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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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20
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Case No. 2:15-cv-09938-RGK-E

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC., AND ALEC
PETERS' OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE*
NO. 4 TO EXCLUDE TESTIMONY
OR DOCUMENTS BY REECE
WATKINS**

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

1 **I. INTRODUCTION**

2 Mr. Reece Watkins was an Axanar donor who personally spent more money on
3 official merchandise sold by Plaintiffs as a result of watching *Prelude to Axanar*,
4 which reinvigorated his love for Star Trek. Mr. Watkins also personally polled
5 Axanar donors about the same issue through a Facebook post, and received nothing
6 but positive feedback similar to his own experience. Plaintiffs have not presented any
7 witness or donor to counter Mr. Watkins' position, or to testify that they spent less on
8 official Star Trek products or consumption because they viewed or donated to
9 Defendants' Works. Nevertheless, Plaintiffs want to prevent the jury from hearing
10 directly from a donor who can testify about his own experience. The Court should
11 permit Mr. Watkins to testify because his testimony and Facebook post represent the
12 opinion of a lay witness with specific knowledge relevant to the question of damages,
13 a critical consideration for the jury in this case, as well as the benefit Plaintiffs
14 received from the free promotion provided by Defendants' Works. Therefore, the
15 Court should permit Defendants to introduce testimony from Mr. Watkins to the jury.

16 **II. SUMMARY OF FACTS**

17 Mr. Watkins is a fan of the Star Trek franchise, a member of the Axanar Fan
18 Group on Facebook, and a donor to Defendants' Works. Dkt. 75-28 (Decl. of Reece
19 Watkins). Prior to viewing Plaintiff Paramount Pictures' *Star Trek: Beyond*, Mr.
20 Watkins viewed Defendants' work *Prelude to Axanar* for free. *Id.* Viewing *Prelude*
21 *to Axanar* revived Mr. Watkins' passion for the Star Trek franchise and inspired him
22 to purchase the collector's edition of *Star Trek: Beyond* on pre-order and official, Star
23 Trek-licensed props and costumes, including The Original Series [TOS] phaser,
24 communicator, and tricorder, an Anovos tunic, and Blue-Ray remasters. *Id.* Mr.
25 Watkins credits his experience of watching *Prelude to Axanar* as his inspiration for
26 making these purchases. *Id.*

27 On October 25, 2016, Mr. Watkins authored a Facebook post in the Axanar
28 Facebook group in which he praised *Prelude to Axanar* for renewing his interest in the

1 Star Trek franchise. Dkt. 75-29 (Watkins Facebook post). The post garnered fifty-six
2 responses from other members of the Axanar Fan Group, and not one of them
3 presented a counter or negative response. *Id.*

4 Defendants designated Mr. Watkins in their amended initial disclosures as
5 having knowledge relevant to his own experience and that of other fans whose
6 consumption of official Star Trek works and merchandise increased thanks to
7 Defendants' Works. Defendants have designated Mr. Watkins to testify at trial about
8 his personal experience as an Axanar donor and a Star Trek fan.

9 **III. ARGUMENT**

10 **A. Mr. Watkins is Free to Provide Opinion Testimony as a Lay Witness**

11 Contrary to Plaintiffs' contentions, opinion testimony from Mr. Watkins is
12 admissible under the Federal Rules of Evidence. According to Federal Rule of
13 Evidence 602, "[a] witness may testify to a matter only if evidence is introduced
14 sufficient to support a finding that the witness has personal knowledge of the matter.
15 Evidence to prove personal knowledge may consist of the witness's own testimony."
16 Where lay witnesses give their opinions, their testimony should be limited to those
17 opinions that are rationally based on their perceptions and are helpful to clearly
18 understanding their testimony or to determining a fact in issue. Fed. R. Evid. 701.

19 In his testimony, Mr. Watkins will share his personal experience with
20 Defendants' Works and how they encouraged him to engage with Plaintiffs' Works in
21 a new way. Dkt. 75-28 (Decl. of Reece Watkins). Mr. Watkins thus speaks only to a
22 matter of which he has personal knowledge in a way that will assist the jury in
23 assessing the claims and defenses at issue.

24 Even if Mr. Watkins speaks to the comments made on Facebook about the
25 positive impact Defendants' Works have had on Plaintiffs' Works, such comments
26 will be framed by his own personal experience and firsthand knowledge. *Id.* Thus,
27 Plaintiffs cannot claim that Mr. Watkins "risks usurping the function of the jury"
28

1 when the Federal Rules of Evidence clearly allow lay witnesses to present their
2 personal opinions based on their personal knowledge.

3 **B. Mr. Watkins' Testimony Will Not Include Inadmissible Hearsay**

4 Additionally, Plaintiffs' contention that Mr. Watkins' testimony includes
5 inadmissible hearsay is incorrect, as Mr. Watkins is free to testify about the positive
6 feedback he received to his post on Facebook. Dkt. 75-28 (Decl. of Reece Watkins).

7 Hearsay is a statement made by an out-of-court declarant that is offered into
8 evidence to prove the truth of the matter asserted. Fed R. Evid. 801. Plaintiffs claim
9 that testimony from Mr. Watkins regarding the comments made in response to his
10 Facebook post constitutes hearsay because it is offered for its truth, but this is
11 incorrect. Mr. Watkins cannot speak to the activities of the people who replied to his
12 post, but he can speak to the personal knowledge he has of the feedback that he
13 received. This testimony concerns only Mr. Watkins' understanding and
14 interpretation of the widespread response he got as opposed to any of the actions of
15 the people who provided that response. The feedback will not be used to establish the
16 "truth of the matter asserted" in any of those specific comments, but only to
17 demonstrate Mr. Watkins' experience receiving fifty-six comments to his Facebook
18 post with only positive responses. Dkt. 75-29 (Watkins Facebook post).

19 Given that Defendants are not offering testimony of the responses to Mr.
20 Watkins' Facebook to prove the truth of those responses, Plaintiffs' claim that such
21 testimony constitutes hearsay and should therefore be excluded is unsuccessful.

22 **C. Mr. Watkins' Testimony is Relevant**

23 Plaintiffs wrongly assert that Mr. Watkins's testimony is irrelevant, anecdotal,
24 and unduly prejudicial. Rather, Mr. Watkins testimony concerning his personal
25 experience with the works of Plaintiffs and Defendants is relevant to the jury's
26 evaluation of damages and in no way prejudices Plaintiffs.

27 Evidence is relevant if it has any tendency to make the existence of any fact that
28 is of consequence to the determination of the action more or less probable than it

1 would be without such evidence. Fed. R. Evid. 401. Accordingly, any evidence that
2 assists the jury in the damages analysis is relevant, and one factor to be considered is
3 the effect of Defendants' Works upon the market for or value of Plaintiffs' Works. 1
4 M. Nimmer, Copyright § 13.05[A], p. 13–76 (1984).

5 It is understandable why Plaintiffs would not want the jury to hear about Mr.
6 Watkins' experience, as Mr. Watkins will testify that watching Defendants' work
7 *Prelude to Axanar* rekindled his interest in Plaintiffs' Works and inspired him to
8 purchase Plaintiffs' merchandise. Dkt. 75-28 (Decl. of Reece Watkins). However,
9 the jury is entitled to hear any evidence that assists in its evaluation of damages. The
10 evaluation of statutory damages is especially important in this case.

11 A defendant is entitled to a jury trial to determine the amount of statutory
12 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.
13 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has
14 the power to consider factors that might inform them on what they find fair and “just”
15 when deciding where on the wide scale a plaintiff should be awarded statutory
16 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344
17 U.S. 228, 232 (1952) (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249
18 U.S. 100, 106 (1919)). Under the Copyright Act, the amount of available statutory
19 damages per infringed work increases from a minimum of \$200 where the alleged
20 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to
21 \$150,000 depending on whether the infringement was “committed willfully.” 17
22 U.S.C. § 504(c)(2). And the jury can award anywhere in between.¹

23 ¹ Statutory damages must “bear some relation to actual damages suffered.” *Van Der*
24 *Zee v. Greenidge*, 2006 WL 44020, at *2 (S.D.N.Y. 2006). Otherwise, they risk
25 running afoul to constitutional principles of due process. *Parker v. Time Warner*, 331
26 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can expand] so far
27 beyond the actual damages suffered that the statutory damages come to resemble
28 punitive damages” and that, under *BMW* and *State Farm*, “it may be that in a
sufficiently serious case the due process clause might be invoked”) (citing *BMW of*
North America, Inc. v. Gore, 517 U.S. 559, 574 (1996) (overturning \$2 million
punitive damages award where the plaintiff obtained a jury award of only \$4,000 in
actual damages, because such punitive damages violated the Due Process Clause of
the Constitution because it was “grossly excessive” compared to the plaintiff’s actual
damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003)

1 The jury “has wide discretion in determining the amount of statutory damages
2 to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)
3 (emphasis added). Neither the statute nor its legislative history provide guidance on
4 the factors the trier of fact is to consider when making an award of statutory damages.
5 *See* 6 Patry on Copyright § 22:174 (2016). In the absence of any statutory or other
6 guidance, courts have employed the following non-exhaustive factors in determining
7 statutory damages: (1) the expenses saved and the profits reaped by the defendant, (2)
8 the revenues lost by the plaintiff, (3) the value of the copyright, (4) the deterrent effect
9 on others besides the defendant, (5) willfulness of the defendant’s conduct, (6)
10 whether the defendant has cooperated in providing records to assess the value of the
11 infringing material, (7) the potential for discouraging the defendant, and (8) the
12 conduct and attitude of the parties; (9) any benefit to Plaintiffs from Defendants’
13 conduct. *See e.g., Coach, Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZK, 2013
14 WL 950938, at *2 (C.D. Cal. Mar. 12, 2013); *Peer Int’l Corp. v. Luna Records, Inc.*,
15 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 Mr. Watkins’ testimony is therefore relevant because it reflects the benefits and
17 free promotion Plaintiffs enjoy from Defendants’ Works and the longstanding
18 tradition of Star Trek fan fiction. Although Plaintiffs are correct that Mr. Watkins,
19 himself, is only one consumer, Plaintiffs have not been able to present a single
20 consumer who can testify to the contrary or corroborate the hypothetical harm that
21 Plaintiffs claimed to have suffered.

22 The Ninth Circuit requires far more than mere speculation to show market
23 harm. In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit disapproved the
24 district court’s “reason[ing]” that users who could download images “free of
25 charge...are less likely to pay for a download, and [that] the availability of [such]...
26 images would harm [plaintiff’s] market” for licensing. 508 F.3d 1146, 1168 (9th Cir.

27
28 (reversing punitive damages award of \$145 million as unconstitutionally excessive compared to the \$1 million compensatory damages award because there must be some proportionality of the punitive award to the plaintiff’s actual harm).

1 2007). Rather, in the absence of a finding that users had actually downloaded such
2 images for competing uses, “[t]his potential harm to [plaintiff’s] market remain[ed]
3 hypothetical.” *Id.*

4 Not only does the potential harm to Plaintiffs’ market here remain hypothetical,
5 but it is also contradicted by Mr. Watkins’ testimony, which is direct evidence that
6 Plaintiffs have reaped substantial benefits from precisely the type of fan-created work
7 that *Axanar* exemplifies. Mr. Watkins’ testimony contradicts any alleged adverse
8 effect on the market and demonstrates instead that Plaintiffs have seen the very
9 opposite – an increase in revenue. All of this evidence is not only relevant, but
10 necessary, to the evaluation of statutory damages.

11 Additionally, contrary to Plaintiffs’ claims, the probative value provided by
12 such evidence is substantial, as it speaks to the impact of Defendants’ Works on the
13 market for Plaintiffs’ Works. Since the jury is free to weigh the evidence as they see
14 fit, Plaintiffs’ concern that the evidence is “too anecdotal” is unwarranted. Plaintiffs’
15 Motion *in Limine* No. 4, p. 4. Moreover, Mr. Watkins may support Defendants’
16 Works, but he has also been a loyal fan of Plaintiffs’ Works since long before
17 Defendants’ Works came into existence. Dkt. 75-28 (Decl. of Reece Watkins). Thus,
18 his mere showing of support for Defendants’ Works does not warrant the exclusion of
19 his testimony for risk of prejudice.

20 **IV. CONCLUSION**

21 For all of these reasons, the Court should deny Plaintiffs’ Motion *in Limine* No.
22 4 to exclude testimony or documents by Reece Watkins.

23
24 Dated: January 6, 2017

WINSTON & STRAWN LLP

25
26 By: /s/ Erin R. Ranahan
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