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8 and ALEC PETERS

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

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

14 Plaintiffs,

15 vs.

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

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

Assigned to: Hon. R. Gary Klausner

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

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

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

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

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

23 Dated: December 16, 2016

WINSTON & STRAWN LLP

24
25 By: /s/ Erin R. Ranahan
26 Erin R. Ranahan
27 Diana Hughes Leiden
28 Kelly N. Oki
Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.
and ALEC PETERS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

15 **II. ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 that [REDACTED]

16 [REDACTED]

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

19 [REDACTED]. *Id.* at

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

24 **III. CONCLUSION**

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

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1 Dated: December 16, 2016

WINSTON & STRAWN LLP

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3 By: /s/ Erin R. Ranahan
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