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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,  
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a  
California corporation; ALEC PETERS,  
an individual, and DOES 1-20,  
22

23 Defendants.  
24

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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN  
LIMINE NO. 2 TO PRECLUDE  
PLAINTIFFS FROM RELYING  
ON EVIDENCE THAT WAS NOT  
TIMELY DISCLOSED UNDER  
THE COURT'S SCHEDULING  
ORDER**

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Paramount Pictures Corporation (“Paramount”) and CBS Studios  
3 Inc. (“CBS”) (collectively, “Plaintiffs”) oppose the motion in limine (“Motion”) by  
4 Defendants Axanar Productions, Inc. and Alec Peters (collectively, “Defendants”) to  
5 exclude reference to documents and materials not timely produced in discovery, or  
6 at all, including the Star Trek works that Defendants infringed.

7 **I. INTRODUCTION**

8 By their motion in limine, Defendants seek to exclude from evidence all of  
9 the episodes of the Star Trek television series and the thirteen Star Trek films  
10 (collectively, the “Star Trek Copyrighted Works”) as well as evidence from *The*  
11 *Four Years War*, which Defendants themselves attempted to conceal.

12 Defendants’ motion is deliberately misleading as they claim to be somehow  
13 surprised by the fact that each and every film and episode of Star Trek was not  
14 produced to them until those works were filed in November in connection with  
15 Plaintiffs’ motion for summary judgment. The entire premise of Defendants’  
16 motion in limine is false, and is an attempt to mislead the Court. Defendants assert  
17 that all of these videos (which are publicly available **and** owned by their client)  
18 should be excluded from trial, on the grounds that they were not produced in  
19 discovery. However, Defendants fail to disclose to the Court that neither party  
20 produced videos or DVDs of the Star Trek works to the other – as the parties  
21 specifically agreed that to do so would be unnecessary. In June of 2016, the parties  
22 met and conferred in person regarding numerous discovery issues, and the parties  
23 agreed that no such exchange of Star Trek films and television episodes was  
24 necessary. Ms. Ranahan, who attended that meeting on behalf of Defendants, stated  
25 that such an exchange was entirely unnecessary because her client, Alec Peters,  
26 already had all of those works in his possession. Thereafter, Mr. Peters’ deposition  
27 was taken, and he confirmed exactly what Ms. Ranahan had represented, stating that  
28 . Not surprisingly,

1 following Plaintiffs' document production, Defendants never requested copies of the  
2 films and television episodes. Defendants even filed a motion to compel in which  
3 they demanded dozens of categories of documents, but they failed to request any of  
4 the films or television episodes that they now are seeking to exclude.

5 Defendants' motion is at odds with their agreements and conduct in  
6 discovery. The Star Trek films and television episodes are at the heart of Plaintiffs'  
7 claims of copyright infringement and the jury should be allowed to see excerpts to  
8 illustrate similarities between the Star Trek Copyrighted Works and the Axanar  
9 Works.

10 Defendants have also moved to exclude the testimony of John Van Citters.  
11 Defendants have been aware of Mr. Van Citters testimony for over two months. Mr.  
12 Van Citters is an employee of Plaintiff CBS and his knowledge of Star Trek is  
13 extensive and beyond that of a lay person as he has been professionally involved  
14 with the Star Trek franchise for more than ten years. He was timely designated as  
15 an employee-expert (a party-employed witness that has knowledge on a relevant  
16 subject matter beyond that of an ordinary lay person), and yet Defendants declined  
17 to attempt to take his deposition on this topic. There is no basis to exclude Mr. Van  
18 Citters' testimony from trial, Defendants' motion is untimely and improper  
19 (Defendants failed to meet and confer at all about their request to exclude Mr. Van  
20 Citters' testimony), and it should be denied.

## 21 **II. FACTS**

### 22 **A. The Nature of the Disputed Evidence.**

23 Since 1966, Plaintiffs and their predecessors have produced six television  
24 series and thirteen movies taking place both before and after the events depicted in  
25 *Star Trek: The Original Series*. Combined, the collection contains more than 700  
26 hundred of hours of video content, all of which is widely available on DVD, Blu-  
27 Ray, and digital streaming formats.

28

1 Peters claims to be a fan of the Star Trek content produced by Plaintiffs,  
2 including the Star Trek Copyrighted Works. He claims to have [REDACTED]

3 [REDACTED]  
4 [REDACTED]. Declaration of David Grossman (“Grossman Decl.”) ¶ 2, Ex. A.

5 Peters also testified that [REDACTED]

6 [REDACTED]. Grossman Decl. ¶ 3, Ex. A.

7 *The Four Years War* is a booklet created by the FASA Corporation (under  
8 license from Paramount, who owns the copyright) as a companion to *Star Trek: The*  
9 *Role Playing Game*. It was written to give players background on the fictional 23rd  
10 century conflict between the United Federation of Planets and the Klingon Empire,  
11 and includes articles and first-hand accounts purportedly written by denizens of the  
12 period. *The Four Years War* was created for a niche market and copies are now  
13 difficult to obtain. Defendant Alec Peters, however, [REDACTED] and he and the  
14 director of *Star Trek: Prelude to Axanar* (Christian Gossett) used this publication as  
15 a “bible” for their creation of the Axanar Works. Grossman Decl. ¶¶ 4-5, Exs. A-C.

16 Mr. Peters also supervised the creation of an “illustrated script” of *Star Trek:*  
17 *Prelude to Axanar*, which intersperses storyboard images, source materials, and  
18 other visuals against the wording of the script for that work. Although it was  
19 created by Defendants, requested in discovery, and Defendants failed and refused  
20 (repeatedly) to turn it over, they now seek to exclude it from evidence on the  
21 frivolous basis that their own document that they refused to disclose (and that was  
22 eventually turned over in discovery by a third party) was not re-produced to them.

23 Mr. Van Citters is an employee of CBS and has extensive knowledge of Star  
24 Trek. His testimony will assist those members of the jury who may not already be  
25 familiar with Star Trek themes and iconography. He has been known to Defendants  
26 since before this litigation began, and he was deposed by Defendants in this lawsuit  
27 as a fact witness and a PMK witness. On November 2, 2016, the same day that  
28 Defendants designated their experts, he was designated by Plaintiff as a non-retained

1 expert regarding the Star Trek Copyrighted Works. Declaration of Jonathan Zavin  
2 (“Zavin Decl.”) ¶ 5, Ex. C. Defendants have made no attempt to depose him as an  
3 expert. *Id.*, ¶ 6; Grossman Decl. ¶ 6. Further, Defendants never met and conferred  
4 regarding their intention to exclude Mr. Van Citters, even though they met and  
5 conferred regarding all of their proposed motions to exclude on multiple occasions.  
6 Zavin Decl. ¶ 4, Ex. B. Defendants’ motion *in limine* contains no explanation for  
7 their failure to comply with the Court’s rules on this point and, instead, falsely  
8 asserts that Defendants met and conferred in compliance with Local Rule 7-3.

9 **B. The Parties’ Agreement to Not Exchange This Content.**

10 On June 21, 2016, the parties held a meet and confer regarding their  
11 respective requests for production and counsel for Plaintiffs, David Grossman and  
12 Jonathan Zavin, met and conferred with Defendants’ counsel Erin Ranahan. At the  
13 meeting, Ms. Ranahan agreed that Peters would produce all source material, other  
14 than Star Trek television series and films, which he used to create the Axanar  
15 Works. Grossman Decl. ¶ 3; Zavin Decl. ¶ 2. The parties agreed that they would  
16 not be exchanging copies of any Star Trek television episodes and motion pictures  
17 and Ms. Ranahan expressly stated that to do so would be unnecessary as Peters  
18 informed her that he already owned all of the Star Trek films and television series.  
19 *Id.* Peters, in his deposition, stated [REDACTED]  
20 [REDACTED]. Grossman Decl. Ex. A.

21 Based on the fact that the parties had entered into this agreement not to  
22 exchange copies of films and television shows that both already possessed, neither  
23 side made any demand of the other, during discovery, to produce such content.  
24 Thus, Defendants do not attach a single email, letter or other communication to their  
25 motion in limine in which they ever made any demand for these DVDs (which their  
26 client already possessed). Moreover, Defendants filed a motion to compel in this  
27 case, and they failed to identify any claimed videos that had not been produced by  
28 Plaintiffs – precisely because Plaintiffs were not required to do so, and the parties

1 had expressly agreed that no such exchange would be necessary. *See* Dkt. No. 54  
2 (Defendants’ Motion to Compel).

3 Further, and consistent with Ms. Ranahan’s representation during the parties’  
4 discovery meet and confer, Mr. Peters testified [REDACTED]  
5 [REDACTED]. Grossman Decl. ¶ 3, Ex. A  
6 Defendants’ motion to exclude is, therefore, frivolous as it deliberately  
7 misrepresents to the Court the parties’ prior agreement, and attempts to exclude  
8 critically relevant evidence which Defendants have possessed at all relevant times.

9 Defendants’ attempt to exclude *The Four Years War* book from this trial is  
10 similarly baseless. This is a book, copyrighted by Paramount, which Peters owns  
11 and which he and the director of *Star Trek: Prelude to Axanar*, Christian Gossett,  
12 used as a “bible” for the creation of the Axanar Works. Grossman Decl. ¶¶ 4-5,  
13 Exs. A-C. Nevertheless, Peters did not turn this document over in discovery, and  
14 Plaintiffs were only able to uncover the use of this work as source material for the  
15 Axanar Works through their own efforts and by obtaining discovery from third  
16 parties. Notably, the email between Mr. Gossett and Peters wherein *The Four Years*  
17 *War* book is described as the “bible” for the Axanar Works was not turned over by  
18 Defendants. In any case, a copy of this book was given to Defendants by Plaintiffs  
19 in October 2016 at the time of Mr. Peters first deposition, so by trial they will have  
20 had it in their possession for more than three months, thereby eliminating any claim  
21 of surprise or prejudice.

22 **C. Mr. Van Citters Was Timely Disclosed, Defendants Failed to Meet**  
23 **and Confer Regarding Their Intent to Exclude Him, and There Is**  
24 **No Basis for Their Request.**

25 John Van Citters is an employee of Plaintiff CBS, and he was deposed during  
26 this action, as both a percipient witness and as the person most knowledgeable for  
27 Plaintiff CBS on a number of subjects. Mr. Van Citters is also known to Defendant  
28 Peters, and Peters and Mr. Van Citters engaged in numerous email exchanges, over

1 the course of several years, prior to the filing of this lawsuit. After Mr. Van Citters  
2 was deposed, on November 2, 2016, he was designated as a non-retained expert  
3 under Federal Rule of Civil Procedure 26. Zavin Decl. ¶ 5, Ex. C. Mr. Van Citters  
4 was designated to testify regarding his knowledge of the Star Trek Copyrighted  
5 Works, including the elements that appear in the Axanar Works which were copied  
6 from Plaintiffs' films and television shows. Mr. Van Citters was designated as an  
7 expert the same day as Defendants designated their experts, and within the time  
8 permitted by the Court's scheduling order and rules.

9 Defendants argue that, during the PMK deposition, Mr. Van Citters was  
10 instructed not to testify regarding the Star Trek Copyrighted Works, but this is false.  
11 The relevant testimony speaks for itself, and shows that Mr. Van Citters was only  
12 instructed not to testify regarding attorney-client communications involved in the  
13 creation of a specific chart for purposes of litigation. Zavin Decl. ¶ 3, Ex. A.  
14 Indeed, Defendants' counsel, during that deposition, was expressly advised that  
15 Defendants could inquire regarding the copying of the works themselves, as  
16 opposed to Mr. Van Citters' communications with counsel regarding a post-  
17 litigation chart. *Id.* Defendants, however, declined to do so, and there is no basis  
18 for their assertion that Mr. Van Citters was instructed not to testify regarding  
19 Defendants' copying of Plaintiffs' works.

20 Further, after Mr. Van Citters was designated as a non-retained expert, the  
21 subject matter of his testimony was disclosed to Defendants, and Defendants never  
22 made any attempt to depose Mr. Van Citters regarding his designated testimony.  
23 Zavin Decl. ¶ 6, Grossman Decl. ¶ 6. Defendants also failed to disclose that they  
24 intended to move to exclude Mr. Van Citters' testimony from trial. Defendants met  
25 and conferred on multiple occasions regarding their proposed motions *in limine*,  
26 both on the phone and through email, and they failed to identify Mr. Van Citters'  
27 testimony (at all) as a subject of any of their motions to exclude. Zavin Decl. ¶ 4,  
28 Ex. B.

1 **III. ARGUMENT**

2 Under Federal Rule of Civil Procedure 37(c)(1) (“Rule 37”), “[i]f a party fails  
3 to provide information... as required by Rule 26(a) or (e), the party is not allowed to  
4 use that information... to supply evidence... at a trial, unless the failure was  
5 substantially justified or is harmless.”

6 Here, Plaintiffs’ decision not to provide copies of the Star Trek Copyrighted  
7 Works to Defendants was both substantially justified and harmless. First, the  
8 decision to not produce the Star Trek Copyrighted Works **was according to an**  
9 **agreement with Defendants’ counsel**, who specifically declined to exchange  
10 copies of the Star Trek films and television series during the meet and confer  
11 process. Second, Defendants’ counsel stated at the meet and confer that Peters  
12 already had copies of all of these works – and Peters’ deposition testimony  
13 [REDACTED]. Third, because the parties had already agreed not to  
14 exchange these works, neither side made any request of the other during discovery  
15 to produce these documents. Indeed, Defendants filed a wide-ranging motion to  
16 compel in September of 2016, but failed to mention, at all, that they were not in  
17 possession of the Star Trek Copyrighted Works that had been discussed in the First  
18 Amended Complaint and in Plaintiffs’ detailed interrogatory responses describing  
19 the relevant works and infringements.

20 Similarly, Defendant Alec Peters [REDACTED].  
21 Grossman Decl. ¶ 4, Ex. A. Had he disclosed its use at the outset of the litigation as  
22 he was obligated, the parties would have also likely agreed to forgo an unnecessary  
23 exchange. And, in any case, because Peters [REDACTED] knew the significance of  
24 *The Four Years War* long before Plaintiffs, Defendants cannot be harmed by  
25 Plaintiffs’ ignorance of Peters’ copying of that work. Finally, at his deposition in  
26 October 2016, more than three months before trial, Peters was provided with another  
27 copy of *The Four Years War*, so he can hardly claim “surprise” at trial. Thus, under  
28 Rule 37, there is no bar to the use of the Star Trek Copyrighted Works, or *The Four*

1 *Years War*, in the upcoming trial. Any argument to the contrary is at best  
2 disingenuous, and, at worst, a deliberate attempt to trick Plaintiffs and withhold vital  
3 information from the jury.

4 Defendants also seek to exclude yet another document that they possess, and  
5 failed to turn over themselves in discovery – the “illustrated script” that Peters  
6 created of *Star Trek: Prelude to Axanar*. This document was undoubtedly called for  
7 in discovery – it was provided to donors as a “perk” during Peters’ fundraising  
8 campaigns – and yet Defendants’ counsel failed and refused to turn this over, even  
9 after its existence was disclosed in discovery. Plaintiffs eventually obtained a copy  
10 of the illustrated script from a third party witness – Terry McIntosh – whom both  
11 sides deposed in this action. Defendants’ request that the Court exclude evidence  
12 that they themselves have been in possession of from the inception of this lawsuit is  
13 frivolous and should be rejected.

14 Likewise, there is absolutely no basis for the exclusion of Mr. Van Citters’  
15 proposed testimony from this trial. Mr. Van Citters was noticed as a percipient  
16 witness by Defendants, and was also designated as the PMK witness for Plaintiff  
17 CBS, and his testimony was taken by Defendants’ counsel at the same time in both  
18 of those capacities. During that deposition, Mr. Van Citters was only instructed not  
19 to answer questions relating to attorney-client privilege. Some of the privilege  
20 issues arose during questions regarding Mr. Van Citters’ participation in the creation  
21 of a specific chart that was created for this lawsuit. Mr. Van Citters was instructed  
22 not to answer questions regarding his communications with counsel, but  
23 Defendants’ counsel was expressly advised that Mr. Van Citters would answer  
24 questions regarding the works that were copied so long as specific communications  
25 with counsel were not at issue. Zavin Decl. ¶ 3 Ex. A (“You’re free to obviously  
26 ask him about the substance of the chart...”). Defendants declined to ask Mr. Van  
27 Citters at that time about his knowledge of Defendants’ copying or of specific  
28 elements that were copied by Defendants.

1 Defendants also assert that the specialized knowledge of Mr. Van Citters is  
2 insufficient to qualify him as an expert under *Daubert v. Merrell Dow*  
3 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because: “Plaintiffs do not demonstrate  
4 that he has specialized knowledge that would ‘aid the jury in resolving a factual  
5 dispute.’” Motion at 6. Defendants claim that Mr. Van Citters merely consumed  
6 the Star Trek Copyrighted Works and is therefore not qualified as an expert under  
7 *Daubert*. Defendants are incorrect. Mr. Van Citters is not a casual fan of Star Trek  
8 who has merely watched the episodes. He has spent more than ten years of his  
9 professional life working with Star Trek in an executive capacity. During that time,  
10 Mr. Van Citters has been in charge of Star Trek product development, which is the  
11 creation and licensing of authorized Star Trek products, and he has also been in  
12 charge of ensuring that those products are compatible with the existing Star Trek  
13 universe and the existing Star Trek Copyrighted Works. Zavin Decl. ¶ 5, Ex. C  
14 (attaching 11/2 designation). Mr. Van Citters is required to know and to understand  
15 the entire Star Trek universe and its individual works as part of his daily  
16 responsibilities. Mr. Van Citters is uniquely qualified to assist the jury is in  
17 understanding the common themes and iconography that tie together the entire Star  
18 Trek franchise, and which can be seen throughout the Axanar Works. Therefore,  
19 under *Daubert*, and its progeny, Mr. Van Citters should be permitted to testify to  
20 subjects outside the knowledge of laypersons. *See VIP Prods., LLC v. Jack Daniel's*  
21 *Prods.*, 2016 U.S. Dist. LEXIS 133387, at \*45-46 (D. Ariz. Sep. 27, 2016) (citing  
22 *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir.  
23 2004)) (“Experience, training and education may provide a sufficient foundation for  
24 an expert’s testimony” concerning consumer behavior).

25 Further, Mr. Van Citters was designated as an expert under Federal Rule of  
26 Civil Procedure 26(a)(2)(C) as a non-retained or “employee” expert. Although Mr.  
27 Van Citters could be qualified as an independent *Daubert* expert, that is not  
28 necessary here. After Mr. Van Citters was identified as a non-retained expert,

1 Defendants made no attempt whatsoever to depose him. Although Plaintiffs sought  
 2 to depose Defendants’ purported experts (Christian Tregillis and Henry Jenkins),  
 3 and Ms. Ranahan refused to make either of them available for their noticed  
 4 depositions, Defendants did not serve a deposition notice regarding Mr. Van Citters’  
 5 proposed testimony and never requested, in any way, that he be deposed regarding  
 6 the subject matter of his designated testimony. Zavin Decl. ¶ 6; Grossman Decl. ¶  
 7 6. Not only did Defendants fail to depose Mr. Van Citters, rendering their request to  
 8 exclude him moot, they also failed to meet and confer regarding this motion *in*  
 9 *limine* – in violation of Local Rule 7-3. During the parties’ meet and confer on  
 10 December 9, 2016, Ms. Ranahan did not make any mention of Defendants’ intention  
 11 to move to exclude Mr. Van Citters. Zavin Decl. ¶ 4. Further, following that  
 12 telephonic meet and confer, the parties exchanged (and supplemented) their  
 13 respective proposed lists of motions *in limine* as a continuation of the meet and  
 14 confer process. *Id.*, Ex. B. Defendants, again, did not identify Mr. Van Citters’  
 15 proposed testimony in either their telephonic meet and confer or in their written lists  
 16 of proposed motions to exclude. Defendants have not provided any reason for their  
 17 failure to meet and confer, and instead, represented to the Court that they complied  
 18 with Local Rule 7-3 prior to filing this motion. Defendants’ motion should be  
 19 denied.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs respectfully request that Defendants’  
 22 motion in limine no. 2 to preclude Plaintiffs from relying on evidence that was not  
 23 timely disclosed under the Court’s scheduling order be denied.

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Dated: January 6, 2017

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