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8 and ALEC PETERS

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.
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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I. INTRODUCTION

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

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

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]

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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,
28

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.¹

25 _____
26 ¹ 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.

1 Dated: January 6, 2017

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By: /s/ Erin R. Ranahan

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