

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
20
21

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

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC., AND ALEC
PETERS' EVIDENTIARY
OBJECTIONS TO THE
DECLARATION OF JOHN VAN
CITTERS IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Date: 12/19/16
Time: 9:00 a.m.
Place: Courtroom 850, 8th Floor
255 East Temple Street
Los Angeles, CA 90012
Judge: Hon. R. Gary Klausner

22
23 **REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED**

24 **UNDER SEAL**
25
26
27
28

1 Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) hereby
2 submit the following evidentiary objections to the Declaration of John Van Citters that
3 was submitted in support of Plaintiffs’ Opposition to Defendants’ Motion for
4 Summary Judgment (“Van Citters Declaration”).

5 **I. Paragraphs 15-62 of the Van Citters Declaration Should Be Stricken**
6 **Because Plaintiffs Did Not Disclose Mr. Van Citters as Knowledgeable**
7 **About the Topics in the Declaration**

8 Plaintiffs identified Mr. Van Citters in Plaintiffs’ initial disclosures as having
9 knowledge of “[c]ontact with Defendants and licensing of Plaintiffs’ works” only.
10 And while he was designated as a 30(b)(6) witness to testify regarding certain topics
11 on behalf of CBS, Plaintiffs’ counsel objected at his deposition to all lines of
12 questioning about the creation of the chart in Plaintiffs’ First Amended Complaint
13 purportedly showing substantial similarity between Plaintiffs’ works and the *Axanar*
14 works as privileged. Van Citters Dep. Tr. at 78:14-80:13. A similar table including
15 this information was then included in the Van Citters Declaration in Paragraphs 15-62.
16 The Van Citters Declaration also includes statements about Plaintiffs’ works
17 (Paragraphs 3-7, and 9), Plaintiffs’ copyrights (Paragraphs 8, 10, 11, and 14), and
18 Plaintiffs’ purported damages (Paragraphs 63-65). Mr. Van Citters was not disclosed
19 as a witness on any of those topics either.

20 A party who fails to make a required initial disclosure (such as disclosing
21 witnesses likely to have information on key topics) “is not allowed to use that
22 information or witness to supply evidence on a motion, at a hearing, or at trial” unless
23 the party’s failure was “substantially justified” or “harmless.” Fed. R. Civ. P.
24 37(c)(1); *Hoffman v. Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th
25 Cir. 2008). Plaintiffs’ failure to disclose Mr. Van Citters as a witness with knowledge
26 of any of the topics discussed in his Declaration deprived Defendants of the
27 opportunity to cross-examine Mr. Van Citters on these topics before he submitted the
28 self-serving declaration in support of Plaintiffs’ motion. Nor could Plaintiffs provide

1 any “justification” for failing to disclose Mr. Van Citters on these topics in the many
2 months between the time due for initial disclosures and Mr. Van Citters’ deposition on
3 September 28, 2016 or the close of discovery on November 1, 2016. Paragraphs 15-
4 62 of the Van Citters Declaration should be stricken. Fed. R. Civ. P. 37(c)(1); *Yeti by*
5 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001)
6 (affirming trial court’s exclusion of previously undisclosed evidence where the
7 defendant failed to meet its burden to show that the nondisclosure was either harmless
8 or justified).

9 **II. The Van Citters Declaration, Which Relies on Evidence Not Produced,**
10 **Should Be Stricken**

11 Discovery closed in this case on November 2, 2016. *See* ECF No. 44.
12 Plaintiffs continued to produced evidence after the close of discovery in violation of
13 the Court’s order, and failed to produce some evidence at all. A party who fails to
14 make a required initial disclosure (including providing copies of “all documents,
15 electronically stored information, and tangible things that the disclosing party has in
16 its possession, custody, or control and may use to support its claims or defenses”) “is
17 not allowed to use that information or witness to supply evidence on a motion, at a
18 hearing, or at trial” unless the party’s failure was “substantially justified” or
19 “harmless.” Fed. R. Civ. P. 26(a)(1)(A)(ii); Fed. R. Civ. P. 37(c)(1); *Hoffman v.*
20 *Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). To date,
21 Plaintiffs have not produced any of the allegedly infringed works, or Exhibit BBB to
22 the Van Citters Declaration. The Van Citters Declaration generally, which relies on
23 the unproduced allegedly infringed works, and specifically Paragraph 14 which relies
24 on the unproduced Exhibit BBB, should be stricken and Plaintiffs should not be
25 permitted to rely upon that evidence to support their motion.

1 **III. The Van Citters Declaration Should Be Stricken Because Mr. Van Citters**
2 **Is Not Qualified as an Expert**

3 On November 2, 2016 (over a month after Van Citters had been deposed),
4 Plaintiffs disclosed Mr. Van Citters as a purported expert “regarding matters that
5 would be considered outside the knowledge of laypersons who are not knowledgeable
6 about Star Trek works and/or who do not have the experience and knowledge
7 possessed by Mr. Van Citters regarding the history of the Star Trek entertainment
8 franchise.” Plaintiffs stated that Mr. Van Citters would provide “expert” opinion
9 testimony, predicated on “his background and experience working for Plaintiffs ...,
10 and his personal knowledge in the Star Trek works,” that “Defendants’ Axanar Works
11 are copied from Plaintiffs’ Star Trek Copyrighted Works, including Klingons,
12 Vulcans, the U.S.S. Enterprise, Garth of Izar, Soval the Vulcan Ambassador, the
13 planet Vulcan, and the various elements, including the settings, characters, plots,
14 sequences and themes described in the First Amended Complaint.”

15 Mr. Van Citters does not appear to be qualified as an expert. He claims to have
16 “seen every Star Trek film, television episode, and have read the Star Trek books” and
17 to have “reviewed Defendants’ *Prelude to Axanar*” and “Defendants’ ‘Vulcan Scene’
18 of *Axanar*,” Van Citters Decl. ¶¶ 2, 15, 43, but Plaintiffs do not demonstrate that he
19 has specialized knowledge that would “aid the jury in resolving a factual dispute.”
20 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). Paragraphs 15-62
21 of the Van Citters Declaration constitutes opinion testimony of a lay person that is
22 inadmissible under Federal Rules 701 and 702.

23 **IV. Portions of the Van Citters Declaration Are Inadmissible**

24 In addition to being improper for the reasons set forth above, various portions
25 of the Van Citters Declaration are inadmissible under the Federal Rules of Evidence,
26 as set forth below. Evidence submitted in support of summary judgment motions
27 must be admissible. *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181-82 (9th
28 Cir. 1988). In order to be admissible, evidence must be (1) relevant to the claims or

1 defenses of the case (Fed. R. Evid. 401, 402, 403); (2) based on personal knowledge
 2 of the witness and on proper foundation (Fed. R. Evid. 602 and 901); and (3) non-
 3 hearsay (Fed. R. Evid. 801 and 802). Testimony that requires scientific, technical, or
 4 other specialized knowledge can be provided only by an expert witness with the
 5 requisite knowledge, skill, experience, training, or education (Fed. R. Evid. 701, 702).
 6 Opinion testimony of laypersons is inadmissible. *Id.*

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Evidence	Objection
1.	Van Citters Decl. ¶¶ 12-14, 19, 57, 60, 64, 65	<u>Fed. R. Evid. 401, 402, 403</u> 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> 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.
2.	Van Citters Decl. ¶¶ 15-62	<u>Fed. R. Evid. 602, 701, 702, 901</u> 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,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

		<p>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>
3.	Van Citters Decl. ¶ 63	<p><u>Fed. R. Evid. 401, 402, 403, 602, 801, 802, 901</u></p> <p>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 by [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] Mr. Van Citters’ statement that [t]he unrestricted and widespread conduct of the sort engaged in by the 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</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

		<p><i>Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
4.	Van Citters Decl. ¶ 64	<p><u>Fed. R. Evid. 401, 402, 403</u> Mr. Van Citters’ statement that “Plaintiffs have already created and licensed derivative works that 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> 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>
5.	Van Citters Decl. ¶¶ 63-65	<p><u>Fed. R. Evid. 401, 402, 403</u> 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. <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.</p>

1 Dated: December 5, 2016

WINSTON & STRAWN LLP

2
3 By: /s/ Erin R. Ranahan
4 Erin R. Ranahan
5 Diana Hughes Leiden
6 Kelly N. Oki
7 Attorneys for Defendants,
8 AXANAR PRODUCTIONS, INC.
9 and ALEC PETERS
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28