

1 Erin R. Ranahan (SBN: 235286)
eranahan@winston.com
2 Diana Hughes Leiden (SBN: 267606)
dhleiden@winston.com
3 Kelly N. Oki (SBN: 304053)
koki@winston.com
4 WINSTON & STRAWN LLP
333 South Grand Avenue
5 Los Angeles, CA 90071
Telephone: (213) 615-1700
6 Facsimile: (213) 615-1750

7 Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.,
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' MOTION *IN LIMINE*
NO. 1 TO PRECLUDE PLAINTIFFS
FROM RELYING ON EVIDENCE
CONCERNING ALLEGED
DISCOVERY VIOLATIONS**

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

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TO THE COURT, PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 31, 2017, or as soon as this matter may be heard in Courtroom 850 of the Honorable R. Gary Klausner, 255 East Temple Street, Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs from introducing evidence or argument relating to any alleged discovery disputes or alleged discovery violations Plaintiffs claim against Defendants.

This Motion is brought pursuant Federal Rules of Evidence 401-403. This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declaration of Diana Hughes Leiden (“Leiden Decl.”), previously filed documents incorporated by reference herein, and upon such other and further evidence and argument as may be presented to the Court prior to or at the time of hearing on this motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 that took place on December 9, 2016.

Dated: December 16, 2016

WINSTON & STRAWN LLP

By: /s/ Erin R. Ranahan
Erin R. Ranahan
Diana Hughes Leiden
Kelly N. Ōki
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 Paramount Pictures Corporation and CBS Studios Inc.
6 (“Plaintiffs”) from relying on at trial any evidence or testimony regarding discovery
7 disputes between the parties or alleged discovery violations by Defendants.

8 Though Plaintiffs attempted to seek a Court order compelling Defendants to
9 conduct additional searches and produce more documents, this effort came long after
10 the discovery cut-off in this case allowed. Nevertheless, despite this order,
11 Defendants have continued to raise these so-called discovery “violations” both in their
12 summary judgment motion, and throughout a second deposition of Mr. Peters taken
13 *after* the Court declined to order any further production of documents.

14 Raising these issues is therefore not only highly misleading factually, because
15 the Court did not hold that Defendants engaged in any discovery misconduct, but
16 these discovery issues are also irrelevant to the ultimate copyright issues presented for
17 trial and would likely influence the jury to conclude that one side has tried to gain an
18 advantage by suppressing or withholding evidence. For these and all the foregoing
19 reasons, Defendants respectfully request that the Court grant Defendants’ Motion *in*
20 *Limine* No 1.

21 **II. FACTUAL BACKGROUND**

22 Plaintiffs have never obtained an order in this case requiring Defendants to
23 search for or produce a single document. Defendants, an individual and a small
24 company, made a good faith production of documents proportionally relevant to this
25 case, producing far more times what Plaintiffs (two large corporations) produced.
26 ECF No. 55 (Joint Stipulation Re Defendants' Motion to Compel at 3:2-8).

27 Defendants did not search and produce every social messaging post because
28 they were publicly available and Plaintiffs had been systematically gathering those

1 they found helpful to them. *See, e.g.*, ECF. No. 26 (First Amended Complaint
2 (“FAC”)) at ¶ 36.

3 Defendants did not search and produce text messages because they did not
4 consider them proportional to the needs of the case, and explained that to Plaintiffs
5 during the meet and confer process. Indeed, Plaintiffs did not produce a single text
6 message either. Plaintiffs’ counsel, Mr. Zavin, represented to Defendants’ counsel in
7 a meet and confer following Mr. Peters’ first deposition, on October 19, that Plaintiffs
8 would not require Defendants to search and produce text messages. Leiden Decl., Ex.
9 8 (Peters tr. at 281:14-19). On September 29, 2016, Defendants timely filed a motion
10 to compel Plaintiffs to search and produce several categories of documents and serve
11 responses to various interrogatories and other discovery requests. *See* ECF No. 60
12 (Min. Order). Immediately following that ruling, Plaintiffs filed an *Ex Parte*
13 *Application* With Magistrate Judge Eick requesting that the Court order Defendants to
14 certify that they had produced all sorts of additional documents. The Court declined
15 to order a search of text messages, and noted that Plaintiffs’ *Ex Parte* Application,
16 brought just a couple days before discovery closed, was untimely. ECF No. 68
17 (Minute Order).

18 As the Court noted,

19Except as expressly stated herein, the Application is
20 denied. The Discovery Cut-Off Date is November 2, 2016.
21 See Minute Order, filed May 9, 2016. Notwithstanding the
22 issues Plaintiffs have raised regarding the adequacy of
23 Defendants’ document productions (based largely on
24 information obtained in connection with the depositions
25 taken in October of 2016), *the Court will not require at this*
26 *late date the effective recommencement of document*
27 *searches, reviews and productions.*

28 *Id.*

1 But that ruling has not stopped Plaintiffs from attempting to cast aspersions
2 about Defendants' alleged discovery misconduct that did not exist and was
3 specifically rejected by the Court. *See, e.g.*, ECF No. 72-2 (Grossman Decl. at ¶ 8
4 ("In response to Plaintiffs' discovery requests, Mr. Peters produced a smattering of
5 emails, and he admittedly did not produce any social media postings or other online
6 postings/ statements he made concerning the Axanar Works, including statements and
7 posting he made on his own website, AxanarProduction.com."); ECF No. 88-1
8 (Grossman Decl. at ¶¶ 8, 100). Plaintiffs also made such accusations throughout a
9 second deposition of Mr. Peters taken *after* the Court declined to order any further
10 production of documents. *See* Leiden Decl., Ex. 8 (Peters tr. at 261:7-283:20). This
11 included asking Mr. Peters to pull out his cell phone for a review of text messages,
12 contrary to the agreement Plaintiffs' counsel previously made, and even though
13 discovery had closed and the Court declined to consider such issues on an *Ex Parte*
14 basis in the final days of discovery. *Id.*

15 III. LEGAL STANDARD

16 Rulings on motions *in limine* are committed to the discretion of the trial court.
17 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has
18 "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair
19 and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App'x
20 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude
21 evidence where the evidence is not relevant, or where the 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 plaintiff’s 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 **IV. ARGUMENT**

11 **A. The Court Should Exclude All Evidence And Testimony Regarding** 12 **Discovery Disputes As Irrelevant and Prejudicial**

13 The legal rule for excluding prejudicial evidence under Federal Rule of
14 Evidence 403 explains that “[t]he court may exclude relevant evidence if its probative
15 value is substantially outweighed by a danger of one or more of the following: unfair
16 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
17 needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

18 Plaintiffs intend to offer the testimony and evidence regarding alleged
19 discovery violations, though no discovery violations have been found against
20 Defendants in this case. *See* ECF Nos. 60, 68. For example, Plaintiffs seek to
21 introduce Defendant Alec Peters’ Responses to Plaintiff Paramount Pictures
22 Corporation and CBS Studios Inc.’s First Set of Request for Production of
23 Documents, dated May 31, 2016—produced, nearly six months ago—as evidence of
24 such. Plaintiffs have also continually referenced so-called inadequate productions in
25 summary judgment filings, and in questioning Mr. Peters after the Court declined to
26 order further production of any documents. *See* Leiden Decl., Ex. 8 (Peters tr. at
27 281:14-19); ECF No. 72-2 (Grossman Decl. at ¶ 8); ECF No. 88-1 (Grossman Decl. at
28 ¶¶ 8,100). Defendant Alec Peters’ Responses to Plaintiff Paramount Pictures

1 Corporation and CBS Studios Inc.’s First Set of Request for Production of Documents
2 is attached to the concurrently-filed Declaration of Diana Hughes Leiden as Exhibit 4.

3 Courts in this district and others have noted that the purpose of discovery is to
4 “remove surprise from *trial preparation* so that parties can obtain evidence necessary
5 to evaluate and resolve their dispute.” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 535
6 (C.D. Cal. 2005) (emphasis added); *see also United States v. Proctor & Gamble*, 356
7 U.S. 677, 683 (“The purpose of discovery is to allow a broad search for facts, the
8 names of witnesses, or any other matters which may aid a party in the preparation or
9 presentation of his case.”). Indeed, this belated effort to paint Defendants as
10 uncooperative regarding discovery early in this dispute is simply irrelevant. Plaintiffs
11 cannot argue with any seriousness that they were prejudiced—this particularly true in
12 light of the fact that Plaintiffs *twice* deposed Defendant Alec Peters, most recently on
13 November 2, 2016. No discovery misconduct has been found against Defendants in
14 this case at all, and certainly not the type that should impact argument on the merits a
15 at trial.

16 Even still, evidence of the parties’ discovery disputes are not relevant to the
17 questions of copyright infringement, and thus should not be presented to the jury.
18 Fed. R. Evid. 401; *see Mformation Techs., Inc. v. Research in Motion Ltd.*, No. C 08-
19 04990, 2012 WL 2339762, at *2 (N.D. Cal. Jun 7, 2012) (finding good cause to
20 exclude evidence of discovery disputes including “evidence pertaining to Plaintiff’s
21 late production of any source code”). As mentioned, Plaintiffs will likely introduce
22 such evidence to influence the jury to conclude that one side has tried to gain an
23 advantage by suppressing or withholding evidence. *Id.* Given that Defendants would
24 suffer undue prejudice from this irrelevant testimony, which adds no probative value
25 with respect to Plaintiffs’ copyright claims, the Court should exclude such evidence
26 under Federal Rules of Evidence 401 and 403.

1 **V. CONCLUSION**

2 For all of the foregoing reasons, Defendants respectfully request that the Court
3 grant their Motion *in Limine* No. 1.

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5 Dated: December 16, 2016

WINSTON & STRAWN LLP

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By: /s/ Erin R. Ranahan
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