20 **A. Defendants’ Failure To Comply With Discovery Obligations.**

21 On June 21, 2016, the parties held a meet and confer regarding their  
22 respective requests for production and counsel for Plaintiffs, David Grossman and  
23 Jonathan Zavin, met and conferred with Defendants’ counsel Erin Ranahan. At the  
24 meeting, Ms. Ranahan agreed that Peters would produce all source material, other  
25 than Star Trek television series and films, which he used to create *Prelude to*  
26 *Axanar*, the *Vulcan Scene*, and the upcoming Axanar feature (together, the “Axanar  
27 Works”). Declaration of David Grossman (“Grossman Decl.”), ¶ 3. The parties  
28 agreed that they would not be exchanging copies of any Star Trek television

1 episodes and motion pictures and Ms. Ranahan expressly stated that to do so would  
2 be unnecessary as Mr. Peters informed her that he already owned all of the Star Trek  
3 films and television series. Peters, in his deposition, stated [REDACTED]  
4 [REDACTED]. Grossman Decl. ¶  
5 3, Ex. A.

6 While the parties agreed that exchanging videos and television episodes that  
7 each of them already had would be unnecessary, Plaintiffs did not relieve Mr. Peters  
8 or Axanar Productions, of producing other responsive discovery, including the  
9 source materials he used to create the Axanar Works, and any sketches, storyboards,  
10 or communications relating to the creation of the Axanar Works.

11 Specifically, Defendants were obligated to produce all of their relevant  
12 website postings, emails, text messages, social media postings and statements on  
13 crowdfunding websites, such as Indiegogo and Kickstarter. Defendants, however,  
14 failed to do so. Mr. Peters produced virtually none of the emails, website postings,  
15 social media postings, Facebook communications and podcasts that will be the  
16 subject of this trial. Those documents show that Mr. Peters intended to profit (and  
17 did profit) from the Axanar Works, and that Peters set out to copy Plaintiffs’ Star  
18 Trek works – down to excruciating details. Peters’ own minimal document  
19 production involved only a smattering of documents, all of which he believed would  
20 benefit his litigation position.

21 For example, at his deposition, Peters [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED].  
25 Grossman Decl. ¶ 4, Ex. A. However, despite Peters’ use of this document as  
26 source material, Defendants failed to produce *The Four Years War* during  
27 discovery, or at all. Instead, Plaintiffs learned of Defendants’ use of *The Four Years*  
28

1 War from a podcast made by Peters on or around May 31, 2016, several months  
2 after Plaintiffs filed their complaint.

3 Additionally, Defendants withheld thousands of pages of emails between  
4 Peters and Christian Gossett (the director of *Star Trek: Prelude to Axanar*) about the  
5 Axanar Works. Peters' extensive communications with Mr. Gossett were only  
6 uncovered when Mr. Gossett produced them in response to a third party subpoena in  
7 late October 2016. In fact, Peters, and the other key witness for Peters, Robert  
8 Burnett, withheld virtually all key e-mails relating to this case. At his first  
9 deposition, [REDACTED], Grossman Decl.  
10 ¶ 5, Ex. A. Faced with the fact that Gossett subsequently produced thousands or  
11 relevant e-mails between himself and Peters, which Peters had not produced, at his  
12 second deposition Peters testified that [REDACTED]. Grossman  
13 Decl. ¶ 6, Ex. A. Further, Robert Burnett, the director of Axanar (and represented  
14 by Peters' counsel), whose documents had been subpoenaed, failed to turn over any  
15 e-mails between himself and Peters, on the grounds that that this would be  
16 burdensome since Peters had them all and had turned them over to Plaintiffs.  
17 Grossman Dec. ¶ 7, Ex. B.

18 Peters also failed to produce any of the social media messages between  
19 himself and his collaborators on the Axanar project, including the co-writer of the  
20 Axanar script, Bill Hunt, Peters' ex-girlfriend and paid crew-member, Diana  
21 Kingsbury, and Robert Burnett, the director of the upcoming Axanar feature. The  
22 documents that Plaintiffs *were* able to obtain through independent investigation  
23 show that Peters engaged in extensive discussions regarding the creative details of  
24 the Axanar project, including deciding which of Plaintiffs' copyrighted materials  
25 were to be used as source material to create the Axanar Works. Further, Peters  
26 engaged in communications with third party witness Terry McIntosh, none of which  
27 he produced, but that show that Peters was attempting to meet with Netflix, was  
28 using the name "Star Trek" to garner online views for the infringing Axanar Works,

1 and was attempting to leverage his use of Plaintiffs’ intellectual property so that he  
2 could become a “producer.”

3 Mr. Peters also has denied that he “copied” Star Trek, and has done so by  
4 hiding the very evidence that would contradict his litigation statements. For  
5 example, in the First Amended Complaint, Plaintiffs alleged that Defendants copied  
6 many elements from Plaintiffs’ intellectual property: “including the United  
7 Federation of Planets, ‘beaming up,’ Klingons, Vulcans, the Starship Enterprise,  
8 spacedocks, [and] the interrelationship between species, planets and alliances.  
9 Defendants have intentionally sought to replicate the Star Trek Copyrighted Works  
10 (down to copying costumes, makeup and jewelry) and, in doing so, they have sought  
11 to create a ‘Star Trek’ film.” FAC, Dkt. No. 26, ¶ 46. Defendants denied this  
12 allegation: “Defendants deny that *Prelude to Axanar* copies any protected  
13 expression from any of the Star Trek Works. Defendants deny that *Prelude to*  
14 *Axanar* is substantially similar to, is derivative of, or infringes any of the Star Trek  
15 Works.... Defendants deny the allegations in paragraph 46. In particular,  
16 Defendants deny...**that Soval’s robe in Prelude to Axanar contains ‘ancient**  
17 **Vulcan script’ (the robe contains Chinese letters).**” Dkt. No. 47, ¶ 46, pp.8-9  
18 (emphasis added).

19 The Vulcan (robe) costume depicted in the FAC does not contain “Chinese  
20 letters” – and based on Mr. Peters’ unproduced emails, it is clear that his attention to  
21 detail in recreating the Star Trek universe would not have allowed for “Chinese  
22 letters” to appear on the costume of a fictional alien character in the Star Trek  
23 universe. Mr. Peters engaged in many email exchanges approving innumerable  
24 details of the *Star Trek: Prelude to Axanar*, and *Star Trek: Axanar* productions and,  
25 in one of those exchanges, Mr. Peters approved the costume to be worn by a Vulcan  
26 ambassador character named Soval. Mr. Peters (in the email he did not produce)  
27 stated: “I think the outer robe works too. We can add Vulcan Glyphs.” Grossman  
28 Decl. ¶ 8, Exs. C-D.

1 Below on the left is the costume that Mr. Peters approved, before he added  
2 the Vulcan writing, compared to the image on the right from the FAC, which Mr.  
3 Peters claimed was not Vulcan writing, but rather was unprotected “Chinese letters.”



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12 The evidence now shows that Mr. Peters knew, at the time these denials were  
13 made, that he had set out to create an authentic, professional Star Trek film, and that  
14 he was engaged in a lengthy process, documented by **many hundreds of**  
15 **unproduced emails**, through which he was attempting to willfully copy Plaintiffs’  
16 intellectual property. Peters’ attempts to hide the true evidence from the Court and  
17 the jury is relevant to his credibility, and to his claims that he did not engage in  
18 willful infringement.

19  
20 Peters’ extensive withholding of documents and information is relevant to his  
21 credibility and also to his willful conduct in deliberately copying all aspects of  
22 Plaintiffs’ works. Burnett’s withholding of e-mails is likewise relevant to his  
23 credibility. The emails withheld by Peters (but produced by Christian Gossett, the  
24 director of *Star Trek: Prelude to Axanar*), demonstrate the degree of copying  
25 engaged in by Peters and the jury should be made aware that the information that is  
26 most damaging to Peters’ claims of “innocent” infringement was in his possession  
27 and control, but was not produced by him in this lawsuit.

28

1 **III. ARGUMENT**

2 Under Federal Rule of Evidence 402, “[r]elevant evidence is admissible.” By  
3 withholding relevant evidence regarding the source material of the Axanar Works,  
4 his copying of elements of Plaintiffs’ works, and other material issues, Peters sought  
5 to diminish the extent that the Axanar Works are derivative of Plaintiffs’ properties,  
6 and his own involvement in selecting the source material to be used. Pursuant to 17  
7 U.S.C. § 504(c), if the “court finds, that infringement was committed willfully, the  
8 court in its discretion may increase the award of statutory damages . . . .”

9 Defendants’ withholding of probative materials is relevant to establishing the  
10 willful nature of their actions. The willful nature of the withholding is especially  
11 egregious here, where a considerable number of the documents were readily  
12 available to Peters throughout the litigation.

13 Defendants will also not be improperly prejudiced by admission of their  
14 failure to turn over (or delete) relevant documents in this lawsuit. Defendants’  
15 decision to withhold the subject materials constituted a calculated risk that the true  
16 source material for the Axanar Works, and the full extent of Defendants’ copying of  
17 Plaintiffs’ works, would remain hidden. Excluding this evidence now would  
18 reward Defendants for their own sharp dealing. This evidence is directly relevant to  
19 Peters’ (and Burnett’s) credibility, and should be permitted at trial in this action.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
22 motion in limine no. 1 to exclude reference to Defendants’ failure to comply with  
23 discovery obligations be denied.

24

25 Dated: January 6, 2017

LOEB & LOEB LLP  
JONATHAN ZAVIN  
DAVID GROSSMAN  
JENNIFER JASON

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By: /s/ David Grossman



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13 UNITED STATES DISTRICT COURT  
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15

16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
a Delaware corporation,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

23 Defendants.  
24

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 2 TO PRECLUDE  
PLAINTIFFS FROM RELYING  
ON EVIDENCE THAT WAS NOT  
TIMELY DISCLOSED UNDER  
THE COURT'S SCHEDULING  
ORDER**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios  
3 Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine (“Motion”) by  
4 Defendants Axanar Productions, Inc. and Alec Peters (collectively, “Defendants”) to  
5 exclude reference to documents and materials not timely produced in discovery, or  
6 at all, including the Star Trek works that Defendants infringed.

7 **I. INTRODUCTION**

8 By their motion in limine, Defendants seek to exclude from evidence all of  
9 the episodes of the Star Trek television series and the thirteen Star Trek films  
10 (collectively, the “Star Trek Copyrighted Works”) as well as evidence from *The*  
11 *Four Years War*, which Defendants themselves attempted to conceal.

12 Defendants’ motion is deliberately misleading as they claim to be somehow  
13 surprised by the fact that each and every film and episode of Star Trek was not  
14 produced to them until those works were filed in November in connection with  
15 Plaintiffs’ motion for summary judgment. The entire premise of Defendants’  
16 motion in limine is false, and is an attempt to mislead the Court. Defendants assert  
17 that all of these videos (which are publicly available **and** owned by their client)  
18 should be excluded from trial, on the grounds that they were not produced in  
19 discovery. However, Defendants fail to disclose to the Court that neither party  
20 produced videos or DVDs of the Star Trek works to the other – as the parties  
21 specifically agreed that to do so would be unnecessary. In June of 2016, the parties  
22 met and conferred in person regarding numerous discovery issues, and the parties  
23 agreed that no such exchange of Star Trek films and television episodes was  
24 necessary. Ms. Ranahan, who attended that meeting on behalf of Defendants, stated  
25 that such an exchange was entirely unnecessary because her client, Alec Peters,  
26 already had all of those works in his possession. Thereafter, Mr. Peters’ deposition  
27 was taken, and he confirmed exactly what Ms. Ranahan had represented, stating that  
28 [REDACTED]. Not surprisingly,

1 following Plaintiffs' document production, Defendants never requested copies of the  
2 films and television episodes. Defendants even filed a motion to compel in which  
3 they demanded dozens of categories of documents, but they failed to request any of  
4 the films or television episodes that they now are seeking to exclude.

5 Defendants' motion is at odds with their agreements and conduct in  
6 discovery. The Star Trek films and television episodes are at the heart of Plaintiffs'  
7 claims of copyright infringement and the jury should be allowed to see excerpts to  
8 illustrate similarities between the Star Trek Copyrighted Works and the Axanar  
9 Works.

10 Defendants have also moved to exclude the testimony of John Van Citters.  
11 Defendants have been aware of Mr. Van Citters testimony for over two months. Mr.  
12 Van Citters is an employee of Plaintiff CBS and his knowledge of Star Trek is  
13 extensive and beyond that of a lay person as he has been professionally involved  
14 with the Star Trek franchise for more than ten years. He was timely designated as  
15 an employee-expert (a party-employed witness that has knowledge on a relevant  
16 subject matter beyond that of an ordinary lay person), and yet Defendants declined  
17 to attempt to take his deposition on this topic. There is no basis to exclude Mr. Van  
18 Citters' testimony from trial, Defendants' motion is untimely and improper  
19 (Defendants failed to meet and confer at all about their request to exclude Mr. Van  
20 Citters' testimony), and it should be denied.

## 21 **II. FACTS**

### 22 **A. The Nature of the Disputed Evidence.**

23 Since 1966, Plaintiffs and their predecessors have produced six television  
24 series and thirteen movies taking place both before and after the events depicted in  
25 *Star Trek: The Original Series*. Combined, the collection contains more than 700  
26 hundred of hours of video content, all of which is widely available on DVD, Blu-  
27 Ray, and digital streaming formats.

28

1 Peters claims to be a fan of the Star Trek content produced by Plaintiffs,  
2 including the Star Trek Copyrighted Works. He claims to have [REDACTED]

3 [REDACTED]  
4 [REDACTED]. Declaration of David Grossman (“Grossman Decl.”) ¶ 2, Ex. A.

5 Peters also testified that [REDACTED]

6 [REDACTED]. Grossman Decl. ¶ 3, Ex. A.

7 *The Four Years War* is a booklet created by the FASA Corporation (under  
8 license from Paramount, who owns the copyright) as a companion to *Star Trek: The*  
9 *Role Playing Game*. It was written to give players background on the fictional 23rd  
10 century conflict between the United Federation of Planets and the Klingon Empire,  
11 and includes articles and first-hand accounts purportedly written by denizens of the  
12 period. *The Four Years War* was created for a niche market and copies are now  
13 difficult to obtain. Defendant Alec Peters, however, [REDACTED] and he and the  
14 director of *Star Trek: Prelude to Axanar* (Christian Gossett) used this publication as  
15 a “bible” for their creation of the Axanar Works. Grossman Decl. ¶¶ 4-5, Exs. A-C.

16 Mr. Peters also supervised the creation of an “illustrated script” of *Star Trek:*  
17 *Prelude to Axanar*, which intersperses storyboard images, source materials, and  
18 other visuals against the wording of the script for that work. Although it was  
19 created by Defendants, requested in discovery, and Defendants failed and refused  
20 (repeatedly) to turn it over, they now seek to exclude it from evidence on the  
21 frivolous basis that their own document that they refused to disclose (and that was  
22 eventually turned over in discovery by a third party) was not re-produced to them.

23 Mr. Van Citters is an employee of CBS and has extensive knowledge of Star  
24 Trek. His testimony will assist those members of the jury who may not already be  
25 familiar with Star Trek themes and iconography. He has been known to Defendants  
26 since before this litigation began, and he was deposed by Defendants in this lawsuit  
27 as a fact witness and a PMK witness. On November 2, 2016, the same day that  
28 Defendants designated their experts, he was designated by Plaintiff as a non-retained

1 expert regarding the Star Trek Copyrighted Works. Declaration of Jonathan Zavin  
2 (“Zavin Decl.”) ¶ 5, Ex. C. Defendants have made no attempt to depose him as an  
3 expert. *Id.*, ¶ 6; Grossman Decl. ¶ 6. Further, Defendants never met and conferred  
4 regarding their intention to exclude Mr. Van Citters, even though they met and  
5 conferred regarding all of their proposed motions to exclude on multiple occasions.  
6 Zavin Decl. ¶ 4, Ex. B. Defendants’ motion *in limine* contains no explanation for  
7 their failure to comply with the Court’s rules on this point and, instead, falsely  
8 asserts that Defendants met and conferred in compliance with Local Rule 7-3.

9 **B. The Parties’ Agreement to Not Exchange This Content.**

10 On June 21, 2016, the parties held a meet and confer regarding their  
11 respective requests for production and counsel for Plaintiffs, David Grossman and  
12 Jonathan Zavin, met and conferred with Defendants’ counsel Erin Ranahan. At the  
13 meeting, Ms. Ranahan agreed that Peters would produce all source material, other  
14 than Star Trek television series and films, which he used to create the Axanar  
15 Works. Grossman Decl. ¶ 3; Zavin Decl. ¶ 2. The parties agreed that they would  
16 not be exchanging copies of any Star Trek television episodes and motion pictures  
17 and Ms. Ranahan expressly stated that to do so would be unnecessary as Peters  
18 informed her that he already owned all of the Star Trek films and television series.  
19 *Id.* Peters, in his deposition, stated [REDACTED]  
20 [REDACTED]. Grossman Decl. Ex. A.

21 Based on the fact that the parties had entered into this agreement not to  
22 exchange copies of films and television shows that both already possessed, neither  
23 side made any demand of the other, during discovery, to produce such content.  
24 Thus, Defendants do not attach a single email, letter or other communication to their  
25 motion in limine in which they ever made any demand for these DVDs (which their  
26 client already possessed). Moreover, Defendants filed a motion to compel in this  
27 case, and they failed to identify any claimed videos that had not been produced by  
28 Plaintiffs – precisely because Plaintiffs were not required to do so, and the parties

1 had expressly agreed that no such exchange would be necessary. *See* Dkt. No. 54  
2 (Defendants’ Motion to Compel).

3 Further, and consistent with Ms. Ranahan’s representation during the parties’  
4 discovery meet and confer, Mr. Peters testified [REDACTED]  
5 [REDACTED]. Grossman Decl. ¶ 3, Ex. A  
6 Defendants’ motion to exclude is, therefore, frivolous as it deliberately  
7 misrepresents to the Court the parties’ prior agreement, and attempts to exclude  
8 critically relevant evidence which Defendants have possessed at all relevant times.

9 Defendants’ attempt to exclude *The Four Years War* book from this trial is  
10 similarly baseless. This is a book, copyrighted by Paramount, which Peters owns  
11 and which he and the director of *Star Trek: Prelude to Axanar*, Christian Gossett,  
12 used as a “bible” for the creation of the Axanar Works. Grossman Decl. ¶¶ 4-5,  
13 Exs. A-C. Nevertheless, Peters did not turn this document over in discovery, and  
14 Plaintiffs were only able to uncover the use of this work as source material for the  
15 Axanar Works through their own efforts and by obtaining discovery from third  
16 parties. Notably, the email between Mr. Gossett and Peters wherein *The Four Years*  
17 *War* book is described as the “bible” for the Axanar Works was not turned over by  
18 Defendants. In any case, a copy of this book was given to Defendants by Plaintiffs  
19 in October 2016 at the time of Mr. Peters first deposition, so by trial they will have  
20 had it in their possession for more than three months, thereby eliminating any claim  
21 of surprise or prejudice.

22 **C. Mr. Van Citters Was Timely Disclosed, Defendants Failed to Meet**  
23 **and Confer Regarding Their Intent to Exclude Him, and There Is**  
24 **No Basis for Their Request.**

25 John Van Citters is an employee of Plaintiff CBS, and he was deposed during  
26 this action, as both a percipient witness and as the person most knowledgeable for  
27 Plaintiff CBS on a number of subjects. Mr. Van Citters is also known to Defendant  
28 Peters, and Peters and Mr. Van Citters engaged in numerous email exchanges, over

1 the course of several years, prior to the filing of this lawsuit. After Mr. Van Citters  
2 was deposed, on November 2, 2016, he was designated as a non-retained expert  
3 under Federal Rule of Civil Procedure 26. Zavin Decl. ¶ 5, Ex. C. Mr. Van Citters  
4 was designated to testify regarding his knowledge of the Star Trek Copyrighted  
5 Works, including the elements that appear in the Axanar Works which were copied  
6 from Plaintiffs' films and television shows. Mr. Van Citters was designated as an  
7 expert the same day as Defendants designated their experts, and within the time  
8 permitted by the Court's scheduling order and rules.

9 Defendants argue that, during the PMK deposition, Mr. Van Citters was  
10 instructed not to testify regarding the Star Trek Copyrighted Works, but this is false.  
11 The relevant testimony speaks for itself, and shows that Mr. Van Citters was only  
12 instructed not to testify regarding attorney-client communications involved in the  
13 creation of a specific chart for purposes of litigation. Zavin Decl. ¶ 3, Ex. A.  
14 Indeed, Defendants' counsel, during that deposition, was expressly advised that  
15 Defendants could inquire regarding the copying of the works themselves, as  
16 opposed to Mr. Van Citters' communications with counsel regarding a post-  
17 litigation chart. *Id.* Defendants, however, declined to do so, and there is no basis  
18 for their assertion that Mr. Van Citters was instructed not to testify regarding  
19 Defendants' copying of Plaintiffs' works.

20 Further, after Mr. Van Citters was designated as a non-retained expert, the  
21 subject matter of his testimony was disclosed to Defendants, and Defendants never  
22 made any attempt to depose Mr. Van Citters regarding his designated testimony.  
23 Zavin Decl. ¶ 6, Grossman Decl. ¶ 6. Defendants also failed to disclose that they  
24 intended to move to exclude Mr. Van Citters' testimony from trial. Defendants met  
25 and conferred on multiple occasions regarding their proposed motions *in limine*,  
26 both on the phone and through email, and they failed to identify Mr. Van Citters'  
27 testimony (at all) as a subject of any of their motions to exclude. Zavin Decl. ¶ 4,  
28 Ex. B.



1 **III. ARGUMENT**

2 Under Federal Rule of Civil Procedure 37(c)(1) (“Rule 37”), “[i]f a party fails  
3 to provide information... as required by Rule 26(a) or (e), the party is not allowed to  
4 use that information... to supply evidence... at a trial, unless the failure was  
5 substantially justified or is harmless.”

6 Here, Plaintiffs’ decision not to provide copies of the Star Trek Copyrighted  
7 Works to Defendants was both substantially justified and harmless. First, the  
8 decision to not produce the Star Trek Copyrighted Works **was according to an**  
9 **agreement with Defendants’ counsel**, who specifically declined to exchange  
10 copies of the Star Trek films and television series during the meet and confer  
11 process. Second, Defendants’ counsel stated at the meet and confer that Peters  
12 already had copies of all of these works – and Peters’ deposition testimony  
13 [REDACTED]. Third, because the parties had already agreed not to  
14 exchange these works, neither side made any request of the other during discovery  
15 to produce these documents. Indeed, Defendants filed a wide-ranging motion to  
16 compel in September of 2016, but failed to mention, at all, that they were not in  
17 possession of the Star Trek Copyrighted Works that had been discussed in the First  
18 Amended Complaint and in Plaintiffs’ detailed interrogatory responses describing  
19 the relevant works and infringements.

20 Similarly, Defendant Alec Peters [REDACTED].  
21 Grossman Decl. ¶ 4, Ex. A. Had he disclosed its use at the outset of the litigation as  
22 he was obligated, the parties would have also likely agreed to forgo an unnecessary  
23 exchange. And, in any case, because Peters [REDACTED] knew the significance of  
24 *The Four Years War* long before Plaintiffs, Defendants cannot be harmed by  
25 Plaintiffs’ ignorance of Peters’ copying of that work. Finally, at his deposition in  
26 October 2016, more than three months before trial, Peters was provided with another  
27 copy of *The Four Years War*, so he can hardly claim “surprise” at trial. Thus, under  
28 Rule 37, there is no bar to the use of the Star Trek Copyrighted Works, or *The Four*

1 *Years War*, in the upcoming trial. Any argument to the contrary is at best  
2 disingenuous, and, at worst, a deliberate attempt to trick Plaintiffs and withhold vital  
3 information from the jury.

4 Defendants also seek to exclude yet another document that they possess, and  
5 failed to turn over themselves in discovery – the “illustrated script” that Peters  
6 created of *Star Trek: Prelude to Axanar*. This document was undoubtedly called for  
7 in discovery – it was provided to donors as a “perk” during Peters’ fundraising  
8 campaigns – and yet Defendants’ counsel failed and refused to turn this over, even  
9 after its existence was disclosed in discovery. Plaintiffs eventually obtained a copy  
10 of the illustrated script from a third party witness – Terry McIntosh – whom both  
11 sides deposed in this action. Defendants’ request that the Court exclude evidence  
12 that they themselves have been in possession of from the inception of this lawsuit is  
13 frivolous and should be rejected.

14 Likewise, there is absolutely no basis for the exclusion of Mr. Van Citters’  
15 proposed testimony from this trial. Mr. Van Citters was noticed as a percipient  
16 witness by Defendants, and was also designated as the PMK witness for Plaintiff  
17 CBS, and his testimony was taken by Defendants’ counsel at the same time in both  
18 of those capacities. During that deposition, Mr. Van Citters was only instructed not  
19 to answer questions relating to attorney-client privilege. Some of the privilege  
20 issues arose during questions regarding Mr. Van Citters’ participation in the creation  
21 of a specific chart that was created for this lawsuit. Mr. Van Citters was instructed  
22 not to answer questions regarding his communications with counsel, but  
23 Defendants’ counsel was expressly advised that Mr. Van Citters would answer  
24 questions regarding the works that were copied so long as specific communications  
25 with counsel were not at issue. Zavin Decl. ¶ 3 Ex. A (“You’re free to obviously  
26 ask him about the substance of the chart...”). Defendants declined to ask Mr. Van  
27 Citters at that time about his knowledge of Defendants’ copying or of specific  
28 elements that were copied by Defendants.

1 Defendants also assert that the specialized knowledge of Mr. Van Citters is  
2 insufficient to qualify him as an expert under *Daubert v. Merrell Dow*  
3 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because: “Plaintiffs do not demonstrate  
4 that he has specialized knowledge that would ‘aid the jury in resolving a factual  
5 dispute.’” Motion at 6. Defendants claim that Mr. Van Citters merely consumed  
6 the Star Trek Copyrighted Works and is therefore not qualified as an expert under  
7 *Daubert*. Defendants are incorrect. Mr. Van Citters is not a casual fan of Star Trek  
8 who has merely watched the episodes. He has spent more than ten years of his  
9 professional life working with Star Trek in an executive capacity. During that time,  
10 Mr. Van Citters has been in charge of Star Trek product development, which is the  
11 creation and licensing of authorized Star Trek products, and he has also been in  
12 charge of ensuring that those products are compatible with the existing Star Trek  
13 universe and the existing Star Trek Copyrighted Works. Zavin Decl. ¶ 5, Ex. C  
14 (attaching 11/2 designation). Mr. Van Citters is required to know and to understand  
15 the entire Star Trek universe and its individual works as part of his daily  
16 responsibilities. Mr. Van Citters is uniquely qualified to assist the jury is in  
17 understanding the common themes and iconography that tie together the entire Star  
18 Trek franchise, and which can be seen throughout the Axanar Works. Therefore,  
19 under *Daubert*, and its progeny, Mr. Van Citters should be permitted to testify to  
20 subjects outside the knowledge of laypersons. *See VIP Prods., LLC v. Jack Daniel's*  
21 *Prods.*, 2016 U.S. Dist. LEXIS 133387, at \*45-46 (D. Ariz. Sep. 27, 2016) (citing  
22 *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir.  
23 2004)) (“Experience, training and education may provide a sufficient foundation for  
24 an expert’s testimony” concerning consumer behavior).

25 Further, Mr. Van Citters was designated as an expert under Federal Rule of  
26 Civil Procedure 26(a)(2)(C) as a non-retained or “employee” expert. Although Mr.  
27 Van Citters could be qualified as an independent *Daubert* expert, that is not  
28 necessary here. After Mr. Van Citters was identified as a non-retained expert,

1 Defendants made no attempt whatsoever to depose him. Although Plaintiffs sought  
 2 to depose Defendants’ purported experts (Christian Tregillis and Henry Jenkins),  
 3 and Ms. Ranahan refused to make either of them available for their noticed  
 4 depositions, Defendants did not serve a deposition notice regarding Mr. Van Citters’  
 5 proposed testimony and never requested, in any way, that he be deposed regarding  
 6 the subject matter of his designated testimony. Zavin Decl. ¶ 6; Grossman Decl. ¶  
 7 6. Not only did Defendants fail to depose Mr. Van Citters, rendering their request to  
 8 exclude him moot, they also failed to meet and confer regarding this motion *in*  
 9 *limine* – in violation of Local Rule 7-3. During the parties’ meet and confer on  
 10 December 9, 2016, Ms. Ranahan did not make any mention of Defendants’ intention  
 11 to move to exclude Mr. Van Citters. Zavin Decl. ¶ 4. Further, following that  
 12 telephonic meet and confer, the parties exchanged (and supplemented) their  
 13 respective proposed lists of motions *in limine* as a continuation of the meet and  
 14 confer process. *Id.*, Ex. B. Defendants, again, did not identify Mr. Van Citters’  
 15 proposed testimony in either their telephonic meet and confer or in their written lists  
 16 of proposed motions to exclude. Defendants have not provided any reason for their  
 17 failure to meet and confer, and instead, represented to the Court that they complied  
 18 with Local Rule 7-3 prior to filing this motion. Defendants’ motion should be  
 19 denied.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
 22 motion in limine no. 2 to preclude Plaintiffs from relying on evidence that was not  
 23 timely disclosed under the Court’s scheduling order be denied.

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Dated: January 6, 2017

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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
a Delaware corporation,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

23 Defendants.  
24  
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27  
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Case No.: 2:15-cv-09938-RGK-E

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 3 TO PRECLUDE  
PLAINTIFFS FROM  
INTRODUCING EVIDENCE  
REGARDING ALLEGEDLY  
INFRINGEMENTS NOT  
IDENTIFIED IN THE FIRST  
AMENDED COMPLAINT**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017



1 booklet that was designed for use as a companion text to the primary game  
2 instructions. Presented as a compendium of fictional historical analysis, firsthand  
3 accounts, and technical details, *The Four Years War* was intended to give players a  
4 broad understanding of the Federation’s war with the Klingon Empire in the 23rd  
5 century, and Garth of Izar’s role in that war. *The Four Years War* is no longer in  
6 print, but can be obtained online.

7 Defendant Alec Peters [REDACTED].

8 Declaration of David Grossman (“Grossman Decl.”) ¶ 2, Ex. A.

9 **B. *The Four Years War* is Included in the FAC**

10 Paragraph 19 of the FAC is as follows:

11  
12 19. Plaintiffs also own the United States copyrights in  
13 numerous other Star Trek works, including works in which  
14 Garth of Izar appears, including but not limited to the  
15 following novels: Garth of Izar (Registration No.  
16 TX0005745716, owned by Paramount), Strangers from the  
17 Sky (Registration No. TX0006429184, owned by CBS),  
18 and Infinity’s Prism (Registration No. TX0006872810,  
19 owned by CBS), as well as works in which starships  
20 appear, including but not limited to Star Trek Titan: Sword  
21 of Damocles (Registration No. TX0007050792, owned by  
22 CBS)(collectively, the “Star Trek Books”) (the “Star Trek  
23 Books,” together, with the “Star Trek Television Series”  
24 and the “Star Trek Motion Pictures,” are referred to  
25 collectively as the “Star Trek Copyrighted Works”).

26 *The Four Years War* is a work in which Garth of Izar appears and is therefore  
27 specifically included in both the defined term Star Trek Books (which by its own  
28 terms was not limited to only the few specific books named in paragraph 19), and  
consequently in the defined term Star Trek Copyrighted Works. It is the Star Trek  
Copyrighted Works that the Plaintiffs alleged in the FAC that the Defendants  
infringed. See FAC ¶¶ 28, 30, 41, 44, 48, 55, 57, 63 and 67. Thus, Defendants’  
motion is completely frivolous in that the FAC itself put them on notice of a claim  
regarding all books in which Garth of Izar appeared. It is rendered even more



1 frivolous because the work, *The Four Years War*, was specifically identified to  
2 Defendants in discovery as an infringed work.

3 **C. Peters’ Failure to Produce This Content.**

4 On June 21, 2016, the parties held a meet and confer regarding their  
5 respective requests for production. Counsel for Plaintiffs, David Grossman and  
6 Jonathan Zavin, met and conferred with Defendants’ counsel Erin Ranahan. At the  
7 meeting, Ms. Ranahan agreed that Peters would produce all source material, other  
8 than the Star Trek television series and films, which he used to create the Axanar  
9 Works. Grossman Decl. ¶ 3.

10 At his deposition, Peters [REDACTED]  
11 [REDACTED]. Grossman Decl. ¶ 4, Ex. A. However, despite  
12 Peters’ use of this document as source material, Defendants failed to produce *The*  
13 *Four Years War* during discovery, or at all. Instead, Plaintiffs learned of  
14 Defendants’ use of *The Four Years War* in or around September 2016 from a  
15 podcast published by Peters on or around May 31, 2016, five months after Plaintiffs  
16 filed this lawsuit, and months after the filing of the amended complaint. Defendants  
17 also were able to obtain, in October 2016, from the director of *Star Trek: Prelude to*  
18 *Axanar*, Christian Gossett, emails with Mr. Peters regarding use of *The Four Years*  
19 *War* to create the Axanar Works. In fact, in these emails, which were not turned  
20 over, without any explanation for their withholding, by Peters; Gossett and Peters  
21 discuss the use of *The Four Years War* as a “bible” for their creation of the Axanar  
22 Works. Grossman Decl. ¶ 5, Exs. B and C.

23 Finally, after the discovery of Defendants’ use of this document, Plaintiffs  
24 served interrogatory responses that specifically identified *Star Trek: The Role*  
25 *Playing Game* – and *The Four Years War* as infringed works. See Declaration of  
26 Kelly Oki, Exs. 1 and 2 (ECF Nos. 75-3 and 75-4).

27 Defendants, therefore, have been aware of this evidence at all relevant times.  
28 They were specifically told during discovery that *The Four Years War* was one of

1 the works copied by Peters (which Peters already knew) and there is no basis for the  
2 exclusion of such evidence.<sup>1</sup>

### 3 **III. ARGUMENT**

4 Under Federal Rule of Civil Procedure 8(a)(2), a complaint must include only  
5 “a short and plain statement of the claim showing that the pleader is entitled to  
6 relief.” To comply with Rule 8, “[s]pecific facts are not necessary; the statement  
7 need only give the defendant fair notice of what the... claim is and the grounds upon  
8 which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations and internal  
9 quotation marks omitted). For a copyright complaint, it is sufficient if it “alleges  
10 representative acts of infringement, rather than a comprehensive listing.” *Blizzard*  
11 *Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd.* 3:15- cv-04084-CRB, 2015 WL  
12 8178826, at \*6 (N.D. Cal. Dec. 8, 2015). In fact, as seen above, the booklet for *The*  
13 *Four Years War* was included in the FAC.

14 Furthermore, Rule 15(b) of the Federal Rules of Civil Procedure provides  
15 that, “[i]f, at trial, a party objects that evidence is not within the issues raised in the  
16 pleadings, the court may permit the pleadings to be amended” and that the court  
17 should, “freely permit an amendment when doing so will aid in presenting the merits  
18 and the objecting party fails to satisfy the court that the evidence would prejudice  
19 that party’s action or defense on the merits.” Under Rule 15(b), amendments to  
20

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21 <sup>1</sup> This is not the first time Defendants have sought to exclude this evidence,  
22 which they failed to turn over even though they themselves used it to create the  
23 Axanar Works. In their opposition to Plaintiffs’ motion for summary judgment,  
24 Defendants submitted the very same interrogatory responses identified in their  
25 pending motion, but asserted (contrary to the clear content of the interrogatory  
26 responses themselves) that *The Four Years War* had not been identified in those  
27 interrogatory responses. See Defendants’ Opposition to Plaintiffs’ Motion for  
28 Partial Summary Judgment, p. 3 (“Plaintiffs’ claim that Defendants took their plot  
from the subject matter of a supplement to *Star Trek: The Role Playing Game*, titled,  
“The Four Years War,” is wholly irrelevant to this lawsuit, given that *Plaintiffs have*  
*not even named this as an allegedly infringed work.* Defendants’ Response to  
Statement of Undisputed Facts (“RSUF”) 29.”). This statement was false when  
made, and was actually contradicted by the very evidence Defendants cited to –  
Plaintiffs’ interrogatory responses that were appended to the Declaration of Kelly  
Oki as Exhibits 1 and 2. Dkt. Nos. 75-3 and 75-4.

1 pleadings may be made at any time, even after judgment. *Page v. Wright*, 116 F.2d  
2 449, 454 (7th Cir. 1940).

3 Under the liberal requirements of Rule 8 as it applies to copyright matters, the  
4 allegations in Plaintiffs' complaint provided fair notice that Plaintiffs alleged  
5 infringement of any and all Star Trek Copyrighted Works. Defendants should have  
6 been particularly aware of potential infringement of Star Trek materials that they  
7 owned, had copies of, and expressly used to create their infringing works, including  
8 *The Four Years War*. Defendants now claim that their own unexplained failure to  
9 produce *The Four Years War* in discovery should act as a shield to that document's  
10 admissibility into evidence. However, Plaintiffs were the only parties that could  
11 have been prejudiced by Defendants' failure to divulge their source materials and  
12 Plaintiffs should not be further prejudiced by that failure.

13 Finally, even if *The Four Years War* was not explicitly described in the FAC,  
14 that is not a valid basis for excluding evidence from trial, and Defendants have not  
15 cited to any authority to support their motion. Any exclusion of evidence would not  
16 only need to be supported by legal authority, but also would require a showing that  
17 the inclusion of such evidence would unfairly prejudice Defendants. Given that: (a)  
18 Defendants had a copy of *The Four Years War* at all relevant times; (b) Defendants  
19 failed and refused to produce a copy of this work during discovery even though it  
20 was used as a "bible" for the creation of the Axanar Works, and (c) Plaintiffs  
21 identified this specific work in interrogatory responses describing the Star Trek  
22 works copied by Defendants, there is no valid basis to claim that this evidence  
23 should be excluded. This motion is entirely without merit and should be denied.

#### 24 **IV. CONCLUSION**

25 For the foregoing reasons, Plaintiffs respectfully request that Defendants'  
26 motion in limine no. 3 to exclude works not referenced in Plaintiffs' complaint,  
27 including *The Four Years War*, be denied.

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Dated: January 6, 2017

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15

16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
a Delaware corporation,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' 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**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios  
3 Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants  
4 Axanar Productions, Inc. (“Axanar Productions”) and Alec Peters (“Peters”)  
5 (collectively, “Defendants”) No. 4 to exclude reference to substantial similarity to  
6 elements in the public domain, from third party sources, or that are purportedly  
7 unoriginal.

8 **I. INTRODUCTION**

9 By their motion in limine, Defendants seek to exclude from evidence claims  
10 of substantial similarity to elements that are in the public domain, are from third  
11 party sources, or that Defendants claim are unoriginal. For example, Defendants  
12 claim there is no dispute that the concept of spacecraft traveling faster than the  
13 speed of light is neither original, nor unique to Star Trek. First, Defendants’  
14 argument mischaracterize the works at issue, and Plaintiffs’ claim for copyright  
15 infringement. No claims have been asserted that Plaintiffs own the right to fictional  
16 depictions of light-speed travel. Plaintiffs are suing Defendants based on their  
17 wholesale, and deliberate, misappropriation of fictional and original elements of the  
18 Star Trek universe. Second, viewing each element in isolation, as Defendants  
19 suggest, mischaracterizes the scope of Plaintiffs’ copyright claims and would  
20 deprive the jury of the opportunity to accurately assess those claims. Furthermore,  
21 Defendants fail to recognize that the copying they engaged in, of numerous elements  
22 across the Star Trek universe, is relevant to show their copying of the look and feel  
23 of Star Trek, and to show their intentional infringement of the Star Trek works.

24 **II. FACTS**

25 **A. The Nature of the Evidence.**

26 Plaintiffs own the copyrights to over 700 Star Trek television episodes and  
27 thirteen films. Defendants have also licensed thousands of Star Trek novels, video  
28 games, and other products (collectively with television episodes and films, the “Star

1 Trek Copyrighted Works”). All of the Star Trek Copyrighted Works are a mixture  
2 of copyrightable elements that are wholly unique to Star Trek, and general science  
3 fiction elements, all of which are given original attributes or designs within the Star  
4 Trek Copyrighted Works, which original attributes or designs are equally subject to  
5 copyright protection. Plaintiffs will introduce evidence demonstrating that  
6 Defendants copied both types of elements. The jury should be given the opportunity  
7 to evaluate Defendants’ infringing material against the Star Trek Copyrighted  
8 works, both as to each element individually, and as the Star Trek Copyrighted  
9 Works were originally presented to the public.

10 Defendants also suggest that various elements of Star Trek that they copied,  
11 such as costumes and geometric shapes, even in distinct and recognizable  
12 configurations; the mood and theme of the Star Trek Copyrighted Works; the  
13 Klingon language; and multiple characters from the Star Trek Copyrighted Works  
14 are not copyrightable. This position also is not supported by copyright law, and the  
15 Court has already ruled that the elements cited by Defendants were copied from the  
16 Star Trek Copyrighted Works and, taken together, are “qualitatively important”  
17 enough for a finding of substantial similarity. Dkt. No. 163, p. 8 (see also pp. 6-7)  
18 (“Although each of these elements [including costumes, phasers, starship designs,  
19 fictional planets, architecture, spacedocks, the federation logo, stardates, warp drive,  
20 transporters, and the Klingon language] may not be individually original and  
21 copyright protectable, they are ‘numerous enough and their selection and  
22 arrangement original enough that their combination constitutes an original work of  
23 authorship,’ especially when combined with the costumes and fictional characters  
24 and species, examples of which are described above.”).

### 25 **III. ARGUMENT**

#### 26 **A. Elements Allegedly in the Public Domain or Common to All** 27 **Science Fiction.** 28


1 Whether each of the items that Defendants argue should be excluded are  
2 individually protectable by copyright is not relevant to their admissibility. Even  
3 potentially unprotected elements “may gain some protection in combination with  
4 each other. Specific combinations of unprotectable elements may be copyrightable,  
5 provided that the elements combined ‘are numerous enough and their selection and  
6 arrangement original enough that their combination constitutes an original work of  
7 authorship.’” *Muromura v. Rubin Postaer & Assocs.*, CV 12-09263 DDP AGRX,  
8 2015 WL 1728324, at \*3-4 (C.D. Cal. 2015) citing *Satava v. Lowry*, 323 F.3d 805,  
9 810 (9th Cir. 2003). This position was adopted by this court in the context of the  
10 infringing elements of the Axanar Works. Dkt. No. 163, pp. 6-7

11 Given its long history, Star Trek does use, and in some cases created, many  
12 established elements of the outer-space science fiction genre. However, the  
13 particular combination of these elements, and their unique attributes, especially  
14 when viewed alongside elements unique to the franchise, creates the unmistakable  
15 Star Trek universe. Under 17 U.S.C. section 106, Plaintiffs have the exclusive right  
16 to create derivative works by recasting, transforming, or adapting those elements to  
17 tell new stories in the same Star Trek universe. *DC Comics v. Towle*, 802 F.3d  
18 1012, 1023 (9th Cir. 2015). Incorporating similar themes and mood is an important  
19 factor in connecting a the derivative work to the original. *Benay v. Warner Bros.*  
20 *Entertainment, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010) (“protectable elements”  
21 include “plot, themes, dialogue, mood, setting, pace, characters, and sequence of  
22 events . . . .”). Therefore, the jury should be permitted to consider every aspect of  
23 the Star Trek Copyrighted Works, including the themes and mood, when deciding  
24 whether the Axanar Works copied the Star Trek Copyrighted Works.

25 It should also be noted that several of the items listed as being in the public  
26 domain are over-generalizations of elements found in the Star Trek Copyrighted  
27 Works. As they are described (or perhaps more accurately, mis-described) by  
28 Defendants, these elements might not be individually subject to copyright protection



1 but, as they appear in the Star Trek Copyrighted Works, they undoubtedly are. For  
2 example, the appearance of Vulcans in Star Trek is more than just “pointy ears,” as  
3 Defendants suggest. Vulcans in the Star Trek Copyrighted Works eschew emotions  
4 for logic and reason. They are also depicted with straight dark (or gray) hair cut in a  
5 “bowl” style. Their characteristics are distinct and have been developed over many  
6 works. Taken together, these additional original elements make Vulcans easily  
7 distinguishable from the other fictional, pointy-eared, races listed by Defendants,  
8 and certainly subject to copyright protection. In fact, they have become iconic  
9 characters, completely and easily identified with Star Trek. Again, this Court has  
10 already found that the characteristics of both Klingons and Vulcans, “may be  
11 entitled to copyright protection.” Dkt. No. 163, p. 6.

12 “Transporters” in the Star Trek Copyrighted Works are also unique.  
13 Teleportation is not a novel concept, but the method of achieving the effect in Star  
14 Trek is extremely particular: the subject is converted into an energy pattern and  
15 stored in the ship memory banks, then is “beamed” to a target location where it  
16 rematerializes. In the Star Trek Copyrighted Works, transporters have various  
17 recognizable features and limitations that Defendants appropriate, such as the use of  
18 . Declaration of  
19 David Grossman (“Grossman Decl.”) ¶ 2, Ex. A at p. 34. All of these elements are  
20 original and protected by copyright.

21 “Warp” drive is another element that Defendants characterize as generic, but  
22 is unique in its execution in the Star Trek Copyrighted Works. Starships in the Star  
23 Trek Copyrighted Works generate a “warp field” by mixing matter and anti-matter  
24 in a “warp core” and distributing the resulting energy to “warp nacelles” that  
25 protrude from the sides of the ship. The fictional science behind this technology  
26 underlies the design language used in the Star Trek Copyrighted Works, most  
27 prominently that warp-capable starships feature “warp nacelles” and “warp cores.”  
28 Defendants’ use of the same fictional science requires that they adopt the same

1 design language, which is visible in the final design of the USS Ares and all concept  
2 art produced for the Axanar Works. *See* Grossman Decl. ¶ 4, Exs. B-C.

3 The use of “phasers” is another element that is unique to the Star Trek  
4 Copyrighted Works. Defendants describe phasers as a heat-ray weapon similar to  
5 those that appear in H. G. Wells’ “War of the Worlds.” However, a phaser is a  
6 particle-beam weapon that was originated for the Star Trek Copyrighted Works and,  
7 like transporter technology, has original unique and recognizable features and  
8 limitations that Defendants appropriate. For example, the proposed Axanar feature  
9 film includes [REDACTED]. Grossman Decl.

10 ¶ 2, Ex. A at page 28. Defendants also created phaser designs, using Star Trek  
11 phasers as a template, in creating the Axanar Works. Grossman Decl. ¶ 5, Exs. D-E.

12 In all cases where Defendants’ defense to infringement is based on part of the  
13 infringed elements being in the public record, or of a common origin, Defendants  
14 have mischaracterized the nature of the copied elements, or have mischaracterized  
15 Plaintiffs’ claims. The fictional elements that make up the Star Trek universe are  
16 creative and original and Defendants’ motion in limine is not the appropriate vehicle  
17 to argue issues that have already been determined by the Court. Only a “scintilla of  
18 creativity” is sufficient to obtain copyright protection, and the Court has already  
19 ruled that original elements from Plaintiffs’ works have been copied by Defendants.  
20 *See Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004),  
21 *aff’d sub nom. Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir.  
22 2005) (describing originality as requiring independent creation and “just a scintilla  
23 of creativity”).

#### 24 **B. Characters Taken from Star Trek.**

25 Defendants list a number of characters as being too ‘minor’ to warrant  
26 copyright protection, which may be properly afforded to characters in a television  
27 program or motion picture. *See Olson v. National Broadcasting Co., Inc.*, 855 F.2d  
28 1446 (9th Cir. 1988). Again, this issue has already been determined by the Court,

1 and Defendants' arguments regarding characters copied from the Star Trek  
2 Copyrighted Works has been rejected.

3 While it is possible for a stock character to lack the unique attributes  
4 necessary for copyright protection, none of the characters listed by Defendants are  
5 so "lightly sketched" in the Star Trek Copyrighted Works as to be unprotectable.  
6 *See Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (magician in  
7 standard magician garb performing magic tricks not sufficiently distinctive). Rather  
8 each of the characters is "sufficiently delineated" and displays, "consistent, widely  
9 identifiable traits" as described below. *DC Comics*, 802 F.3d at 1019.

10 Garth of Izar, the U.S.S. Enterprise, Soval the Vulcan Ambassador, Klingons  
11 and Vulcans are all copyrightable characters, and the Court has already ruled that  
12 Defendants' Axanar Works copied these characters and original elements, and are  
13 substantially similar to Plaintiffs' works. Dkt. No. 163, p. 8-9 ("The Axanar Works  
14 are substantially similar to the Star Trek Copyrighted Works, at least under the  
15 extrinsic test."). And with respect to Garth of Izar, the Court has already held that it  
16 "does not agree that Garth, being a featured character in one television episode, the  
17 title character of one novel, and having appeared in *Four Years War*, is obscure or  
18 lightly sketched." Dkt. No. 163, p. 8.

### 19 **C. Geometric Shapes, Costumes, and the Klingon Language.**

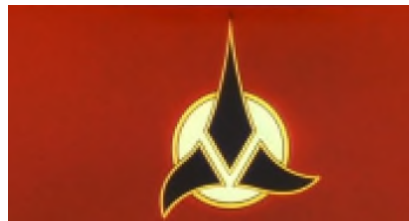
20 "An author's expressive combination or arrangement of otherwise noncopy-  
21 rightable elements (like geometric shapes) may satisfy the originality requirement."  
22 *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) citing *Roulo v. Russ*  
23 *Berrie & Co.*, 886 F.2d 931, 939 (7th Cir. 1989). Here, the jury should be permitted  
24 to evaluate the various elements that make up the Star Trek universe, including the  
25 symbols, insignia, dialogue, costumes and props used in the Star Trek Copyrighted  
26 Works, and appropriated by the Defendants.

27 Again, the Court has already addressed, and rejected, Defendants' assertion  
28 that these elements are not the proper subject of this suit. Dkt No. 163, pp. 6-7 ("All

1 these elements appear in the Axanar Works. Although each of these elements may  
2 not be individually original and copyright protectable, they are ‘numerous enough  
3 and their selection and arrangement original enough that their combination  
4 constitutes an original work of authorship,’ especially when combined with the  
5 costumes and fictional characters and species, examples of which are described  
6 above.”).

7 The elements taken by Peters in order to painstakingly re-create the Star Trek  
8 universe are original and, even those elements that Defendants argue are not subject  
9 to independent copyright protection, when combined with other elements, may be  
10 analyzed by the jury to determine that Defendants appropriated the concept and feel  
11 of the Star Trek Copyrighted Works.

12 Moreover, Defendants are incorrect in their assertion that the elements  
13 identified in their motion are not original or copyrightable. For example, the  
14 Klingon logo that Defendants refer to as “simply a three-pointed star” is actually an  
15 intricate combination of three different triangular shapes partly surrounded by a  
16 circle (reproduced below from Plaintiffs’ First Amended Complaint (*See* Dkt. No.  
17 47 at ¶ 46, 28:3-15)).



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22 Defendants also misapply the “useful article doctrine” to the costumes they  
23 appropriated from the Star Trek Copyrighted Works. In the realm of costumes, this  
24 doctrine does not prevent copyright protection for “individual design elements... so  
25 long as those design elements are physically or conceptually separable from the  
26 article itself.” *Chosun v. Int’l., Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 326  
27 (2nd Cir. 2005). Importantly, no Court has ever held that fictional uniforms and  
28 costumes are “useful articles” – which is obvious as those costumes are neither

1 “useful” nor are they physical “articles.” Furthermore, although colored shirts may  
2 not be copyrightable in isolation, the color patterns utilized in the Star Trek works,  
3 and copied by Defendants, are original and unique to Star Trek, and the jury should  
4 be allowed to consider Defendants’ appropriation of the original Star Trek pattern of  
5 clothing when determining whether Defendants copied the look and feel of the Star  
6 Trek Copyrighted Works. The jury should also be able to consider similar designs  
7 of clothing with respect to the other races, such as the use of particular robes for  
8 Vulcans and battle gear for Klingons.

9 The jury should also be able to decide that Defendants’ incorporation of the  
10 Klingon language into their Axanar Works contributed to Defendants’ appropriation  
11 of the concept and feel of the Star Trek Copyrighted Works. Although Defendants  
12 argue that the Klingon language is not subject to copyright, that is not determinative  
13 of whether or not Defendants’ use of that language may be considered in  
14 determining copyright infringement.<sup>1</sup> Klingon is a completely original and fictitious  
15 language to be spoken by Klingons, and Defendants’ use of that language in order to  
16 faithfully recreate the look and feel of the Star Trek Copyrighted Works is an  
17 appropriate part of the infringement analysis.

#### 18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
20 motion in limine no. 4 to preclude Plaintiffs from relying on evidence regarding  
21 items that they claim are unoriginal, in the public domain, or from third parties, be  
22 denied.

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24 <sup>1</sup> Further *Klingon* is not a complete system as contemplated by some courts in  
25 discussing the lack of copyright protection for systems of expression. *See Oracle*  
26 *Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014) (discussing copyright  
27 protection in computer source code). Instead, the language, licensed by Paramount,  
28 has only 3000 words and is difficult to use outside of describing life for a space-  
faring warrior race of aliens, or satirizing Star Trek fans. For comparison, according  
to Miriam-Webster, English may have as many as one million words. *See Help –*  
*How many words are there in English?*, [https://www.merriam-](https://www.merriam-webster.com/help/faq-how-many-english-words)  
[webster.com/help/faq-how-many-english-words](https://www.merriam-webster.com/help/faq-how-many-english-words) (last visited Dec. 29, 2016).

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Dated: January 6, 2017

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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
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16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
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18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 5 TO PRECLUDE  
PLAINTIFFS FROM RELYING  
ON EVIDENCE CONCERNING  
PERSONAL DRAMA, SMEAR  
CAMPAIGN, AND OTHER  
IRRELEVANT  
COMMUNICATIONS**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants Axanar Productions, Inc. (“Axanar Productions”) and Alec Peters (“Peters”) (collectively, “Defendants”) to exclude testimony and documents that include personal attacks against Peters.

**I. INTRODUCTION**

Defendants’ motion in limine no. 5 should be denied as it fails to identify any specific evidence or testimony to be excluded. Defendants’ motion is styled as a motion “to preclude plaintiffs from relying on evidence concerning personal drama, smear campaign, and other irrelevant communications.” However, Defendants do not identify any evidence or testimony that can be said to fit their characterization, and their vague motion should be denied on that basis alone.

Moreover, the few general descriptions of testimony and evidence provided by Defendants in their motion are not the proper subject of a motion in limine. The fact that the director of *Star Trek: Prelude to Axanar*, Christian Gossett, testified regarding the creation and production of the Axanar Works, is not part of any “smear campaign.” The fact that Terry McIntosh, a former volunteer for the Axanar film project, produced documents showing that Mr. Peters sought to meet with Netflix and hoped to be a “producer” of Star Trek – is neither irrelevant, nor does it involve any “personal drama.” There is absolutely no basis for the exclusion of any evidence turned over by Mr. Gossett and Mr. McIntosh. Further, the documentary evidence provided by Mr. Gossett and Mr. McIntosh includes thousands of pages of emails and messages that Alec Peters failed and refused to turn over in this action. Peters’ misconduct should not be rewarded, as these third-party witnesses have every right to testify at trial, and to present evidence relating to their participation in the creation of the Axanar Works.



1 Finally, the fact that Peters [REDACTED]  
2 [REDACTED]  
3 [REDACTED], cannot be excluded from trial under any theory.  
4 Indeed, Peters' use of production funds to [REDACTED]  
5 [REDACTED], is highly probative of whether or not Peters'  
6 profited from or benefited from the infringement. Whether Peters benefited from  
7 Axanar is directly relevant to his liability for damages.

8 **II. FACTS**

9 **A. The Nature of the Evidence.**

10 Between 2010, when he began writing a screenplay for an Axanar motion  
11 picture, and the present, Defendant Peters worked with a series of collaborators.  
12 Some of these collaborators, like Christian Gossett and Terry McIntosh, have  
13 testified in this lawsuit regarding their roles in the creation of the Axanar Works,  
14 and regarding statements made by Peters.

15 In addition to their testimony on the use of the Star Trek copyrighted works in  
16 the creation of Axanar (testimony that is obviously relevant to substantial similarity  
17 and copying), some of Peters' prior collaborators also have knowledge of how he  
18 spent the funds that were donated to his company to be used in connection with the  
19 production of a film. All of this testimony is relevant, and Defendants' motion in  
20 limine does not identify any particular document, or testimony, that is the proper  
21 subject of a motion to exclude.

22 **III. ARGUMENT**

23 Under Federal Rule of Evidence 402, "[r]elevant evidence is admissible,"  
24 unless otherwise excluded. Defendants argue that the above-referenced matters  
25 should be excluded because they are either irrelevant, or overly prejudicial.  
26 However, this evidence is relevant, and highly probative, because it goes to both the  
27 copying of the Star Trek works by Defendants, and to the profits made by  
28 Defendants from such infringements.

1 Defendant Peters’ relationship with Diana Kingsbury is also relevant to this  
2 inquiry. [REDACTED]

3 [REDACTED]. The use of funds raised from Star Trek fans  
4 purportedly for the creation of a film, to pay [REDACTED]  
5 [REDACTED] is evidence that Peters profited from his infringing conduct.

6 Defendants have also failed to establish that no one other than Peters was  
7 aware of how funds were spent by Defendant Alec Peters. His collaborators,  
8 including Christian Gossett (the director of *Prelude to Axanar*), and Terry McIntosh  
9 (the associate producer of *Prelude to Axanar*), were intimately tied to the production  
10 of the Axanar Works, and should be permitted to explain how they became aware of  
11 various expenditures.

12 The fact that Mr. Gossett was not disclosed in Plaintiffs’ initial disclosures is  
13 also no bar to his testimony. Failure to comply with Rule 26 does not compel  
14 exclusion where a failure to disclose is either substantially justified or harmless.  
15 Fed. R. Civ. P. 37(c)(1); and *see Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
16 F.3d 1101, 1106 (9th Cir. 2001) (“The information may be introduced if the parties’  
17 failure to disclose the required information is substantially justified or harmless.”).  
18 Here, Defendants cannot genuinely claim that Plaintiffs’ failure to disclose a  
19 possible witness right at the start of the case, the director of *Star Trek: Prelude to*  
20 *Axanar*, of whom Defendants were no doubt aware, is either prejudicial or  
21 surprising. This witness was far better known at that time to Defendants than to  
22 Plaintiffs. Further, Mr. Gossett’s deposition was taken months ago in discovery, by  
23 both parties to this lawsuit, and he produced thousands of pages of email  
24 communications with Peters (which Peters failed to turn over), demonstrating that  
25 Peters was aware, at all times, of Gossett’s involvement in, and relevance to, the  
26 creation of the Axanar Works.

27 Nor will Defendants be unduly prejudiced by this information. The subject  
28 matter of these third party-produced documents, and their testimony, relates

1 exclusively to Defendant Peters’ activities concerning the Axanar Works. There has  
2 never been an attempt by Plaintiffs (or any testimony in this case) to impugn his  
3 actions in his private life, or in the operation of his other businesses. Furthermore,  
4 Peters will have the opportunity to cross-examine and impeach any witness who  
5 makes a personal attack against him. Finally, the underlying basis for seeking to  
6 exclude these witnesses is Peters’ claim that these witnesses do not like him. There  
7 is no rule of law, and Defendants cite none, that the only witnesses who can testify  
8 are those that like the Defendants.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
11 motion in limine No. 5 to exclude testimony and documents that include personal  
12 attacks against Peters, including testimony from Christian Gossett and Terry  
13 McIntosh, be denied.

14  
15 Dated: January 6, 2017

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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 PARAMOUNT PICTURES  
CORPORATION, a Delaware  
17 corporation; and CBS STUDIOS INC.,  
a Delaware corporation,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

23 Defendants.  
24

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 6 TO PRECLUDE  
PLAINTIFFS FROM REFERRING  
TO IRRELEVANT SUPERSEDED  
SCRIPTS**

Discovery Cutoff: November 2, 2016  
Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios  
3 Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants  
4 Axanar Productions, Inc. (“Axanar Productions”) and Alec Peters (“Peters”)  
5 (collectively, “Defendants”) to exclude any reference to prior scripts for the Axanar  
6 Works.

7 **I. INTRODUCTION**

8 By their motion in limine, Defendants seek to exclude from evidence prior  
9 scripts of the Axanar Works, including the script that Defendant Peters testified was  
10 going to be used to shoot the full-length “*Star Trek: Axanar*” motion picture.  
11 Defendants’ motion has no merit and should be denied. Defendants argue that, after  
12 the lawsuit was filed, they altered their prior scripts, and therefore, the jury should  
13 not be permitted to analyze the script that Defendants had created prior to the filing  
14 of this lawsuit. Defendants have it backwards. The scripts that were created *after*  
15 the filing of the lawsuit are irrelevant as they were created post-litigation, with the  
16 intention of altering the characters and stories from the pre-existing script for  
17 litigation purposes. These post-lawsuit scripts are not evidence and should be  
18 excluded.

19 However, the pre-lawsuit script is the very document that Defendants  
20 intended to use in shooting the Axanar feature beginning in January 2016. The  
21 Court has already ruled that the Axanar Script (which, prior to the filing of this  
22 lawsuit was to be the shooting script for *Star Trek: Axanar*) is the proper subject of  
23 this copyright infringement suit. *See* Dkt No. 163, Order, at 9 (“After reviewing  
24 evidence before the Court, including the *Axanar* Works, the Court is satisfied that  
25 Defendants have achieved their goal of creating authentic Star Trek films and script.  
26 The *Axanar* Works are substantially similar to the Star Trek Copyrighted Works, at  
27 least under the extrinsic test.”). The pre-lawsuit script has already been determined  
28 to be the subject of this case, it should be admitted at trial, and any subsequent script

1 will only impede the jury’s task, which is to evaluate the facts as pled, not irrelevant  
2 remediation efforts.

3 **II. FACTS**

4 **A. The Nature of the Evidence.**

5 Before Plaintiffs filed this lawsuit, Defendants had planned to begin shooting  
6 the Axanar Motion Picture in January 2016. Declaration of David Grossman  
7 (“Grossman Decl.”) ¶ 2, Ex. A. At that time, Defendants’ most recent script was  
8 dated in November, 2015 and labeled as version “7.7.” At his deposition, Peters  
9 confirmed [REDACTED]

10 [REDACTED]  
11 [REDACTED]. Grossman  
12 Decl. ¶ 3, Ex. A.

13 After being served with Plaintiffs’ complaint in this lawsuit, Defendant Peters  
14 claims that he, and others, rewrote portions of the Axanar Script. According to  
15 Defendants’ motion in limine, the most recent script involves changes that Peters  
16 believes may distance the upcoming Axanar feature from Plaintiffs’ copyrighted  
17 Star Trek works. Peters argues that the scripts drafted after Plaintiffs filed this  
18 lawsuit should be the basis of Plaintiffs’ infringement claims, rather than the script  
19 [REDACTED].

20 *Id.*

21 **III. ARGUMENT**

22 Any versions of the script created after this litigation was filed on December  
23 29, 2015 bear no relevance to Plaintiffs’ claims for infringement because Plaintiffs  
24 did not file suit based on those scripts. Defendants could continue to prepare scripts  
25 *ad infinitum* but all of those scripts would be irrelevant because they are not the  
26 subject of this lawsuit. The creation of post-lawsuit scripts is not the creation of  
27 “evidence” and should not be permitted.

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1 The pre-lawsuit scripts are, however, evidence, and will be analyzed at the  
2 trial of this matter. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*  
3 *Inc.*, 528 U.S. 167, 189 (2000) (“It is well settled that a defendant’s voluntary  
4 cessation of a challenged practice does not deprive a federal court of its power to  
5 determine the legality of the practice”) (internal quotations and citation omitted).  
6 Further, Defendants’ attempt to exclude the final shooting script is yet another  
7 attempt to reargue something they have already lost (twice). In response to the First  
8 Amended Complaint, Defendants moved to dismiss on the grounds, *inter alia*, that  
9 the lawsuit was premature because no film had been created from the Axanar Script.  
10 In its decision denying the motion, the Court ruled that the lawsuit was not  
11 premature, because the script for Axanar was fixed in a tangible medium of  
12 expression, and was intended at the time to be the basis for a film. Defendants  
13 argued this same point again, in the motion for summary judgment proceedings, and  
14 the Court ruled, again, that the Axanar Script was the proper subject of a claim for  
15 copyright infringement. Dkt. No. 163, Order, at 3 (“The claim against the *Axanar*  
16 Motion Picture is not based on ‘abstract disagreements’ and is ripe for  
17 adjudication.”). If Plaintiffs are required to rely on subsequent scripts, instead of the  
18 script that was intended for use in shooting the upcoming Axanar Motion Picture,  
19 Defendants could render any trial virtually impossible by simply creating another  
20 new script the day before the trial. Furthermore, introducing to the jurors any scripts  
21 other than number “7.7,” would render the trial unnecessarily confusing, and would  
22 be highly prejudicial to Plaintiffs. *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 700 (7th  
23 Cir. 2007) (trial court properly excluded evidence of subsequent remedial measures,  
24 which would have been unfairly prejudicial).

#### 25 **IV. CONCLUSION**

26 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
27 motion in limine no. 6 to exclude prior scripts of the Axanar Works be denied.  
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Dated: January 6 , 2017

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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
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Case No.: 2:15-cv-09938-RGK-E

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 7 TO PRECLUDE  
INTRODUCTION OR MENTION  
OF CERTAIN OF DEFENDANTS'  
FINANCIAL INFORMATION  
AND INACCURATE  
REFERENCE TO "PROFITS"  
DEFENDANTS ALLEGEDLY  
EARNED**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants Axanar Productions, Inc. and Alec Peters (collectively, “Defendants”) to exclude evidence relating to Defendants’ financial records.

**I. INTRODUCTION**

By their motion in limine (the “Motion”), Defendants seek to exclude from evidence the financial records of Defendants, with the exception of the amount of funds collected through Defendants’ several Kickstarter and Indiegogo fundraising campaigns. Defendants assert that information relating to how Defendants spent the proceeds of those fundraisers is irrelevant to this matter and that Plaintiffs should be precluded from characterizing any funds raised and spent by Defendants as “profits.” On the contrary, the jury must be permitted to review Defendants’ financial records in detail in determining the amount of money that Defendant Peters received in profits or other financial benefits from Defendants’ infringing activities.

**II. FACTS**

**A. The Nature of the Evidence.**

In response to Plaintiffs’ discovery requests, Defendants produced a 215-page document (the “Financial Records”) detailing all funds raised to produce *Star Trek: Prelude to Axanar* and the upcoming Axanar feature (the “Axanar Works”) as well as the expenditure of those funds. Plaintiffs will present the Financial Records to the jury so that it can evaluate profits and financial benefits obtained by Peters (and Axanar Productions) in connection with the Axanar Works.

Plaintiffs will also introduce documents and testimony demonstrating Defendants’ plans to use the movie studio (built using funds raised to produce the Axanar Works), the lease to which [REDACTED], a for-profit corporation solely owned by Peters, and Peters personally, to generate a profit from additional independent films.

1 Plaintiffs will also present evidence of financial expenditures that Peters made  
2 using funds that were raised to create the infringing Axanar Works, including

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]. See Dkt. Nos. 75-3 and 75-4, Oki  
6 Declaration, Exs. 1-2. These payments demonstrate that Peters received profits  
7 from Axanar as a direct infringer and vicarious and contributory infringer. This  
8 evidence of monies obtained by Peters from Axanar is clearly relevant should  
9 Plaintiffs elect actual damages and profits (including Peter’s profits) under section  
10 504(b) of the Copyright Act. Further, the profits that the Defendants received would  
11 be relevant to the jury in awarding statutory damages, if such damages were elected  
12 by Plaintiffs.

13 **III. ARGUMENT**

14 Defendants have argued that, “Defendants did not make any profit from the  
15 free distribution of [the Axanar] Works, and had and have no intent to do so in the  
16 future. ... There is simply no evidence that Defendants stand to profit from  
17 Plaintiffs’ Works.” Dkt. No. 87, Opposition to Plaintiffs’ Motion for Partial  
18 Summary Judgment at 16.

19 Defendants now are attempting to withhold the very evidence from the jury  
20 that would establish that, contrary to Peters’ arguments, he profited from the Axanar  
21 Works, which were part of a professional, commercial endeavor. By precluding  
22 evidence of the expenditures made by Peters and his colleagues, it would not be  
23 possible for the jury to verify Defendants’ claims.

24 Defendants suggest that the jury can make a determination regarding “profits”  
25 with having access only to the amount of money raised by Defendants. In their  
26 motion, Defendants cite to 17 U.S.C. section 504 for the proposition that “[i]n  
27 establishing the infringer’s profits, the copyright owner is required to present proof  
28 only of the infringer’s gross revenue, and the infringer is required to prove his or her

1 deductible expenses and the elements of profit attributable to factors other than the  
2 copyrighted work.” Motion at 6-7. Presumably, Defendants intend to testify that all  
3 of the money raised by Axanar was spent, and therefore there were no “profits.”  
4 However, the jury must be permitted to consider whether the expenses claimed by  
5 Defendants were legitimate expenditures towards producing the Axanar Works, or  
6 merely funds redirected for the personal use of Peters, i.e., profits taken by Peters  
7 from Axanar. For example, although Defendants belatedly characterized [REDACTED]  
8 [REDACTED]  
9 [REDACTED], that argument is specious and the jury should be allowed to consider  
10 whether those costs are more fairly identified as profits, either to Axanar, Peters  
11 individually, or both.

12 Defendants’ gross revenue received from the infringing conduct amounts to  
13 approximately \$1.5 million. If the Court grants Defendants’ motion to exclude  
14 evidence relating to Axanar’s expenditures, and thus eliminates Plaintiffs’ ability  
15 challenge the appropriateness of any expenses, it should only do so subject to  
16 Defendants’ stipulation that the entirety of the funds raised for the Axanar Works  
17 constitute profits from infringing conduct. Further, Peters has been sued personally  
18 as a direct and indirect infringer (and the Court has already determined that if the  
19 jury finds substantial similarity of the Axanar Works with the Star Trek Works, that  
20 Peters is personally liable as an infringer), so monies paid to him with respect to  
21 Axanar constitute his “gross revenues” as an infringer, and are indispensable  
22 evidence regarding Peters’ profit from Axanar.

23 There are other documents, and additional testimony, relating to Peters’  
24 commercialization of the Axanar Works, and the profits he received, and intended to  
25 receive, from infringing upon Plaintiffs’ copyrights. This evidence includes Peters’  
26 build-out of a commercial film “studio” that he intended to lease out, through his  
27 solely-owned for profit company (Axanar Productions). Whether those expenses  
28 are legitimately connected to producing the Axanar Works, or can be attributed to

1 Defendant Peters’ future for-profit business ventures, are facts that the jury must be  
2 permitted to determine. There is no basis for the exclusion of any expenditures  
3 made or income received by Peters and his colleagues in connection with the  
4 Axanar Works, and the jury should not be deprived of this absolutely necessary  
5 information.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
8 motion in limine no. 7 to exclude Defendants’ financial records be denied.

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Dated: January 6, 2017

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23 Defendants.

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 8 RE USE OF "STAR  
TREK" NAME**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants Axanar Productions, Inc. (“Axanar Productions”) and Alec Peters (“Peters”) (collectively, “Defendants”) to exclude Defendants’ use of the term, “Star Trek.”

**I. INTRODUCTION**

By their motion in limine, Defendants seek to exclude from evidence their use of the term “Star Trek” when referring to *Star Trek: Prelude to Axanar*, the *Vulcan Scene*, and the proposed full-length feature, *Star Trek: Axanar* (collectively, the “Axanar Works”). Defendants argue that, because this matter is not a trademark dispute, their use of “Star Trek” is not relevant, including to the jury’s analysis of substantial similarity. On the contrary, Defendants’ use of the term “Star Trek” to describe the Axanar Works is highly probative of the issues for trial for a number of reasons. These include whether Defendants intended to create a “Star Trek” work, and whether Peters acted willfully in infringing Plaintiffs’ copyrights.

Further, there are numerous pieces of evidence, including Defendants’ own statements, videos and marketing materials that use the term “Star Trek,” “Star Trek: Prelude to Axanar” and “Star Trek: Axanar.” These materials cannot be, and should not be, excised from the trial.

There is no merit to Defendants’ motion, and it should be denied.

**II. FACTS**

**A. The Nature of the Evidence.**

Defendants have referred to the Axanar Works as *Star Trek: Axanar*. This title formulation is the same as that used in Plaintiffs’ copyrighted Star Trek works (e.g., *Star Trek: The Next Generation*, *Star Trek: First Contact*). Peters also used the term “Star Trek” heavily in online statements and publications, at conventions, and in advertisements for the Axanar Project. Peters even used an email address

1 ending in “@startrekaxanar.com.” *See, e.g.*, Declaration of David Grossman  
2 (“Grossman Decl.”), ¶¶ 2-3, Exs. A-D.

3 Peters also created a twitter account @StarTrekAxanar, went to conventions  
4 to advertise his film as “Star Trek: Axanar” and created numerous advertisements  
5 and promotional materials referring to his productions as “Star Trek” films and  
6 products. Grossman Decl. ¶ 5, Exs. B, F.

7 Defendants have more recently renamed the Axanar Works to exclude “Star  
8 Trek,” but that fact does not erase Defendants’ prior conduct, or render Defendants’  
9 previous statements and conduct inadmissible for this trial. Far from it, Defendants’  
10 use of the terms Star Trek (deliberately and repeatedly) is critical to this trial.

### 11 **III. ARGUMENT**

12 Defendants argue that their use of “Star Trek” to describe the Axanar Works  
13 is irrelevant because Plaintiffs have not filed suit for trademark infringement.  
14 However, Defendants’ use of “Star Trek” to describe the Axanar Works is not being  
15 offered to prove trademark infringement.

16 This is a copyright case, and Defendants have denied copying Star Trek in  
17 order to create *Star Trek: Prelude to Axanar* and *Star Trek: Axanar*. The fact that  
18 Defendants (prior to the filing of this lawsuit), heavily used the term “Star Trek” in  
19 their works, in their promotional materials, and in every one of their discussions  
20 regarding the content of their works, is highly relevant to whether or not Defendants  
21 intended to copy, and did copy, Plaintiffs’ works, and whether they were intended to  
22 be and are in fact substantially similar to Plaintiffs’ works. Further, Peters himself  
23 advertised his works, and raised money for his Axanar Works, by touting them as  
24 “authentic” Star Trek, an “independent Star Trek film,” and stated “this is Star  
25 Trek.” To argue, as Defendants do, that these statements should be excluded from  
26 the trial on whether Defendants copied Star Trek is absurd.

27 Moreover, Peters’ labeling of his Axanar Works with the term “Star Trek”  
28 (before he changed the titles of his works), is relevant to Peters’ attempts to obtain a



1 profit from his infringing activities – he used the term “Star Trek” to raise money  
2 from Star Trek fans, so that he could pay himself and his colleagues. Indeed, one of  
3 Peters’ own communications (which he did not turn over in discovery) shows that  
4 he discussed keeping the name “Star Trek” on an internet page promoting the  
5 Axanar Works because, to remove that phrase would decrease the amount of funds  
6 he was able to raise. Grossman Decl. ¶ 4, Exs. B, E.

7 In addition to the above, Defendants’ use of “Star Trek” in association with  
8 the Axanar Works is relevant to Plaintiffs’ claim that Peters is liable for willful  
9 infringement, and for contributory copyright infringement. Using “Star Trek” to  
10 describe the Axanar Works, supports the conclusion that Peters was aware of the  
11 infringing activity. *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)  
12 (“We have interpreted the knowledge requirement for contributory copyright  
13 infringement to include both those with actual knowledge and those who have  
14 reason to know of direct infringement.”). By identifying “Star Trek” by name,  
15 Peters demonstrated that his use of elements from the Star Trek Copyrighted Works  
16 was willful and that his goal was to place the Axanar Works in the same universe as  
17 Plaintiffs’ “Star Trek” productions. The jury should be permitted to consider this  
18 fact when considering the appropriate measure of damages. *See* 17 U.S.C. §  
19 504(c)(2).

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
22 motion in limine no. 8 to exclude Defendants’ use of the term “Star Trek” should be  
23 denied.

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1 Dated: January 6, 2017

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 9 TO PRECLUDE  
PLAINTIFFS FROM  
REFERENCING THE QUALITY  
OF DEFENDANTS' WORKS**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine by Defendants Axanar Productions, Inc. (“Axanar”) and Alec Peters (“Peters”) (collectively, “Defendants”) to exclude reference to the use of film-industry professionals to produce the Axanar Works.

**I. INTRODUCTION**

By their motion in limine, Defendants seek to exclude from evidence the fact that Defendants employed numerous film-industry professionals to produce *Prelude to Axanar*, the *Vulcan Scene*, and the upcoming Axanar Motion Picture (collectively, the “Axanar Works”). Defendants are also seeking to exclude evidence relating to the quality of the Axanar Works.

The professional nature of the Axanar Works includes the fact that Peters used numerous experienced Star Trek professionals (such as actors, make-up artists and visual effects personnel) to replicate Star Trek. Peters is contesting that his works have the same “concept and feel” of Plaintiffs’ works, but the evidence relating to his use of experienced professionals, including a number of whom were employed on authorized Star Trek work supports Plaintiffs’ position that the Axanar Works were intended to copy, and did copy, Plaintiffs’ works, and were intended to have the same look and feel as the Star Trek works, and did have the same look and feel as those works.

Further, the detail and quality of the Axanar Works demonstrates that Peters willfully infringed Plaintiffs’ works, by ensuring that even small details conformed to Star Trek canon. Peters is claiming that he should not be held liable for “willful” infringement, and that he is an “innocent” infringer (a defense that should not legally have any application to this case). Evidence relating to the creation of the Axanar Works, and the quality and detail of the copying engaged in by Peters and

1 his colleagues, supports a finding of willful infringement, and this evidence should  
2 be permitted at trial.

3 **II. FACTS**

4 **A. The Nature of the Evidence.**

5 Defendants produced, or plan to produce, the Axanar Works [REDACTED]  
6 [REDACTED], many of whom have  
7 worked on Plaintiffs' Star Trek Copyrighted Works. Declaration of David  
8 Grossman ("Grossman Decl.") ¶ 2, Ex. A. Also, the characters featured in the  
9 Axanar Works are portrayed by professional actors [REDACTED]  
10 [REDACTED] and, in some cases, have appeared in Plaintiffs' Star Trek copyrighted  
11 works. Grossman Decl. ¶ 3, Ex. A.

12 Supported by considerable budgets obtained through crowd-funding (the  
13 budget for Axanar was similar to CBS' budget for a one-hour episode of the last  
14 Star Trek television series). See Dkt. 88-70, Declaration of John Van Citters, at ¶  
15 66. Given the participation of film-industry professionals, the production quality of  
16 the Axanar Works is considerable. Defendants' goal in producing the Axanar  
17 Works was to create "a sci-fi feature with big-budget production values," and  
18 Defendants believed that the Axanar Works achieved that goal. Grossman Decl. ¶ 4,  
19 Ex. A. In a podcast, Peters even noted that he thinks it's "heartwarming and  
20 rewarding when people are just blown away and they say this is like a real movie.  
21 Yeah, it is, that was our goal and we're happy people think so." Grossman Decl. ¶  
22 5, Ex. A. Additionally, in raising money for the Axanar Works, Peters stated:

23  
24 *Axanar is the first fully-professional, independent Star Trek film. While*  
25 *some might call it a 'fan film' as we are not licensed by CBS, Axanar*  
26 *has professionals working in front and behind the camera, with a fully*  
*professional crew—many of whom have worked on Star Trek itself—*  
*who ensure Axanar will be the quality of Star Trek all fans want to*  
*see."*

27 Grossman Decl. ¶ 6, Exs. A-B.  
28

1 **III. ARGUMENT**

2 The use of film-industry professionals, including professionals employed in  
3 an identical capacity by Plaintiffs or Plaintiffs’ predecessors, is evidence of the kind  
4 of work Defendants intended to produce, namely, a Star Trek “sci-fi feature with  
5 big-budget production values” that was, “like a real movie.” Grossman Decl. ¶¶ 4-  
6 5, Exs. A, C. The jury will be asked to determine whether Peters created a work that  
7 was similar in concept and feel to the Star Trek works, and Peters’ use of industry  
8 professionals, and the resulting high quality of the productions, is evidence that the  
9 Axanar Works were intended to, and did, replicate the look and feel of Star Trek.

10 Moreover, the use of professionals, and Peters’ attempts to create high-quality  
11 audio-visual productions support a finding of intentional, willful infringement.  
12 Peters is asserting “innocent” infringement, and is arguing that he should not be held  
13 liable for willful infringement of Plaintiffs’ copyrights. The methods by which  
14 Peters went about producing the Axanar Works, including by using professionals  
15 and attempting to create high-quality productions, shows that this was not an  
16 “amateur” home-video production and instead, was a deliberate attempt to copy  
17 Plaintiffs’ works and create infringing derivative works that were substantially  
18 similar to Plaintiffs’ works.

19 The professional nature of the works, and the quality that was sought, and  
20 obtained, in connection with the copying of Plaintiffs’ copyrights, is also relevant to  
21 Defendants’ affirmative defenses. Defendants argue that waiver, implied license,  
22 estoppel, and other affirmative defenses should be invoked to insulate them from  
23 liability. However, Defendants will have to show that they were permitted to create  
24 the Axanar Works, and that Plaintiffs either expressly or impliedly allowed  
25 Defendants to create these professional, high-quality derivative works. Plaintiffs  
26 believe that these affirmative defenses are no longer in the case or before the jury,  
27 and there is no support for these affirmative defenses, but so long as Defendants  
28

1 assert them, and if these defenses are allowed to be considered by the jury, this  
2 evidence directly relates to (and refutes) those defenses.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that Defendants'  
5 motion in limine no. 9 to preclude Plaintiffs from referencing the professionalism or  
6 quality of Defendants' works be denied.

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