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

Assigned to: Hon. R. Gary Klausner

**DEFENDANT AXANAR
PRODUCTIONS, INC.'S NOTICE OF
MOTION AND MOTION *IN LIMINE*
NO. 6 TO PRECLUDE PLAINTIFFS
FROM REFERRING TO
IRRELEVANT SUPERSEDED
SCRIPTS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon thereafter as
3 the matter may be heard before the Honorable R. Gary Klausner of the United States
4 District Court for the Central District of California, at 255 East Temple Street, Los
5 Angeles, California, 90012, Defendants Axanar Productions, Inc. and Alec Peters
6 (collectively, "Defendants") will and hereby do move this Court for an order
7 restricting the parties, all counsel and witnesses from mentioning, directly or
8 indirectly, before jurors and prospective jurors from prior, superseded scripts.

9 This Motion *in Limine* No. 6 ("Motion") is brought pursuant to Rules 701-703
10 of the Federal Rules of Civil Procedure. This Motion is based upon this Motion and
11 Notice of Motion, the supporting documents filed concurrently herewith, previously
12 filed documents incorporated by reference herein, and such oral argument and
13 submissions that may be presented at or before the hearing on this Motion. Pursuant
14 to Local Rule 7-3, this Motion is made following the conference of counsel that took
15 place on December 9, 2016.

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17 Dated: December 16, 2016

WINSTON & STRAWN LLP

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By: /s/ Erin R. Ranahan
Erin R. Ranahan
Andrew S. Jick
Kelly N. Oki
Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.
and ALEC PETERS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Federal Rules of Evidence 401-403,¹ Defendants Axanar Productions, Inc. and Alec Peters (collectively, "Defendants") move for an *in limine* order precluding Plaintiffs from introducing at trial any testimony or evidence constituting or relating to irrelevant, superseded scripts. Not only would such evidence be irrelevant and more prejudicial than probative, but also presentation of such evidence would be a waste of the jury and the Court’s time to determine substantial similarity between the script and some unknown number of Plaintiffs’ works, because there is no risk of that script being made. For these and all the following reasons, Defendants respectfully request that this Court grant its Motion *In Limine* No. 6.

II. LEGAL STANDARD

Rulings on motions *in limine* are committed to the discretion of the trial court. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude evidence where the evidence is not relevant, or where the probative value is outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse discretion in excluding conclusive, speculative evidence). Even if evidence is considered relevant, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131, 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because

¹ All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

1 evidence's probative value was substantially outweighed by unfair prejudice);
2 *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district
3 court's exclusion of evidence that was low in probative value and could have
4 confused the jury as more prejudicial than probative under Rule 403).

5 **III. FACTUAL BACKGROUND**

6 Plaintiffs filed this lawsuit about a film that was not yet made. ECF No. 26
7 (FAC ¶ 32). At the time Plaintiffs filed this lawsuit in December 2015, Defendants
8 had prepared most recently version 7.7 of the script for *Axanar*, dated November 26,
9 2015. ECF No. 94-10 (Decl. of Bill Hunt at ¶ 2). Prior to that, Plaintiffs had
10 created many versions of the script. Leiden Decl., Ex. 5 (Deposition Transcript of
11 Bill Hunt ("Hunt Tr.") at 53:15-25). The Court assumed when ruling on
12 Defendants' motion to dismiss that there was a "final, locked" script that was based
13 on this Court's assumption that the facts in Plaintiffs' First Amended Complaint
14 were true, and thus that the Court could look to that script in order to ascertain
15 substantial similarity and presumably fair use. ECF No. 43 (Order re Defendants'
16 Motion to Dismiss at 7). But discovery has proven otherwise.

17 After Defendants heard the announcement by J.J. Abrams on May 19, 2016
18 that the lawsuit "was going away," Defendants, optimistic about this announcement,
19 began working on a revised draft script, which is the most recent draft and would be
20 the only *Axanar* draft script that Defendants are still considering proceeding with
21 producing. Leiden Decl., Ex. 5 (Hunt Tr. at 87:22-88:8). The latest script features
22 two entirely new characters that were not in version 7.7, an original story, and an
23 original dialogue. ECF No. 94-10 (Hunt Decl. at ¶¶ 3, 4, 9). The use of Star Trek
24 characters is minor and transformative from any prior Star Trek work. ECF No. 75-
25 19 (Peters Decl. at ¶ 16). This draft has 616 changes from the prior draft. ECF No.
26 94-10 (Hunt Decl. at ¶ 2).

27 Defendants are not planning on proceeding with the "7.7" November 2015
28 draft. ECF No. 94-10 (Hunt Decl. at ¶ 15). Moreover, Defendants are waiting to

1 obtain guidance from this lawsuit, including what happens with respect to the fair
2 use defense as applied to *Prelude*, to determine whether breaking up *Axanar* into
3 four “mockumentary” style pieces would likely also qualify as fair use. ECF No.
4 75-19 (Peters Decl. at ¶ 13).

5 **IV. ARGUMENT**

6 Courts have held that preliminary works such as draft screenplays are “too
7 unreliable in determining substantial similarity” as to the final work. *Walker v.*
8 *Time Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); *See v. Durang*, 711
9 F.2d 141, 142 (9th Cir. 1983) (plaintiff not allowed discovery of “early drafts”);
10 *Hudson v. Universal Pictures Corp.*, No. 03-CV-1008(FB)(LB), 2004 WL 1205762,
11 at *3 (E.D.N.Y. April 29, 2004) (“The Court is under no obligation to consider the
12 draft scripts[.]”); *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at *2
13 n.2 (C.D. Cal. Oct. 26, 1983) (refusing to consider “draft screenplays or the shooting
14 script” of movie because they were “not relevant”). Rather, it is “the works as they
15 were presented to the public” that are relevant, not preliminary internal drafts.
16 *Walker*, 615 F. Supp. at 434; *see also Chase-Riboud v. DreamWorks, Inc.*, 987 F.
17 Supp. 1222, 1227 n.5 (C.D. Cal. 1997) (to determine substantial similarity, “the
18 court need only consider the final version of [defendant’s] film as presented to the
19 viewing public”); 4 Nimmer on Copyright § 13.03[D] (“[C]ourts have routinely
20 rejected requests to consider earlier [screenplay] drafts.”).

21 It would be a waste of the jury and the Court’s time to sift through a draft
22 script when there is no risk that such script will be made. If any script is permitted
23 for consideration, given that the film over which Plaintiffs filed this lawsuit is not
24 yet made, it should be the most recent one, and it should also be considered that
25 Defendants are strongly considering producing *Axanar* in the same, unique
26 mockumentary style as *Prelude*.

1 **V. CONCLUSION**

2 For all the foregoing reasons, Defendants respectfully request that this Court
3 grant its Motion *In Limine* No 6.

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5 Dated: December 16, 2016

WINSTON & STRAWN LLP

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