

1 Erin R. Ranahan (SBN: 235286)  
eranahan@winston.com  
2 Diana Hughes Leiden (SBN: 267606)  
dhleiden@winston.com  
3 Kelly N. Oki (SBN: 304053)  
koki@winston.com  
4 WINSTON & STRAWN LLP  
333 South Grand Avenue  
5 Los Angeles, CA 90071  
Telephone: (213) 615-1700  
6 Facsimile: (213) 615-1750

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

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

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

14 Plaintiffs,

15 vs.

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

18 Defendants.  
19

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

*Assigned to: Hon. R. Gary Klausner*

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

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

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

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

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

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

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

23 **II. RELEVANT FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

1 **IV. ARGUMENT**

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

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

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

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

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

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

## 21 **V. CONCLUSION**

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



1 Dated: December 16, 2016

**WINSTON & STRAWN LLP**

2  
3 By: /s/ Erin R. Ranahan  
4 Erin R. Ranahan  
5 Diana Hughes Leiden  
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7 Attorneys for Defendants,  
8 AXANAR PRODUCTIONS, INC.  
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