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8 and ALEC PETERS

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

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

14 Plaintiffs,

15 vs.

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

18 Defendants.
19

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

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC., AND ALEC
PETERS' MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW PURSUANT TO LOCAL RULE
16-4**

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

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1 **DEFENDANTS’ MEMORANDUM OF CONTENTIONS OF FACT & LAW**

2 Pursuant to Local Rule 16-4, Defendant Axanar Productions, Inc. and Alec
3 Peters (“Defendants”) submit this Memorandum of Contentions of Fact and Law.

4 **I. INTRODUCTION**

5 Plaintiffs Paramount Pictures Corporation and CBS Studios, Inc. (“Plaintiffs”)
6 sued lifelong Star Trek fan Alec Peters and his small company, Axanar Productions,
7 Inc. (“Defendants”) for allegedly infringing the copyrights of 40 Star Trek episodes,
8 11 movies, and four novels (“Plaintiffs’ Works”). Defendants’ works at issue are (i)
9 an original twenty-minute “mockumentary” entitled *Prelude to Axanar*; (ii) a three-
10 minute scene (the “*Vulcan Scene*”); and (iii) Defendants’ evolving plans to pursue
11 another non-commercial film project and their creation of scripts for that project (the
12 “Potential Fan Film”) (collectively, “Defendants’ Works”). Defendants assert that
13 Plaintiffs’ claims with respect to the unfinished project are premature; that none of
14 Defendants’ Works are substantially similar to Plaintiffs’ Works; and that Defendants’
15 Works are projected by the doctrine of fair use.

16 **II. CLAIMS AND DEFENSES**

17 **A. Summary of Plaintiffs’ Claims**

- 18 1. **Claim 1:** Copyright Infringement pursuant to 17 U.S.C. § 101 *et*
19 *seq.*;
- 20 2. **Claim 2:** Contributory Copyright Infringement;
- 21 3. **Claim 3:** Vicarious Copyright Infringement; and
- 22 4. **Claim 4:** Declaratory Judgment pursuant to 28 U.S.C. §§ 2201
23 and 2202 that Plaintiffs’ “continued production of the Axanar
24 Motion Picture constitutes infringement of the Star Trek
25 Copyrighted Works.”

26 **B. Elements Necessary to Prove Plaintiffs’ Claims**

- 27 1. Copyright Infringement

28 To succeed on their claims for copyright infringement, Plaintiffs must prove:

- 1 a. Plaintiffs own valid copyrights in the works at issue; and
- 2 b. Defendants copied original expression from the alleged
- 3 copyrighted works. Copying includes (1) reproducing the work in
- 4 copies; (2) preparing derivative works based upon the copyrighted
- 5 work; (3) distributing copies of the copyrighted work to the public
- 6 by sale or other transfer or ownership or by rental or lease or
- 7 lending, (4) performing publicly a copyrighted work, (5)
- 8 displaying publicly a copyrighted work, and (6) performing a
- 9 sound recording by means of a digital audio transmission.

10 *See* Ninth Circuit Manual of Model Jury Instructions (2007 ed.), Instruction Nos. 17.1,

11 17.4 (2007).

12 2. Contributory Copyright Infringement

13 To succeed on their claims for contributory copyright infringement, Plaintiffs

14 must prove:

- 15 a. Plaintiffs own valid copyrights in the works at issue; and
- 16 b. Direct copyright infringement by another; and
- 17 c. Defendants knew or had reason to know of the infringing
- 18 activity; and
- 19 d. Defendants induced or materially contributed to the activity.

20 *See* Ninth Circuit Manual of Model Jury Instructions Civil (2007 ed.), Instructions

21 17.4, 17.20.

22 3. Vicarious Copyright Infringement

23 To succeed on their claims for vicarious copyright infringement, Plaintiffs must

24 prove:

- 25 a. Direct copyright infringement by another; and
- 26 b. Defendants directly benefitted financially from the
- 27 infringing activity; and
- 28

- 1 c. Defendants had the right and ability to control the infringing
- 2 activity; and
- 3 d. Defendants failed to exercise that ability.

4 *See* Ninth Circuit Manual of Model Jury Instructions Civil (2007 ed.), Instructions
5 17.4, 17.19.

6 4. Declaratory Judgment

7 Plaintiffs seek a declaratory judgment “that Defendants’ continued production
8 of the *Axanar* Motion Picture constitutes infringement of the Star Trek Copyrighted
9 Works.” In order to obtain a declaratory judgment of copyright infringement,
10 Plaintiffs must prove:

- 11 a. An actual controversy exists (despite the fact that
 - 12 Defendants have not yet created the motion picture);
 - 13 b. Plaintiffs own valid copyrights in the works at issue; and
 - 14 c. Defendants’ motion picture, which does not yet exist, copies
 - 15 original elements from the alleged copyrighted works.
- 16 Copying includes (1) reproducing the work in copies; (2)
- 17 preparing derivative works based upon the copyrighted
- 18 work; (3) distributing copies of the copyrighted work to the
- 19 public by sale or other transfer or ownership or by rental or
- 20 lease or lending, (4) performing publicly a copyrighted
- 21 work, (5) displaying publicly a copyrighted work, and (6)
- 22 performing a sound recording by means of a digital audio
- 23 transmission.

24 *See* Ninth Circuit Manual of Model Jury Instructions (2007 ed.), Instruction Nos. 17.1,
25 17.4 (2007); 28 U.S.C. §§ 2201 *et seq.*

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1 **C. Brief Description of Key Evidence in Opposition to Each of**
2 **Plaintiffs' Claims**

3 1. Evidence in Opposition to Plaintiffs' Copyright Infringement
4 Claim

5 There is no evidence to support a claim of copyright infringement against
6 Defendants. The key evidence that Defendants will rely upon in opposition to
7 Plaintiffs' copyright infringement claim is: copies of *Prelude to Axanar* and the
8 *Vulcan Scene*, scripts for the unmade Potential Fan Film, and testimony from
9 Defendants' witnesses establishing that there is no substantial similarity between
10 Plaintiffs' Works and Defendants' Works for many reasons, including that
11 Defendants' Works introduce new characters, take place in a time period unexplored
12 by Plaintiffs' Works, feature original plots, and that *Prelude to Axanar* is shot in a
13 narrative "mockumentary" style never before used by either Plaintiffs or any other
14 Star Trek fan fiction. Defendants will rely upon the scripts for the unmade Potential
15 Fan Film and testimony from Defendants' witnesses to prove that because Defendants
16 are not currently committed to using any of the existing scripts in the Potential Fan
17 Film, and have not decided what format, length and substance the Potential Fan Film
18 will take when presented to the public, Plaintiffs' claims against Defendants based on
19 the Potential Fan Film are unripe and cannot be decided by a jury.

20 Defendants will rely upon testimony from Defendants' witnesses (including
21 damages expert Christian Tregillis and transformative use expert Henry Jenkins) and
22 Plaintiffs' witnesses to prove that Defendants' Works are protected as fair use because
23 they have no effect upon the potential market for or value of Plaintiffs' Works, they
24 are transformative and noncommercial in nature, Defendants' Works do not use a
25 substantial portion of Plaintiffs' Works, and because Plaintiffs' Works have been
26 publicized for the last fifty years. Defendants will also rely upon testimony from
27 Defendants' witnesses and communications between Plaintiffs and Defendants to
28 show that Defendants believed that they were operating within the accepted sphere of

1 fan fiction permitted by Plaintiffs and that therefore any copyright infringement was
2 not willful.

3 2. Evidence in Opposition to Plaintiffs' Contributory Copyright
4 Infringement Claim

5 There is no evidence to support a claim of contributory copyright infringement
6 against Defendants. Defendants will rely upon the evidence summarized above in
7 order to oppose Plaintiffs' claim for direct copyright infringement, a required element
8 of contributory copyright infringement. Defendants will rely upon testimony from
9 their witnesses and relevant communications to prove that Defendants did not know
10 about, have reason to know about, induce, or materially contribute to any copyright
11 infringement by third parties.

12 3. Evidence in Opposition to Plaintiffs' Vicarious Copyright
13 Infringement Claim

14 There is no evidence to support a claim of vicarious copyright infringement
15 against Defendants. Defendants will rely upon the evidence summarized above in
16 order to oppose Plaintiffs' claim for direct copyright infringement, a required element
17 of vicarious copyright infringement. Defendants will rely upon testimony from their
18 witnesses and relevant communications to prove that Defendants did not profit from
19 any alleged infringement, nor failed to exercise any right or ability to control the
20 infringing conduct of third parties.

21 4. Evidence in Opposition to Plaintiffs' Declaratory Judgment Claim

22 Defendants will rely upon testimony from Defendants' witnesses and scripts
23 from the unmade Potential Fan Film to prove that Defendants are not currently
24 committed to using any of the existing scripts in the Potential Fan Film, and have not
25 decided what format, length and substance the Potential Fan Film will take when
26 presented to the public, and thus, Plaintiffs' claims against Defendants based on the
27 Potential Fan Film are unripe.

28

1 **D. Summary of Counterclaims and Affirmative Defenses Defendants**
2 **Plan to Pursue**

3 1. Counterclaim for Declaratory Judgment of Non-Infringement

4 Defendants seek a declaratory judgment that Defendants’ Works at issue do not
5 infringe Plaintiffs’ Works at issue, including without limitation because Plaintiffs’
6 alleged Works are unprotectable as a matter of law; because Defendants’ Works are
7 not substantially similar to protectable elements of Plaintiffs’ Works; and because to
8 the extent Defendants’ Works are held to be substantially similar to protectable
9 elements of Plaintiffs’ Works, Defendants’ Works make fair use of such elements and
10 are therefore non-infringing as a matter of law.

11 2. Fair Use

12 Plaintiffs’ claims are barred because any use by Defendants is a fair use, and
13 therefore “is not an infringement of copyright” as a matter of law. To the extent
14 Defendants’ Works are found to have copied protectable elements of Plaintiffs’
15 alleged works resulting in substantial similarity of the works, such use is fair because
16 it has been made for purposes or criticism, comment, parody, or other purpose that is
17 permitted pursuant to the First Amendment, decisional law, statute, or otherwise.

18 3. Waiver

19 Plaintiffs’ claims are barred because Plaintiffs expressly or impliedly waived
20 their claims for copyright infringement against Defendants.

21 4. Unclean Hands

22 Plaintiffs’ claims are barred because Plaintiffs’ conduct in connection with this
23 litigation, including without limitation their eleventh-hour filing of this lawsuit, was
24 unfair or unethical.

25 5. First Amendment

26 Plaintiffs’ claims are barred in whole or in part because the Copyright Act must
27 be interpreted to be compatible with First Amendment guarantees, but Plaintiffs’
28 claims and requested remedies are incompatible with the First Amendment.

1 6. Estoppel

2 Plaintiffs are estopped from bringing some or all of their claims because of their
3 past actions and statements that are inconsistent with or contradict their present
4 assertions and claims.

5 7. Failure to Mitigate

6 Plaintiffs are not entitled to damages, including but not limited to damages for
7 unregistered works and statutory damages for willful infringement, because they
8 failed to take reasonable steps to mitigate such damage.

9 8. Failure to Register

10 Plaintiffs’ claims are barred in whole or in part because Plaintiffs failed to
11 register their alleged copyrights, including without limitation by failing to register
12 purported “characters.”

13 9. Lack of Standing

14 Plaintiffs’ claims are barred in whole or in part because Plaintiffs lack standing
15 to assert their copyright claims.

16 10. Acknowledgment, Ratification, Consent, and Acquiescence

17 Plaintiffs’ claims are barred by Plaintiffs’ acknowledgment, ratification,
18 consent, and/or acquiescence to Defendants’ use.

19 11. Authorized Use

20 Plaintiffs’ claims are barred, in whole or in part, because Defendants’ use was
21 authorized.

22 12. Misuse of Copyright

23 Plaintiffs’ claims are barred because they have misused their copyright(s),
24 including by their abusive or improper conduct in exploiting or enforcing the
25 copyright(s).

26 13. Constitutionally Excessive Damages

27 The statutory damages sought by Plaintiffs are unconstitutionally excessive and
28 disproportionate to any actual damages that may have been sustained, in violation of

1 the Due Process Clause of the United States Constitution.

2 **E. Elements Required to Establish Affirmative Defenses**

3 1. Fair Use

4 One who is not an owner of the copyright may use the copyrighted work in a
5 reasonable way without the consent of the copyright owner if it would advance the
6 public interest. Factors bearing on whether a use is a fair use include:

- 7 1) The purpose and character of the use, including whether such use is of
8 a commercial nature or is for nonprofit educational purposes;
9 2) The nature of the copyrighted work;
10 3) The amount and substantiality of the portion used in relation to the
11 copyrighted work as a whole;
12 4) The effect of the use upon the potential market for, or value of, the
13 copyrighted work;
14 5) Any other factors that bear on whether the use is fair.

15 *See* 17 U.S.C. § 107; Ninth Circuit Manual of Model Jury Instructions (2007 ed.),
16 Instruction No. 17.21.

17 2. Waiver

18 The elements of a defense of waiver require a showing of Plaintiffs' intentional
19 relinquishment of a right with knowledge of its existence and the intent to relinquish
20 it. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001), *aff'd after remand*,
21 284 F.3d 291 (9th Cir. 2002).

22 3. Unclean Hands

23 The elements for a defense of unclean hands in the copyright context are:

- 24 1) inequitable conduct by Plaintiffs;
25 2) that Plaintiffs' conduct directly relates to the claim which it has
26 asserted against the defendant; and
27 3) that the Plaintiffs' conduct injured Defendants.

1 *See Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989);
2 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1223
3 (C.D. Cal. 2007) (citing *Survivor Productions LLC v. Fox Broad. Co.*, No. CV01-
4 3234 LGB (SHX), 2001 WL 35829270, at *3 (C.D. Cal. June 12, 2001)).

5 4. First Amendment

6 Defendants must establish that Plaintiffs' claims are incompatible with
7 Defendants' constitutionally-guaranteed free speech rights.

8 5. Estoppel

9 The three elements of statutory estoppel are:

- 10 1) an assertion by a party of entitlement to statutory right or privilege;
11 2) the receipt by that party of an actual benefit pursuant to the statute; and
12 3) a subsequent assertion by that party that is inconsistent with entitlement to
13 the statutory benefit previously received. *Sathon, Inc. v. Am. Arbitration Ass'n*, No.
14 83 C 6019, 1984 WL 2917, at *3 (N.D. Ill. Mar. 30, 1984) (citing *Technicon Med.*
15 *Info. Sys. Corp. v. Green Bay Packaging, Inc.*, 687 F. 2d 1032, 1034 (7th Cir. 1982),
16 cert. denied, 459 U.S. 1106, 103 S.Ct. 732 (1983)).

17 6. Failure to Mitigate

18 Defendants must establish that:

- 19 1) the damages suffered by Plaintiffs could have been avoided; and
20 2) Plaintiffs failed to use reasonable care and diligence in avoiding the
21 damages. *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978); Ninth
22 Circuit Manual of Model Jury Instructions (2007 ed.), Instruction No. 5.3.

23 7. Failure to Register

24 Defendants must establish that Plaintiffs failed to register their alleged
25 copyrights.

26 8. Lack of Standing

27 Defendants must establish that Plaintiffs were not the owner or exclusive
28 licensee of the works they assert were infringed at the time of the alleged

1 infringement. *See Lanard Toys Ltd. v. Novelty Inc.*, 511 F. Supp. 2d 1020, 1033 (C.D.
2 Cal. 2007).

3 9. Acknowledgment, Ratification, Consent, and Acquiescence

4 Defendants must prove that Plaintiffs have given a license or its consent or
5 acquiescence, express or implied, to Defendants to use Plaintiffs' Works. *See Elvis*
6 *Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991); *Effects*
7 *Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

8 10. Authorized Use

9 Defendants must establish that Plaintiffs, by words or actions, authorized
10 Defendants to use Plaintiffs' Works.

11 11. Misuse of Copyright

12 The elements of copyright misuse require a showing that Plaintiffs have
13 attempted to enforce their copyrights in a manner that goes beyond the scope of the
14 rights granted under the United States Constitution. *See Lasercomb Am., Inc. v.*
15 *Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990); Ninth Circuit Manual of Model Jury
16 Instructions (2007 ed.), Instruction No. 17.23.

17 12. Constitutionally Excessive Damages

18 Defendants must prove that Plaintiffs seek excessive statutory damages. *Cf.*
19 *Philip Morris USA v. Williams*, 549 U.S. 346, 346 (2007), cert. dismissed as
20 improvidently granted, 129 S.Ct. 1436 (2009) (regarding excessive punitive damages).

21 **F. Key Evidence Relied on in Support of Each Affirmative Defense**

22 1. Fair Use

23 The key evidence that Defendants will rely upon to support this defense is as
24 follows: the allegedly infringing videos and script, themselves, including the nature,
25 purpose, and character of their minimal similarity to Plaintiffs' Works; expert
26 testimony and documents relating to the lack of potential impact of Defendants'
27 Works on the market for Plaintiffs' Works; and documents and testimony from
28 Defendants' witnesses regarding Defendants' Works.

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2. Waiver

The key evidence that Defendants will rely upon to support this defense is as follows: testimony from Defendants’ and Plaintiffs’ witnesses; and documents and evidence demonstrating that Plaintiffs have ignored Defendant Peters’ attempts to communicate regarding the use of any allegedly infringing content in Defendants’ Works. Defendants will also rely on Plaintiffs’ delay in taking action against allegedly infringing works before this lawsuit and Plaintiffs’ delay in filing this lawsuit.

3. Unclean Hands

The key evidence that Defendants will rely upon to support this defense is as follows: testimony from Defendants’ and Plaintiffs’ witnesses; and documents and evidence demonstrating that Plaintiffs were aware of allegedly infringing content prior to the filing of the Complaint, and, in spite of corresponding with Defendant Peters previously about his interest in creating the works at issue, took no action against Defendant Peters prior to filing this lawsuit and made no request for removal of the allegedly infringing material.

4. First Amendment

The key evidence that Defendants will rely upon to support this defense is as follows: the allegedly infringing videos and script, themselves, including the nature, purpose, and character of their minimal similarity to Plaintiffs’ Works; and documents and testimony from Defendants’ witnesses regarding Defendants’ Works.

5. Estoppel

The key evidence that Defendants will rely upon to support this defense is as follows: testimony from Defendants’ and Plaintiffs’ witnesses; testimony from experts and their reports; and documents, including Plaintiffs’ internal emails and correspondence among the parties that demonstrate that Plaintiffs took advantage of and benefited from the kind of fan participation that resulted in the alleged

1 infringements.

2 6. Failure to Mitigate

3 The key evidence that Defendants will rely upon to support this defense is as
4 follows: documents and testimony from Plaintiffs’ and Defendants’ witnesses
5 regarding Plaintiffs’ failure to mitigate damages by deliberately delaying in filing this
6 lawsuit against Defendants in spite of Plaintiffs’ previous awareness of Defendants’
7 alleged infringing activity.

8 7. Failure to Register

9 The key evidence that Defendants will rely upon to support this defense is as
10 follows: documents and testimony from Plaintiffs’ and Defendants’ witnesses
11 regarding Plaintiffs’ failure to register certain of its copyrights, including copyrights to
12 certain “characters” and other allegedly infringed elements.

13 8. Lack of Standing

14 The key evidence that Defendants will rely upon to support this defense is as
15 follows: documents and testimony from Plaintiffs’ and Defendants’ witnesses
16 demonstrating that either individual Plaintiff was not the owner or exclusive licensee
17 of the works ultimately determined to be infringed, if any, and therefore is not entitled
18 to a joint judgment against Defendants.

19 9. Acknowledgment, Ratification, Consent, and Acquiescence

20 The key evidence that Defendants will rely upon to support this defense is as
21 follows: documents and testimony from Plaintiffs’ and Defendants’ witnesses
22 regarding Plaintiffs’ failure to mitigate damages by deliberately delaying in filing this
23 lawsuit against Defendants in spite of Plaintiffs’ previous awareness of Defendants’
24 alleged infringing activity.

25 10. Authorized Use

26 The key evidence that Defendants will rely upon to support this defense is as
27 follows: testimony from Defendants’ and Plaintiffs’ witnesses; and documents,
28 including Plaintiffs’ internal emails and correspondence among the parties that

1 demonstrate that Plaintiffs encouraged, took advantage of, and benefited from the kind
2 of fan participation that resulted in the alleged infringements.

3 11. Misuse of Copyright

4 The key evidence that Defendants will rely upon to support this defense is as
5 follows: the allegedly infringing videos and script, themselves; testimony and
6 documents from Plaintiffs' and Defendants' witnesses; and court filings to
7 demonstrate that Plaintiffs are using this lawsuit to prevent Defendants from engaging
8 in lawful activity.

9 12. Constitutionally Excessive Damages

10 The key evidence that Defendants will rely upon to support this defense is as
11 follows: testimony from Plaintiffs' and Defendants' witnesses; experts; and
12 documents and evidence showing that Plaintiffs have failed to provide any
13 quantifications of actual damages and have not suffered any actual damages.

14 **G. Anticipated Evidentiary Issues**

15 The parties have filed the following Motions *in Limine* seeking evidentiary
16 rulings:

17 Plaintiffs' Motions *in Limine*:

- 18 1. To Exclude Altered Financial Statement And Its Contents, Or Any
19 Of The Post-Litigation Transactions Reflected Therein (ECF No.
20 120);
- 21 2. To Exclude Scripts Created After The Litigation Was Filed And
22 Testimony Discussing Them (ECF No. 121);
- 23 3. To Exclude Testimony Or Documents By J.J. Abrams And Justin
24 Lin And Their Public Statements, Or Anything Related To Their
25 Public Statements Or Documents Regarding This Matter (ECF No.
26 122);
- 27 4. To Exclude Testimony Or Documents By Reece Watkins (ECF
28 No. 123);

- 1 5. To Exclude Testimony And Documents Of Jonathan Lane (ECF
2 No. 124);
- 3 6. To Exclude Testimony And Documents Regarding Star Trek Fan
4 Films (ECF No. 127);
- 5 7. To Exclude Testimony And Documents Discussing Peters
6 Unrelated Work Regarding Star Trek Props (ECF No. 129);
- 7 8. To Exclude All Testimony, Documents Or Other Evidence Made
8 Or Created After The Filing Of The Original Complaint In This
9 Litigation (ECF No. 131);
- 10 9. To Exclude The Testimony Of Christian Tregillis (ECF No. 137);
11 and
- 12 10. To Exclude Testimony of Henry Jenkins (ECF No. 142).

13 Defendants' Motions *in Limine* (and explanation of the grounds therefore):

- 14 1. To preclude Plaintiffs from relying on evidence concerning alleged
15 discovery violations because no discovery violations have been
16 found against Defendants in this case nor is evidence of the
17 parties' discovery disputes relevant to Plaintiffs' claims of
18 copyright infringement. (ECF No. 126);
- 19 2. To preclude Plaintiffs from relying on evidence that was not timely
20 disclosed under the Court's scheduling order because the probative
21 value of the evidence is outweighed by the prejudice to
22 Defendants, who were prevented from taking any discovery on
23 these documents. (ECF No. 128);
- 24 3. To preclude Plaintiffs from introducing evidence regarding
25 allegedly infringed works not identified in the First Amended
26 Complaint because allowing Plaintiffs to introduce such evidence
27 after they withheld it from Defendants until the end of the
28 discovery period would be severely prejudicial and would violate

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- Defendants’ right to due process. (ECF No. 130);
4. To preclude Plaintiffs from relying on evidence regarding items that are unoriginal, in the public domain, or from third parties because such items are not protected by copyright, and any mention of them would improperly and unlawfully appear to the jury to expand the proper elements at issue with respect to Plaintiffs’ copyright claims. (ECF No. 132);
 5. To preclude Plaintiffs from relying on evidence concerning personal drama, smear campaign, and other irrelevant communications, including witnesses Christian Gossett, Terry McIntosh, because the introduction of evidence intended to smear Defendants would evoke bias and influence the jury without adding any probative value to the copyright claims at issue. (ECF No. 133);
 6. To preclude Plaintiffs from referring to irrelevant superseded scripts because it would waste the jury’s and the Court’s time to sift through a draft script when there is no risk that such script will be made. (ECF No. 134);
 7. To preclude Plaintiffs from introducing certain of Defendants’ financial information and inaccurate references to “profits” Defendants allegedly earned because any mention or mischaracterization of the money raised by Defendants through crowdfunding campaigns has no bearing on whether Defendants infringed on Plaintiffs’ copyrights and risks prejudicing Defendants and confusing the jury. (ECF No. 135);
 8. To preclude Plaintiffs from relying on any evidence, testimony, or argument suggesting that Defendants’ use of the name “Star Trek” in their works is relevant to an infringement analysis because no

1 reference to the use of Star Trek as a name or trademark is related
2 to any specific alleged copyright infringements at issue, and so any
3 such use would have little to no probative value. (ECF No. 136);
4 and

- 5 9. To preclude Plaintiffs from referencing the quality of
6 Defendants' Works as relevant to an infringement or fair use
7 analysis because such evidence is irrelevant to the analysis of
8 substantial similarity or the Works' transformative nature, and
9 Defendants would be severely prejudiced by the implication that
10 they are acting improperly by using professionals. (ECF No. 138).

11 **H. Anticipated Issues of Law**

12 Defendants identify the following anticipated issues of law: (1) Whether
13 Plaintiffs' claim regarding Potential Fan Film is premature; (2) Whether Defendants'
14 Works are substantially similar to Plaintiffs' Works; (3) The number of works that are
15 substantially similar and whether Plaintiffs' Works should be treated as one work for
16 purposes of determining statutory damages; (4) Whether Defendants' Works are
17 protected as fair use; and (5) Whether Defendants' alleged infringement was willful.

18 **III. BIFURCATION**

19 The parties have not requested bifurcation of the trial.

20 **IV. JURY TRIAL**

21 Defendants timely demanded a jury trial (ECF No. 26) in its answer to
22 Plaintiff's First Amended Complaint. The copyright claims at issue in this case are
23 triable to a jury. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

24 **V. ATTORNEYS' FEES**

25 Defendants intend, as indicated in its pleadings, to seek attorneys' fees from
26 Plaintiffs if they prevail in this action. The Copyright Act provides that in any
27 copyright action, the court "may allow the recovery of full costs by or against any
28 party...[and] the court may award a reasonable attorney's fee to the prevailing party

1 as part of the costs.” 17 U.S.C. § 505. To determine whether to grant a prevailing
 2 defendant attorneys’ fees, the district court determines whether the successful defense
 3 of the action furthered the purposes of the Copyright Act. *Mattel Inc., v. Walking*
 4 *Mountain Prods.*, 353 F.3d 792, 816 (9th Cir. 2003) (remanding for the district court
 5 to reconsider its denial of fees under the proper standard). To this end, the Court may
 6 consider several nonexclusive factors: (1) the degree of success obtained; (2)
 7 frivolousness; (3) motivation; (4) objective unreasonableness; and (5) the need in
 8 particular circumstances to advance considerations of compensation and deterrence.
 9 *Magnuson v. Recording Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996) (citing
 10 *Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). Judge Posner of the Seventh
 11 Circuit Court of Appeals has emphasized that “[w]hen the prevailing party is the
 12 defendant . . . the presumption in favor of awarding fees is very strong.” *Assessment*
 13 *Technologies, LLC v. WIREDData, Inc.*, 361 F.3d 434, 439 (7th Cir. 2004) (citing
 14 *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994)); *see also Milton*
 15 *H. Greene Archives, Inc. v. Julien’s Auction House, LLC*, No. 05-7686, 2007 WL
 16 4898365, at *5 (C.D. Cal. Dec. 20, 2007). “For without the prospect of such an award,
 17 the party might be forced into a nuisance settlement or deterred altogether from
 18 exercising his rights.” *Assessment Technologies*, 361 F.3d at 439.

19 VI. ABANDONMENT OF ISSUES

20 Defendants do not intend to pursue certain of their pleaded affirmative
 21 defenses: Invalidity and Unenforceability of Copyright; and Forfeiture or
 22 Abandonment.

23 Dated: December 19, 2016

WINSTON & STRAWN LLP

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 27 Diana Hughes Leiden
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