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10 Attorneys for Plaintiffs
PARAMOUNT PICTURES
11 CORPORATION and CBS STUDIOS
INC.
12

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.,
a Delaware corporation,
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19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a
California corporation; ALEC PETERS,
an individual, and DOES 1-20,
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23 Defendants.
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Case No.: 2:15-cv-09938-RGK-E

**PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' EVIDENCE
SUBMITTED IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Date: December 19, 2016
Time: 9:00 a.m.
Dept.: 850

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

1 Plaintiffs Paramount Pictures Corporation and CBS Studios Inc. (“Plaintiffs”)
2 hereby submit the following Evidentiary Objections to the Declaration of Kelly N.
3 Oki (Doc. 75-2), the Declaration of Alec Peters (Doc. 75-19), the Declaration of
4 Jonathan Lane (Doc. 75-25) and the Declaration of Reece Watkins (Doc. 75-28)
5 filed by Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) in
6 opposition to Plaintiffs’ Motion for Summary Judgment.

7 **I. The Unsworn Statements of Christian Tregillis and Henry Jenkins Must**
8 **Be Excluded.**

9 **A. Unsworn Statements of Purported Experts Are Not Evidence.**

10 A purported expert report which is attached to an attorney’s declaration is
11 unsworn hearsay, and constitutes inadmissible evidence. *Moroccanoil, Inc. v. Marc*
12 *Anthony Cosmetics, Inc.*, 57 F. Supp. 3d 1203, 1208 (C.D. Cal. 2014)(“Courts in the
13 Ninth Circuit ‘have routinely held that unsworn expert reports are inadmissible.’”);
14 *Smith v. City of Oakland*, No. C-05-4045 EMC, 2007 U.S. Dist. LEXIS 59941, 2007
15 WL 2288328, at *4 (N.D. Cal. Aug. 9, 2007) (“the report should be stricken because
16 it is hearsay. Although the report was signed by Mr. Clark and attached to a
17 declaration..., the report was not sworn to by Mr. Clark.”).

18 Defendants’ two purported “experts,” Christian Tregillis and Henry Jenkins
19 have not submitted sworn testimony in this case. The statements of Mr. Tregillis
20 and Mr. Jenkins were submitted as “exhibits” to the declaration of Defendants’
21 counsel, Kelly Oki. These purported experts are not qualified to opine on the
22 subject matter of their supposed reports, but regardless of their qualifications or
23 opinions, they have not presented the Court with any admissible evidence and their
24 statements should be exclude as inadmissible hearsay.

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1 **B. The Expert Statements Should Also Be Excluded As Defendants’**
2 **Counsel Refused to Allow Those Experts to Be Deposed Prior to**
3 **the Filing of Plaintiffs’ Opposition Brief.**

4 The Oki Declaration attaches two expert reports – of Christian Tregillis and
5 Henry Jenkins. These reports were emailed the evening of November 2, 2016, the
6 deadline for serving expert reports. Grossman Decl., ¶ 100. After the service of
7 these expert reports, and before Defendants filed the pending motion for summary
8 judgment, Plaintiffs’ served subpoenas on Defendants’ counsel for depositions of
9 both experts. These subpoenas were served on Monday November 14, 2016. The
10 experts’ depositions were noticed for Monday, November 21 and Tuesday,
11 November 22. *Id.*, ¶ 100.

12 Ms. Ranahan, counsel for Defendants, received the subpoenas, accepted
13 service of the subpoenas on behalf of Defendants’ experts, but on Tuesday,
14 November 15, 2016, Ms. Ranahan stated that Defendants “wholly objected” to the
15 subpoenas and stated that:

16 “There is no inherent right to take an expert deposition, especially after
17 the discovery cutoff, and clearly Judge Klausner did not believe it
18 necessary to add in a separate expert discovery cutoff to accommodate
19 that. You are free on summary judgment to attempt to rebut the
statements through documents and from non-experts, but we will not
consent to these eleventh hour depositions.”

20 *Id.*, Ex. JJJ. Within minutes of receiving this email, Plaintiffs’ counsel
21 explained that Ms. Ranahan was incorrect, both as a matter of federal practice and
22 based on this Court’s prior rulings. Defendants’ counsel provided her with a ruling
23 from this Court, from earlier this year, in which counsel in another copyright case,
24 Francis Malofiy, had taken the position that his experts could not be deposed after
25 the “fact discovery” cutoff:

26 I request that you reconsider your position. First, your position, that
27 expert depositions had to be completed **prior** to your providing expert
28 reports to Plaintiffs, is untenable. Second, the Federal Rules provide
that a retained expert’s deposition may only be taken after his or her
report is provided. FRCP 26(b)(4). Defendants’ expert reports were

1 not provided until the evening of November 2, 2016. Finally, Judge
 2 Klausner has ruled on this precise issue, and has held that the discovery
 3 cutoff in his pre-trial scheduling order does not apply to preclude expert
 4 depositions, which may be taken following the service of expert
 5 reports. *See Skidmore v. Zeppelin et al.*, Case No. 2:15-cv-03462-
 6 RGK-AGR, Dkt. No. 216 (“The Court having received and considered
 7 the Application of defendants James Patrick Page, Robert Anthony
 8 Plant, Warner/Chappell Music, Inc., Atlantic Recording Corporation
 9 and Rhino Entertainment Company for an Order confirming that **the**
 10 **February 11, 2016 discovery cut-off in this action does not apply to**
 11 **expert depositions** and that defendants may proceed with their
 12 depositions of plaintiff’s experts, and the papers filed in opposition and
 13 reply, and for good cause shown, IT IS HEREBY ORDERED that
 14 defendants’ Application is GRANTED.”) (emphasis added).

15 *Id.*, Ex. JJJ. After receiving this email, Ms. Ranahan argued that this Court’s prior
 16 order was distinguishable as it involved different circumstances. It is not. Ms.
 17 Ranahan also did not explain why she believed that the Federal Rules, which require
 18 experts to sit for their depositions after service of their reports, did not apply to this
 19 case. Further, Ms. Ranahan stated that she was not willing to make Defendants’
 20 experts available prior to the deadline to oppose Defendants’ motion for summary
 21 judgment, which was November 28, 2016. *Id.*, Ex. JJJ.

22 After refusing to make the experts available for deposition, Ms. Ranahan
 23 submitted both expert reports, attached to an attorney declaration, in support of
 24 Defendants’ pending motion for summary judgment.

Defendants’ Evidence	Plaintiffs’ Evidentiary Objection
<u>Declaration of Kelly N. Oki (Doc. 75-2)</u>	
23 Oki Decl. ¶ 3. “Exhibit 3 to my declaration is a 24 true and correct copy of the expert report, dated 25 November 2, 2016, of Christian Tregillis, a Partner 26 at Hemming Morse, LLP, on the financial, 27 economic, and accounting issues related to 28 Plaintiffs’ claims for copyright infringement and	Fed. R. Evid. 703, 802 Lacks foundation; Lacks basis for expert opinion; Hearsay.

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Defendants’ Evidence	Plaintiffs’ Evidentiary Objection
related causes of action.”	
<p>Oki Decl. ¶ 4. “Exhibit 4 to my declaration is a true and correct copy of the expert opinion of Dr. Henry Jenkins, the Provost’s Professor of Communication, Journalism, Cinematic Art, and Education at the University of Southern California (USC), on the impact of fan fiction on <i>Star Trek</i>, and on whether <i>Prelude to Axanar</i> is transformative.”</p>	<p><u>Fed. R. Evid. 703, 802</u> Lacks foundation; Lacks basis for expert opinion; Hearsay. Mr. Jenkins lacks competence or expertise to opine on what aids or competes with motion pictures and television programming, and he does not use any data to support his opinions. Further, he purports to claim that <i>Prelude to Axanar</i> is transformative with no expertise in the area, and he admits although he is Defendants’ expert, he hasn’t even read the Axanar Script at issue in this case.</p>
<p>Oki Decl. ¶ 16. “To date, Plaintiffs have not produced copies of any of the allegedly infringed works in this case. We received a confirming email from Plaintiffs’ counsel on November 15, 2016, stating that Plaintiffs would not be producing the allegedly infringed works to Defendants.”</p>	<p><u>Fed R. Evid. 1002</u> Best evidence rule. On June 21, 2016, Plaintiffs met with counsel for Defendants, Erin Ranahan,</p>

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
	<p>and the parties agreed that Plaintiffs did not need to produce the Star Trek films and episodes. Ms. Ranahan stated that she believed that Mr. Peters already had all of these episodes and also said that Mr. Peters would not be producing his copies of the Star Trek Copyrighted Works. The parties agreed that, if there were works Peters owned that were interlineated or commented on, those would be provided. Grossman Decl., ¶ 99.</p> <p>Furthermore, and consistent with Ms. Ranahan's representation and stipulation at the meet and confer, Mr. Peters testified that [REDACTED]. [REDACTED]. Grossman Decl., ¶ 99, Ex. A (Peters tr. at 40:10-15).</p>

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
<u>Declaration of Alec Peters (Doc. 75-19)</u>	
<p>Peters Decl. ¶ 7. The short film, titled <i>Prelude to Axanar</i>, premiered at San Diego Comic-Con in July 2014 ...”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703 Lacks foundation. <i>Star Trek: Prelude to Axanar</i>, did not premiere at San Diego Comic-Con. Grossman Decl., ¶ 19, Ex. C (Gossett tr. at 72:2-10:24).</p>
<p>Peters Decl. ¶ 7. The mockumentary style of the film allowed us to add critical commentary and analysis to the work in order to highlight a comparison of concepts in the Star Trek universe to the present-day military industrial complex, thus serving a different purpose than Plaintiffs’ Works, which I understand to be solely entertainment-focused. Furthermore, in portraying Garth of Izar, I hoped to examine issues of post-traumatic stress disorder and other psychological issues associated with war....<i>Prelude to Axanar</i>, as a consequence, is both a commentary and satire, exposing the horrors of war in ways the original Star Trek series did not.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703, 1002 Lacks foundation, improper lay opinion, best evidence rule. The Axanar Works speak for themselves and do not contain any satire or commentary on PTSD, the “military industrial complex,” or any other subject.</p>

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
<p>Peters Decl. ¶ 8. “Of the six total characters that appeared in <i>Prelude to Axanar</i>, four are original: Marcus Ramirez, Sam Travis, Sonya Alexander, and Kharn.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703</p> <p>Lacks foundation; Improper lay opinion; Irrelevant.</p> <p>The characters portrayed are not “original,” they are Vulcans, Klingons and Starfleet officers from the Star Trek universe.</p> <p>Further, Mr. Peters testified that [REDACTED].</p> <p>(Grossman Dec., ¶ 23, Ex. A., Peters tr. 48:2-25.)</p> <p>Mr. Peters also testified that [REDACTED].</p>

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Defendants’ Evidence	Plaintiffs’ Evidentiary Objection
	(Grossman Decl., ¶ 23, Ex. A., Peters tr. 46:18-48:1.)
Peters Decl. ¶ 9. “The <i>Vulcan Scene</i> was a continuation of the critical analysis seen in <i>Prelude to Axanar</i> .”	Fed. R. Evid. 401, 402, 602, 701-703, 1002 Lacks foundation; Improper lay opinion. Best Evidence Rule. There is no critical analysis in the Axanar Works.
Peters Decl. ¶ 10. “Of the two characters featured in the <i>Vulcan Scene</i> , one is original: T’Lera.”	Fed. R. Evid. 401, 402, 602, 701-703 Lacks foundation; Improper lay opinion; Irrelevant. T’Lera is a character from the novel <i>Strangers From the Sky</i> , owned by Plaintiff CBS. Grossman Decl., ¶ 95, Ex. XX. Further, the Vulcan characters in the Vulcan scene (including T’Lera) are not “original” – they are Vulcans, and were intentionally copied by Defendants.

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
<p>Peters Decl. ¶ 12. “While I understand that Plaintiffs do have copyright registrations to central Star Trek characters like Spock and Captain Kirk, notably, Plaintiffs have <i>not</i> registered copyrights to the characters Garth of Izar, or the other characters used in Defendants’ Works, most of whom are original creations of Axanar Productions.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703, 1002 Lacks foundation; Improper lay opinion; Irrelevant; Best Evidence. Peters does not identify any “original creations” and the Axanar Works speak for themselves.</p>
<p>Peters Decl. ¶ 13. “It was further alleged by CBS and Paramount that a ‘fully revised and locked’ script existed for the Potential Fan Film. To the contrary, there were over 40 scripts produced in this case, including approximately 12 that were drafted following the Facebook page post proclaiming there was a ‘fully revised and locked’ script. ‘Locked script’ is a term of art that means that no new sets, scenes, or characters will be added to a script, and is used to aid in budgeting purposes. Defendants are not currently committed to following any of the existing scripts, and still remain undecided on what format, length and substance the Potential Fan Film will take, including how much inspiration we draw from the Star Trek universe. We hope to obtain guidance</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703 Lacks foundation; Improper lay opinion; Irrelevant.</p>

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
<p>based on what is decided regarding Prelude to Axanar and the Vulcan Scene before deciding how to proceed with the Potential Fan Film.”</p>	
<p>Peters Decl. ¶ 15. “Though the Potential Fan Film script continues to evolve, this July 1, 2016 version of the Potential Fan Film script included 50 original characters (of a total 57 characters): Kharn, Tanaka, Admiral Threl, Wagner, Alexander, Corax, K’rae, Alexei Leonov, Mor’o, Arev, Sam Travis, T’Lera, Both, Cross, Caine, V’Nera, Moron, Walker, Federation President, Near, Trask, Gates, Here, Erik, Grunt, Logan, Carter, March, Jackson, Feng, Computer, Ajax Tactical Officer, Ajax Com Officer, Andorian Tactical Officer, Tellerite Tactical Officer, D-6 Weapons Officer, Klingon Delegate, Enterprise Tactical Officer, News Announcer, Andorian Corn Officer, Vulcan Tactical Officer, Intelligence Officer, Starfleet Officer #1, Starfleet Officer #2, Klingon General #1, Klingon General #2, Klingon Officer, Klingon Helmsman, D-7 Officer, Klingon Hordes.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703, 1002 Lacks foundation; Improper lay opinion; Irrelevant; Best Evidence. <u>Fed. R. Evid.</u> 403 Misleading and misstates facts. See generally evidence from the John Van Citters declaration. Klingons, Vulcans, Andorians and Starfleet officers are not “original” creations of Defendants.</p>
<p>Peters Decl. ¶ 16. “Nevertheless, neither <i>Prelude to Axanar</i>, nor the Potential Fan Film was ever intended to compete with, or serve as a substitute for, Plaintiffs’ business.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703 Lacks foundation; Improper lay opinion; Irrelevant.</p>

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Defendants' Evidence	Plaintiffs' Evidentiary Objection
<u>Declaration of Jonathan Lane (Doc. 75-25)</u>	
<p>Lane Decl. ¶ 2. “I am a Star Trek fan. I created this Executive Summary, ‘A History of Star Trek fan films,’ in January 2016, based on my extensive knowledge about, and following of, Star Trek fan fiction. Exhibit 1 to my declaration is a true and correct copy of the Executive Summary, which was produced by Defendants, with Bates Number AX000213.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 701-703, 802 Lacks foundation; Improper opinion; Purported “expert” opinion by a witness not qualified as an expert; Irrelevant; Hearsay.</p>
<u>Declaration of Reece Watkins (Doc. 75-28)</u>	
<p>Watkins Decl. ¶ 2. “Exhibit I to my declaration is a true and correct copy of a Facebook post I made on October 25, 2016 and the fifty-six Axanar Fan Group responses made thereto, produced by Defendants as Bates Numbers AX035793-AX035806.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602, 802 Lacks foundation; Hearsay; Irrelevant.</p>
<p>Watkins Decl. ¶ 5. “I specifically made these purchases, worth several hundred dollars, because <i>Prelude to Axanar</i> rekindled my interest in the <i>Star Trek</i> franchise, and would not have these purchases but for watching the fan film.”</p>	<p><u>Fed. R. Evid.</u> 401, 402, 602 Lacks foundation; Irrelevant.</p>

1 Dated: November 28, 2016

LOEB & LOEB LLP
JONATHAN ZAVIN
DAVID GROSSMAN
JENNIFER JASON

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By: /s/ David Grossman
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PARAMOUNT PICTURES
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