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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.
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. 4 TO PRECLUDE PLAINTIFFS
FROM RELYING ON EVIDENCE
REGARDING ITEMS THAT ARE
UNORIGINAL, IN THE PUBLIC
DOMAIN, OR FROM THIRD
PARTIES; MEMORANDUM OF
POINTS AND AUTHORITIES**

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 the
3 matter may be heard before the Honorable R. Gary Klausner, 255 East Temple Street,
4 Los Angeles, California 90012, Defendants Axanar Productions, Inc. and Alec Peters
5 (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs
6 from relying on evidence regarding items that are unoriginal, in the public domain, or
7 from third parties.

8 This Motion is brought pursuant to Rules 401-403 of the Federal Rules of Civil
9 Procedure, and is based on this Motion and Notice of Motion, the Request for Judicial
10 Notice, the exhibits attached thereto, the supporting documents filed concurrently
11 herewith, previously filed documents incorporated by reference herein, and upon such
12 oral argument and submissions that may be presented at or before the hearing on this
13 Motion. Pursuant to Local Rule 7-3, this Motion is made following the conference of
14 counsel that took place on December 9, 2016.

15 Dated: December 16, 2016

WINSTON & STRAWN LLP

17 By: /s/ Erin R. Ranahan
18 Erin R. Ranahan
19 Attorneys for Defendants,
20 AXANAR PRODUCTIONS, INC.
21 and ALEC PETERS
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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 from introducing at trial any evidence regarding items that
6 should be filtered out because they are unoriginal, in the public domain, or from third
7 parties. Plaintiffs should be precluded from introducing this evidence because any
8 probative value is substantially outweighed by a danger of prejudice to Defendants,
9 waste of time, and/or confusion of the issues. Fed. R. Evid. 401-403. Due to these
10 and the other evidentiary infirmities described herein, the Court should grant
11 Defendants’ Motion *in Limine* No. 4.

12 **II. LEGAL STANDARD**

13 Rulings on motions *in limine* are committed to the discretion of the trial court.
14 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has
15 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair
16 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x
17 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude
18 evidence where the evidence is not relevant, or where the probative value is
19 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*
20 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse
21 discretion in excluding conclusive, speculative evidence). Even if evidence is
22 considered relevant, “[t]he court may exclude relevant evidence if its probative value
23 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,
24 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,
25 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s
26 probative value was substantially outweighed by unfair prejudice); *United States v.*
27 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of
28 evidence that was low in probative value and could have confused the jury as more

1 prejudicial than probative under Rule 403); *Dream Games of Ariz., Inc. v. PC Onsite*,
 2 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not abuse its discretion in
 3 granting plaintiff’s motion *in limine* to exclude evidence based on concerns that it
 4 might improperly influence the jury on the amount of statutory damages to assess
 5 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide
 6 sufficiently probative information).

7 Furthermore, a party who fails to make a required initial disclosure (such as
 8 disclosing witnesses likely to have information on key topics or producing documents
 9 they intend to rely upon at trial) “is not allowed to use that information or witness to
 10 supply evidence on a motion, at a hearing, or at trial” unless the party’s failure was
 11 “substantially justified” or “harmless.” Fed. R. Civ. P. 37(c)(1); *Hoffman v.*
 12 *Construction Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). Motions *in*
 13 *limine* are appropriate to preclude the introduction at trial of evidence not produced in
 14 discovery. *Reyes v. City of Glendale*, No. CV 05-0253 CAS (MANx), 2009 WL
 15 2579614, at *4 (C.D. Cal. Aug. 19, 2009); *Lincoln Diagnostics v. Panatrex, Inc.*, No.
 16 07-CV-2077, 2009 WL 3010840, at *5 (C.D. Ill. Sept. 16, 2009) (“any documents
 17 relevant to the issue of damages that Defendant did not produce prior to the ‘drop
 18 dead’ date . . . could not be presented by Defendant at trial.”).

19 **III. ARGUMENT**

20 **A. Plaintiffs Should Be Precluded from Relying on Evidence Regarding** 21 **Items that Should be Filtered Out Because they are Unoriginal, in** 22 **the Public Domain, or from Third Parties**

23 Plaintiffs’ operative complaint in this case emphasizes numerous elements that
 24 have appeared in Plaintiffs’ Works that are not protectable by copyright. These items
 25 include costumes, geometric shapes, words and short phrases, ideas, scenes a faire,
 26 unprotected characters, and elements of works derived from nature, the public domain,
 27 or third parties. Because any mention of these elements would improperly and
 28 unlawfully appear to the jury to expand the proper elements at issue with respect to

1 Plaintiffs' copyright claims, the probative value of such evidence is substantially
2 outweighed by the danger of unfair prejudice. Moreover, the introduction of such
3 evidence would confuse the jury by intertwining copyrightable and non-copyrightable
4 works and would certainly result in a waste of time.

5 To prove copyright infringement, Plaintiffs must show that the “*protectable*
6 *elements*” of their works, “*standing alone*, are substantially similar” to Defendants’
7 works. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th
8 Cir. 2006) (emphasis in original). In making this determination, a court must “filter
9 out and disregard the non-protectable elements.” *Id.* As such, evidence of these “non-
10 protectable elements” is irrelevant, and even if it were relevant, its minimal probative
11 value is outweighed by the unfair prejudice that would result from presenting it to a
12 jury. The introduction of this evidence also poses a great risk of confusing the issues,
13 as Plaintiffs seek to introduce numerous items that are not copyrightable to
14 substantiate their claims.

15 The introduction of evidence of the following non-copyrightable elements
16 relied upon by Plaintiffs would be severely prejudicial:

17 **1. Costumes**

18 Plaintiffs should not be permitted to introduce evidence of items of clothing that
19 are not copyrightable, such as a “gold shirt,” “cowl neck,” “green drapes,” and
20 “robes.” Dkt. 26 (FAC ¶ 46, at 17-19). Under the “useful article” doctrine, clothing
21 cannot be copyrighted except to the extent there are original designs on the clothing
22 that can be separated from the function of the clothing, which is not alleged here, and
23 so any evidence of this clothing would unfairly prejudice Defendants. *Id.*; 17 U.S.C. §
24 101; *Ent. Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1221
25 (9th Cir. 1997) Further, a color cannot be copyrighted. 37 C.F.R. § 202.1(a).¹
26

27 ¹ Plaintiffs also seek to include an image of Mr. Peters wearing the “original Garth”
28 costume. But this picture is *not* a shot from the Potential Fan Film; Mr. Peters, a
lifelong Star Trek fan, lawfully purchased the costume for his collection and is shown
wearing it.

1 **2. Geometric Shapes**

2 Plaintiffs should not be permitted to introduce evidence of geometric shapes to
3 which they claim copyright ownership because “common geometric shapes cannot be
4 copyrighted.” *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (citing
5 U.S. Copyright Office, Compendium II: Copyright Office Practices § 503.02(a)-(b)
6 (1984) (“Copyright Compendium II”). The U.S. Copyright Office refuses to base
7 copyright registration on simple and “standard ornamentation,” such as “chevron
8 stripes,” “a plain, ordinary cross, “common geometric figures or shapes, or “a standard
9 symbol such as an arrow or a five-pointed star.” Copyright Compendium II
10 § 503.02(a)-(b).

11 Therefore, the Starfleet Command Insignia (Dkt. 26, FAC ¶ 46, at 18),
12 “triangular medals on uniforms” (*id.* at 19-20), the United Federation of Planets logos
13 (simply the letters “UFP” surrounded by stars) (*id.* at 27), Federation logo (*id.* at 28),
14 Memory Alpha logo (simply the Greek letter “alpha” with the words “Memory
15 Alpha”) (*id.*), and Klingon logos (simply a three-pointed star) (*id.* at 29), are not
16 protectable elements and cannot form the basis of a copyright claim. Thus, allowing
17 evidence of such items would certainly prejudice Defendants without providing any
18 probative value.

19 **i. Words and Short Phrases**

20 “Words and short phrases such as names, titles, and slogans” are not subject to
21 copyright. 37 C.F.R. § 202.1(a). Thus, the names Garth of Izar, Soval, Richard
22 Robau, and John Gill (Dkt. 26, FAC ¶ 46, at 11-12) are not protectable, and neither
23 are the words Andorians, Tellarites, Romulans, Axanar, Archanis IV, Q’onoS,
24 Nausicaa, Rigel, Andoria, Tellar Prime, Vulcans, Klingons, Terra (land), Starship
25 Enterprise, Starfleet, Federation, Starships, Stardate, and Federation or the short
26 phrase “beaming up.” (*Id.* at 13, 16, 19-21, 26, 30, 33, 35, 38). Thus, allowing
27 Plaintiffs to introduce evidence of these words and short phrases would prejudice the
28 Defendants and confuse copyrightable and non-copyrightable issues.

1 **ii. Elements of Works Derived From Nature, the Public**
 2 **Domain, or Third-Party Works**

3 Plaintiffs should not be permitted to introduce evidence of elements of works
 4 derived from nature, the public domain, or third-party works because a plaintiff cannot
 5 claim copyright protection for elements of its works that are not original in the public
 6 domain. *Feist*, 499 U.S. at 350 (“[c]opyright does not prevent subsequent users from
 7 copying from a prior author's work those constituent elements that are not original,
 8 [including] materials in the public domain”). Further, “to the extent a [work] captures
 9 the characteristics of an object as it occurs in nature, these characteristics are not
 10 protectible.” *Psihoyos v. The National Geographic Society*, 409 F. Supp. 2d 268, 275
 11 (S.D.N.Y. 2005). “Even if a work does not occur in nature—[like] a dragon—there is
 12 no liability if the only similarity between the two works is that they each portray the
 13 same item, but in a different form.” 4 Nimmer on Copyright § 13.03[B][2].
 14 Accordingly, evidence of such works would only serve to prejudice Defendants.

15 Here, Plaintiffs improperly seek to rely on evidence regarding elements derived
 16 from nature, the public domain, or third-party works, including:

- 17 • **Vulcans’ appearance** (Dkt. 26, FAC at 15): a species with “pointy ears” is not
 18 original to Star Trek, and has appeared in many fictional fantasy works
 19 depicting imaginary humanoid species predating Star Trek, including, but not
 20 limited to, vampires, elves, fairies, and werewolves,² as well as in many animals
 21 in nature.
- 22 • **Vulcan** (Dkt. 26, FAC at 14): in Roman mythology, Vulcan is the god of fire
 23 and metalworking. The first known use of “Vulcan” was in 1513.³
- 24 • **Triangular medals on uniforms** (Dkt. 26, FAC at 19): have been used by
 25

26 ² RJN, at ¶ 4 and Ex. D-E. *See, e.g.*, NOSFERATU (Jofa-Atelier Berlin- Johannisthal,
 27 Prana-Film GmbH (1922); Elf, Merriam Webster, <http://www.merriam-webster.com/dictionary/elf> (last visited Mar. 27, 2016) (defining elves as “a small creature in stories usually with pointed ears and magical powers”).

28 ³ RJN, at ¶ 5 and Ex. F Vulcan, Merriam Webster, <http://www.merriam-webster.com/dictionary/Vulcan> (last visited Mar. 27, 2016).

- 1 military, religious, and other organizations throughout history.⁴
- 2 • **Nausicaa** (Dkt. 26, FAC at 20): is a character in Homer’s *Odyssey*.⁵
- 3 • **Rigel** (*id.*): is the name of a first-magnitude star in the constellation Orion.⁶
- 4 • **Terra**, (*id.*): is the Latin word for “Land.”⁷
- 5 • **Federation logo** (Dkt. 26, FAC at 27-28): is adapted from the United Nations
- 6 flag.⁸
- 7 • **Transporters** (Dkt. 26, FAC at 32): have existed in science fiction since 1877.⁹
- 8 • **Warp drive** (Dkt. 26, FAC at 32): has existed in science fiction as early as
- 9 1945.¹⁰
- 10 • **Federation** (Dkt. 26, FAC at 33): is the general word to describe “a country
- 11 formed by separate states that have given certain powers to a central
- 12 government while keeping control over local matters” commonly used in
- 13 science fiction and is inspired by the United Nations.¹¹
- 14 • **Phasers** (Dkt. 26, FAC at 33): are also known as Heat-Ray weapons, which
- 15 have existed in science fiction since H.G. Wells’ “War of the Worlds” in
- 16 1898.¹²
- 17 • **Bridge** (Dkt. 26, FAC ¶ 66(b)): is a naval term for a ship’s command center
- 18 whose first usage predates the 12th century.¹³

19

20 ⁴ RJN, at ¶ 6 and Ex. G. See WILLIAM T. R. MARVIN, *THE MEDALS OF THE MASONIC FRATERNITY: DESCRIBED AND ILLUSTRATED* (1880).

21 ⁵ RJN, at ¶ 7 and Ex. H. Translated by WILLIAM CULLEN BRYANT, *THE ODYSSEY OF HOMER*, James R. Osgood and Co. (1871).

22 ⁶ RJN, at ¶ 8 and Ex. I. Rigel, Merriam Webster, <http://www.merriam-webster.com/dictionary/Rigel> (last visited Mar. 27, 2016).

23 ⁷ RJN, at ¶ 9 and Ex. J. Terra, Merriam Webster, <http://www.merriam-webster.com/dictionary/terra> (last visited Mar. 27, 2016).

24 ⁸ RJN, at ¶ 10 and Ex. K.

25 ⁹ RJN, at ¶ 11 and Ex. L. Teleportation, Merriam Webster, <http://www.merriam-webster.com/dictionary/teleportation>; see also, NEWSPAPER ARTICLE 1878 (last visited Mar. 27, 2016).

26 ¹⁰ RJN, at ¶ 12 and Ex. M. Sten Odenwald, *Who Invented Faster Than Light Travel?*, <http://www.astronomycafe.net/anthol/scifi1.html> (last visited Mar. 28, 2016).

27 ¹¹ RJN, at ¶ 13 and Ex. N. Federation, Merriam Webster, <http://www.merriam-webster.com/dictionary/federation> (last visited Mar. 27, 2015).

28 ¹² RJN, at ¶ 14 and Ex. O. H.G. Wells, *War of the Worlds*, Leipzig (1898).

¹³ RJN, at ¶ 15 and Ex. P. Bridge, Merriam Webster, <http://www.merriam-webster.com/dictionary/bridge> (last visited Mar. 27, 2016).

1 443 F. Supp. 291 (D.C.N.Y. 1977) (although toy company “sought to make use of the
2 themes embodied in” *Star Wars* and its licensed products, “[a] theme is not
3 protectable...[because] it is only the idea which stands behind a protectible
4 expression”). Introduction of such evidence would be severely prejudicial, would
5 confuse the jury, and would waste time.

6 **v. Scènes à Faire**

7 “Scenes-a-faire, or situations and incidents that flow necessarily or naturally
8 from a basic plot premise, cannot sustain a finding of infringement,” *Cavalier v.*
9 *Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002), and so introduction of such
10 evidence is improper. The following elements are unprotectable scènes à faire
11 because they are staples of science fiction: starships and spacedocks, beaming
12 up/transporters, warp drive, phasers, command insignia and medals on uniforms,
13 stardates, Starfleet, and a federation of planets. Dkt. 26 (FAC at 22, 23, 25, 26, 29,
14 30, 32, 33). Indeed, *Star Wars* makes use of nearly all of these elements. *See*
15 *Althouse*, 2014 WL 2986939, at *4 (“these features can be traced back to films like
16 *Star Wars* and *Terminator*, and are neither original nor protectable”). Introduction of
17 such evidence is therefore irrelevant and would only serve to prejudice the
18 Defendants, confuse the jury, and waste time.

19 **vi. Characters Plaintiffs Have Identified Are Not Protected**

20 The Ninth Circuit has explained that copyright protection is not available for
21 “every comic book, television, or motion picture character”—only for those that are
22 “especially distinctive.” *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015).
23 To meet this standard, a character must be “sufficiently delineated” and display
24 “consistent, widely identifiable traits.” *Id.* Further, “characters that have been ‘lightly
25 sketched’ and lack descriptions may not merit copyright protection.” *Id.* For
26 example, courts have held that James Bond, Batman, and Godzilla are characters
27 protected by copyright. *Id.* at 1020. Here, evidence of minor, unprotected characters
28 without “especially distinctive” and “widely identifiable traits,” such as Garth of Izar,

1 Soval, Richard Robau, John Gill, Captain Robert April, Chang, and Sarek Dkt, 26
2 (FAC at 11-12, ¶ 66) should not be introduced.¹⁵ The introduction of such evidence
3 would only waste the Court’s and the jury’s time, confuse copyrightable and non-
4 copyrightable issues, and prejudice the Defendants for that reason.

5 **IV. CONCLUSION**

6 For all of these reasons, the Court should grant Defendants’ Motion *in Limine*
7 No. 4.

8 Dated: December 16, 2016

WINSTON & STRAWN LLP

9
10 By: /s/ Erin R. Ranahan
11 Erin R. Ranahan
12 Attorneys for Defendants,
13 AXANAR PRODUCTIONS, INC.
14 and ALEC PETERS
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27 ¹⁵ RJN, at ¶¶ 1-3 and Exs. A-C. *See, e.g.*, “Soval Name Meaning,”
28 <https://www.kidpaw.com/names/soval> (last visited Dec. 5, 2016); “Garth (name),”
[https://en.wikipedia.org/wiki/Garth_\(name\)](https://en.wikipedia.org/wiki/Garth_(name)) (last visited Dec. 5, 2016); “Epsilon
Bootis,” https://en.wikipedia.org/wiki/Epsilon_Bo%C3%B6tis (last visited Dec. 5,
2016).