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PARAMOUNT PICTURES
11 CORPORATION and CBS STUDIOS
INC.
12

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15

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

**RESPONSE TO DEFENDANTS'
OBJECTIONS TO EVIDENCE
REGARDING PLAINTIFFS'
MOTION FOR PARTIAL
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. submit this
 2 response to Defendants’ objections to evidence regarding Plaintiffs’ Motion for
 3 Partial Summary Judgment.

4 **I. DECLARATION OF JOHN VAN CITTERS**

Evidence	Objection
6 1. Van Citters Decl. ¶¶ 12- 7 14, 19, 57, 60, 64, 65 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p data-bbox="755 527 1110 562"><u>Fed. R. Evid. 401, 402, 403</u></p> <p data-bbox="755 579 1511 1570">Mr. Van Citters’ statements regarding <i>Star Trek: The Role Playing Game</i> and <i>The Four Years War</i> (a “supplement” to this game that “describes the battle of Axanar” and “the military campaigns of Federation Fleet Captain Garth of Izar”) are irrelevant because neither are claimed to be infringed by Defendants in this case. <i>See</i> Defendants’ Responses to Plaintiffs’ Interrogatory Nos. 2-5 (listing various <i>Star Trek</i> motion pictures and television series episodes as the allegedly infringed works); <i>see also</i> FAC, Appendix A (list of allegedly infringed works does not include <i>Star Trek: The Role Playing Game</i> or <i>The Four Years War</i> supplement). Nor are Plaintiffs’ licensed derivative works relevant to this case for the same reason.</p> <p data-bbox="755 1629 1084 1665"><u>Plaintiffs’ Response:</u></p> <p data-bbox="755 1692 1487 1860">Defendants falsely claim that certain works were not identified in Plaintiffs’ discovery responses. Plaintiffs do allege that Defendants infringe <i>Star</i></p>

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Evidence	Objection
	<p><i>Trek: The Role Playing Game</i> and <i>Star Trek: The Four Years War</i>. The cited evidence includes <i>Star Trek: The Role Playing Game</i>.</p> <p>See Dkt. 75-3 (CBS’ interrogatory responses) at 3:8-9 (items 15 and 16), 4:10-11 (items 14 and 15), and 7:16-21. See also Dkt. 75-4 (Paramount’s interrogatory responses) at 3:8-9 (items 14 and 15), 4:11-12 (items 14 and 15), and 7:16-21.</p>
<p>2. Van Citters Decl. ¶¶ 15-62</p>	<p><u>Fed. R. Evid. 602, 701, 702, 901</u></p> <p>Van Citters’ statements that <i>Prelude to Axanar</i> and the <i>Vulcan Scene</i> “cop[y] many elements from the Star Trek Copyrighted Works” lack foundation, are speculative, and constitute improper legal opinion and improper opinion testimony. Mr. Van Citters was not disclosed as a fact witness on these issues, nor does he have the expertise to provide such expert testimony. See <i>Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p> <p><u>Plaintiffs’ Response:</u></p> <p>Mr. Van Citters was deposed by Defendants as a fact witness, and was also deposed as CBS’s 30(b)(6) witness on topics designated by Defendants. He answered all questions posed to him, and Defendants were specifically told at that</p>

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Evidence	Objection
	<p>deposition that they could question him on the similarities asserted by Plaintiffs in this case, with the sole exception of privileged conversations with counsel. <i>See, e.g.</i>, Grossman Reply Decl., ¶ 2, Ex. CCC (Van Citters tr. at 79:11-14) (“You’re free to obviously ask him about the substance of the chart...”). Mr. Van Citters was also designated as a non-retained expert after his deposition, pursuant to Federal Rule 26(a)(2)(C) on the subject of the various elements taken from Plaintiffs’ works, but Defendants declined to take his deposition on that subject.</p> <p>Mr. Van Citters was designated as a non-retained expert, not a <i>Daubert</i> expert. Plaintiffs are not intending to qualify him as such. <i>See Doe v. City of San Diego</i>, No. 12-cv-0689-MMA (DHB), 2013 U.S. Dist. LEXIS 109061, at *21-22 (S.D. Cal. Aug. 1, 2013), holding: “Rule 26 draws a distinction between retained experts and non-retained experts. <i>See Downey v. Bob’s Discount Furniture Holdings, Inc.</i>, 633 F.3d 1, 6 (1st Cir. 2011) (‘In order to give the phrase ‘retained or specially employed’ any real meaning, a court must acknowledge the difference between a percipient witness who happens to be an expert and an expert</p>

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Evidence	Objection
	<p>who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony.’) ([W]here . . . the expert is part of the ongoing sequence of events and arrives at his causation opinion during treatment, his opinion testimony is not that of a retained or specially employed expert.’); <i>Fielden v. CSX Transp., Inc.</i>, 482 F.3d 866, 869 (6th Cir. 2007) (characterizing non-retained expert witness as ‘an actor with regard to the occurrences from which the tapestry of the lawsuit was woven.’).”</p>
<p>3. Van Citters Decl. ¶ 63</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 801, 802, 901</u> Mr. Van Citters’ statement that “[b]ased on the evidence I have reviewed, Mr. Peters was exploring methods by which he could distribute high-quality Star Trek content, without a license, in order to enable him to continue to profit from Plaintiffs’ intellectual property” constitutes inadmissible hearsay not subject to any applicable exception to the hearsay rule, lacks foundation, is speculative, and is contradicted [REDACTED] [REDACTED] [REDACTED]. Mr. Van Citters’ statement that [t]he unrestricted and widespread conduct of the sort engaged in by the</p>

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Evidence	Objection
	<p>Defendants in this case would result in a substantially adverse impact on the market for Plaintiffs’ product” lacks any foundation, is speculative, and constitutes improper legal opinion and improper opinion testimony. Mr. Van Citters was not disclosed as a fact witness on these issues, nor does he have the expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p> <p><u>Plaintiffs’ Response:</u></p> <p>Mr. Van Citters was deposed by Defendants as a fact witness, and was also deposed as CBS’s 30(b)(6) witness on topics designated by Defendants. He was asked about the potential damage caused by Mr. Peters’ attempts to create an independent Star Trek film, and he provided a response to the posed question. This testimony is not hearsay and is not speculative or lacking in foundation as it is based on Mr. Peters’ own statements and conduct.</p>
<p>4. Van Citters Decl. ¶ 64</p>	<p><u>Fed. R. Evid. 401, 402, 403</u></p> <p>Mr. Van Citters’ statement that “Plaintiffs have already created and licensed derivative works that</p>

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Evidence	Objection
	<p>include the characters used by Defendants” including “the licensed works <i>The Four Years War</i> and <i>Return To Axanar</i> which were included as part of <i>Star Trek: The Role Playing Game</i>” is irrelevant because neither are claimed to be infringed by Defendants in this case. <i>See</i> Defendants’ Responses to Plaintiffs’ Interrogatory Nos. 2-5 (listing various <i>Star Trek</i> motion pictures and television series episodes as the allegedly infringed works); <i>see also</i> FAC, Appendix A (list of allegedly infringed works does not include <i>Star Trek: The Role Playing Game</i> or <i>The Four Years War</i> supplement). Nor are Plaintiffs’ licensed derivative works relevant to this case for the same reason.</p> <p><u>Plaintiffs’ Response:</u></p> <p>Defendants falsely claim that certain works were not identified in Plaintiffs’ discovery responses. Plaintiffs do allege that Defendants infringe <i>Star Trek: The Role Playing Game</i> and <i>Star Trek: The Four Years War</i>. The evidence cited by Defendants includes <i>Star Trek: The Role Playing Game</i>. <i>See</i> Dkt. 75-3 (CBS’ interrogatory responses) at 3:8-9 (items 15 and 16), 4:10-11 (items 14 and 15), and 7:16-21. <i>See also</i> Dkt. 75-4 (Paramount’s</p>

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Evidence	Objection
	interrogatory responses) at 3:8-9 (items 14 and 15), 4:11-12 (items 14 and 15), and 7:16-21.
<p>5. Van Citters Decl. ¶¶ 63-65</p>	<p><u>Fed. R. Evid. 401, 402, 403</u></p> <p>Van Citters’ statements regarding Plaintiffs’ creation of licensed derivative works are irrelevant because they are not claimed to be infringed by Defendants in this case. See Defendants’ Responses to Plaintiffs’ Interrogatory Nos. 2-5 (listing various <i>Star Trek</i> motion pictures and television series episodes as the allegedly infringed works); <i>see also</i> FAC, Appendix A.</p> <p><u>Plaintiffs’ Response:</u></p> <p>Defendants falsely claim that certain works were not identified in Plaintiffs’ discovery responses. Plaintiffs do allege that Defendants infringe <i>Star Trek: The Role Playing Game</i> and <i>Star Trek: The Four Years War</i>. The evidence cited by Defendants includes <i>Star Trek: The Role Playing Game</i>.</p> <p><i>See</i> Dkt. 75-3 (CBS’ interrogatory responses) at 3:8-9 (items 15 and 16), 4:10-11 (items 14 and 15), and 7:16-21. <i>See also</i> Dkt. 75-4 (Paramount’s interrogatory responses) at 3:8-9 (items 14 and 15), 4:11-12 (items 14 and 15), and 7:16-21. Further, the evidence regarding derivative works is relevant</p>

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Evidence	Objection
	to the issue of market harm with respect to the fair use analysis.

II. DECLARATION OF DAVID GROSSMAN

Evidence	Objection
<p>1. Grossman Decl. ¶¶ 8, 20, 25, 48, 50</p>	<p><u>Fed. R. Evid. 401, 403</u> Mr. Grossman’s statements regarding Mr. Peters’ purported failure to produce emails, text messages, and every public social media postings is irrelevant. Defendants’ document collection and production is not at issue in Plaintiffs’ Motion for Partial Summary Judgment, and Plaintiffs’ discovery-related complaints reflect only their own failure to raise any of these issues in a timely manner. <i>See</i> 10/31/16 Order Denying Plaintiffs’ <i>Ex Parte</i> Application (Dkt. 68) (“Except as expressly stated herein, [Plaintiffs’ <i>Ex Parte</i> Application] is denied. The Discovery Cut-Off Date is November 2, 2016. <i>See</i> Minute Order, filed May 9, 2016. Notwithstanding the issues Plaintiffs have raised regarding the adequacy of Defendants' document productions...the Court will not require at this late date the effective recommencement of document searches, reviews, and productions.”).</p> <p><u>Plaintiffs’ Response:</u></p>

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Evidence	Objection
	<p>The fact that Defendants withheld relevant evidence is relevant to the case at any stage, regardless of the Court’s order on an <i>ex parte</i> application.</p> <p>Further, fair use is an equitable defense, and Peters, undeniably, failed and refused to produce thousands of pages of relevant evidence, and is, nevertheless, requesting that the Court exercise its equitable discretion in his favor.</p>
<p>2. Grossman Decl. ¶¶ 10-97</p>	<p><u>Fed. R. Evid. 602, 801, 802</u></p> <p>Mr. Grossman’s summary of the content of deposition transcripts, documentary evidence, and the pleadings in this case all lack foundation, are argumentative, are improper legal opinion, are not based on personal knowledge, misstate the evidence, and constitute inadmissible hearsay that is not subject to any applicable exception.</p> <p><u>Plaintiffs’ Response:</u></p> <p>Mr. Grossman is simply summarizing the attached deposition testimony. Further, Mr. Peters’ statements are all admissions of a party witness and are admissible as such. Mr. Grossman attended Mr. Peters’ depositions, and his statements made at that deposition are admissible admissions.</p>

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Evidence	Objection
<p>3. Grossman Decl. ¶¶ 13-14</p>	<p><u>Fed. R. Evid. 401, 403</u></p> <p>Mr. Grossman’s statements regarding <i>Star Trek: The Role Playing Game</i> and <i>The Four Years War</i> are irrelevant because neither are claimed to be infringed by Defendants in this case. <i>See</i> Defendants’ Responses to Plaintiffs’ Interrogatory Nos. 2-5 (listing various <i>Star Trek</i> motion pictures and television series episodes as the allegedly infringed works); <i>see also</i> FAC, Appendix A (list of allegedly infringed works does not include <i>Star Trek: The Role Playing Game</i> or <i>The Four Years War</i> supplement).</p> <p><u>Plaintiffs’ Response:</u></p> <p>Defendants falsely claim that certain works were not identified in Plaintiffs’ discovery responses. Plaintiffs do allege that Defendants infringe <i>Star Trek: The Role Playing Game</i> and <i>Star Trek: The Four Years War</i>. The evidence cited by Defendants includes <i>Star Trek: The Role Playing Game</i>.</p> <p><i>See</i> Dkt. 75-3 (CBS’ interrogatory responses) at 3:8-9 (items 15 and 16) , 4:10-11 (items 14 and 15), and 7:16-21. <i>See also</i> Dkt. 75-4 (Paramount’s interrogatory responses) at 3:8-9 (items 14 and 15), 4:11-12 (items 14 and 15), and 7:16-21.</p>

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Evidence	Objection
<p>4. Grossman Decl. ¶ 21</p>	<p><u>Fed. R. Evid. 401, 403, 602, 801, 802</u></p> <p>Mr. Grossman’s summary of a third party witness’ testimony that <i>Prelude to Axanar</i> “infringes upon Plaintiffs’ copyrights” lack foundation, are not based on personal knowledge, is an improper legal conclusion, and constitutes inadmissible hearsay that is not subject to any applicable exception. Nor is the opinion of a third party regarding infringement relevant.</p> <p><u>Plaintiffs’ Response:</u></p> <p>Mr. Grossman is simply summarizing the attached testimony.</p> <p>Mr. Gossett is not simply a “third party,” he is the director of <i>Prelude</i>, and testified at length regarding the elements that were taken from Star Trek to create <i>Prelude</i>.</p>
<p>5. Grossman Decl. ¶¶ 48-57</p>	<p><u>Fed. R. Evid. 401, 403</u></p> <p>Mr. Grossman’s statements that Defendants “created a ‘professional’ work” lack relevance.</p> <p><u>Plaintiffs’ Response:</u></p> <p>These statements are relevant given that Defendants have asserted the affirmative defense of fair use in response to Plaintiffs’ claims that the Axanar Works infringe Plaintiffs’ copyrights.</p>

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Evidence	Objection
<p>6. Grossman Decl. ¶ 88</p>	<p><u>Fed. R. Evid. 602</u></p> <p>Mr. Grossman’s statements regarding Plaintiffs’ purported copyright registrations and Plaintiffs’ works lack foundation and are not based on personal knowledge.</p> <p><u>Plaintiffs’ Response:</u></p> <p>Mr. Grossman is simply attaching the applicable copyright registrations, which speak for themselves.</p>
<p>7. Grossman Decl. ¶¶ 90-96</p>	<p><u>Fed. R. Evid. 401, 403, 602, 801, 802</u></p> <p>Mr. Grossman’s statement that Mr. Peters “is a lawyer by training” is irrelevant, lacks foundation, and constitutes inadmissible hearsay that is not subject to any applicable exception.</p> <p><u>Plaintiffs’ Response:</u></p> <p>This is not hearsay and not irrelevant. Mr. Peters testified that he is a lawyer in the testimony attached to Mr. Grossman’s declaration. Mr. Peters also referred to his “legal training” in his declaration filed in support of Defendants’ Motion for Summary Judgment. <i>See</i> Peters Decl, ¶ 5 (Dkt. 90-10).</p> <p>Further, Mr. Peters’ statements are all admissions</p>

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Evidence	Objection
	of a party witness and are admissible as such. Mr. Grossman attended Mr. Peters’ depositions, and his statements made at that deposition are admissible admissions.

Dated: December 5, 2016

LOEB & LOEB LLP
JONATHAN ZAVIN
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David Grossman
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