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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re:

VIDANGEL, INC.,

Debtor.

Case No. 17-29073

Chapter 11

Judge Kevin R. Anderson

**REPLY OF MOVANTS TO DEBTOR'S OBJECTION TO THE MOTION FOR
DISMISSAL OF THE DEBTOR'S CHAPTER 11 PETITION PURSUANT TO 11 U.S.C.
§ 1112(b) OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC
STAY PURSUANT TO 11 U.S.C. § 362(d)**

INTRODUCTION

Try as it might, VidAngel cannot hide the fact that it filed its chapter 11 case as part of its blatant forum-shopping strategy.¹ Contrary to VidAngel's characterization, the California Action was not "haranguing litigation."² The United States District Court for the Central District of California and the Ninth Circuit Court of Appeals both held that VidAngel was operating illegally by violating Movants' rights under the Digital Millennium Copyright Act ("DMCA") and infringing their copyrights under § 106 of the Copyright Act. VidAngel obviously does not like those courts' rulings, the resulting injunctive relief, or the damages expected to flow from its liability. As a result, VidAngel filed the Utah Declaratory Action, seeking declaratory relief, in VidAngel's own words (in an SEC filing), to "avoid the prospect of again litigating in an unfavorable forum."³ Its bankruptcy petition is a key piece of VidAngel's tactical maneuvering. Under the relevant *Laguna* factors, VidAngel's filing of the Petition is a bad-faith use of chapter 11. The Petition should be dismissed.

Even if it does not dismiss the Petition now, however, this Court at a minimum should lift the automatic stay to allow the California Action to proceed to resolution. It is undisputed that VidAngel cannot "reorganize" itself unless and until two things happen: (1) the damages that VidAngel owes for its rampant violations of Movants' copyrights are liquidated; and (2) there is an adjudication of whether VidAngel's claimed modifications to its illegal service have halted its legal violations. Those issues can and should be resolved in the California District Court, where

¹ Citations to "Cal. Dkt." refer to *Disney Enters., Inc. v. VidAngel, Inc.*, Case No. 2:16-cv-04109-AB-PLA (C.D. Cal.); citations to "Utah Dkt." refer to *VidAngel, Inc., v. Sullivan Entm't Grp. Inc.*, Case No. 2:17cv00989 EJP (D. Utah); citations to "Dkt." refer to the bankruptcy proceeding.

Unless otherwise noted, any capitalized terms used but not defined herein have the meaning set forth in the Movants' Motion, filed on November 8, 2017 (Dkt. 69).

² Debtor's Obj. to Mot. for Dismissal or for Relief from the Automatic Stay, Dkt. 114 ("Objection") at 22.

³ See VidAngel Form 1-SA at 5, Dkt. 69-1.

Movants' action was proceeding toward an imminent summary judgment ruling and a June 2018 trial date.

All applicable factors weigh in favor of lifting the stay. The California District Court's liquidation of damages and determination of VidAngel's compliance with the law is critical to VidAngel's claimed interest in reorganizing. The California District Court has expertise with copyright law, extensive familiarity with the case, and the provenance to interpret its own injunction. The amount of statutory damages must be set by a jury. Movants' case was advancing to a summary judgment ruling on liability and will be ready for trial in short order. Allowing the California Action to proceed will frustrate VidAngel's forum-shopping, but that is not a cognizable harm.

ARGUMENT

I. VIDANGEL DISTORTS THE RECORD IN AN EFFORT TO DEFEND ITS BLATANT FORUM SHOPPING

VidAngel bases its Objection on false claims about the facts and litigation history of the California Action. First, VidAngel tries to paint its declaratory judgment action in the Utah District Court as involving a completely different service and completely different issues. Second, VidAngel asserts that it had to file the Utah Declaratory Action because the California District Court and Movants sought to block VidAngel from obtaining a ruling on the legality of the Stream-Based Service in California.⁴ Neither claim is true.

A. The Utah Declaratory Action Is Simply A Continuation Of Facts And Legal Issues That Were Substantially Resolved—Against VidAngel—In The California Action

1. VidAngel Itself Has Admitted The “Stream-Based” Service And “Disc-Based” Service Share The Same “Core Functionality”

⁴ Objection at 2.

In its Objection, VidAngel repeatedly refers to its Stream-Based Service as its “new” service, while classifying the disc-based model it used at the time the Injunction was issued as its “old” service.⁵ However, VidAngel previously told the California District Court that the Stream-Based Service “maintained virtually all the core functionality of” the disc-based service, and that the technology was “the same” for both “in most respects.”⁶

The difference between the two services involves how VidAngel gets the movies and TV shows it streams to its customers. Previously, VidAngel got that content by ripping discs, which violated the DMCA. VidAngel now claims it gets the content by intercepting and copying streams of content from licensed streaming services such as Amazon. VidAngel may still be violating the DMCA in obtaining these copies. That issue cannot be assessed until Movants take discovery of VidAngel.

In addition to the possible DMCA violation, VidAngel’s Stream-Based Service still infringes copyright:⁷

- 1) VidAngel continues to make numerous master server copies of copyrighted works without authorization. That copying violates § 106(1) of the Copyright Act.⁸ When VidAngel does that with Movants’ works, the copying also violates the Injunction;⁹ and
- 2) VidAngel streams performances of the copyrighted works to the public from its infringing master server copies. Streaming performances from these copies to

⁵ See, e.g., *id.* at 5, 7-8.

⁶ VidAngel’s Opp’n to Plfs.’ Ex Parte Appl. For an Order Striking VidAngel’s Mot. to Clarify at 4, Cal. Dkt. 184.

⁷ A DMCA violation and copyright infringement are separate and distinct legal violations. See *Disney Enters., Inc. v. VidAngel*, 869 F.3d 848, 856-57, 863-65 (9th Cir. 2017) (separately analyzing infringement and DMCA claims).

⁸ 17 U.S.C. § 106(1).

⁹ See *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 979 (C.D. Cal. 2016).

members of the public violates copyright owners’ public performance right.¹⁰

When VidAngel does that with Movants’ works, the streaming also violates the Injunction.¹¹

2. The Legal Issues That VidAngel Wants To Litigate In The Utah Declaratory Action Are Substantially The Same As Issues VidAngel Litigated (And Lost) In The California Action

The Utah Declaratory Action and the California Action not only involve the same “core functionality” services and the same (or closely related) parties,¹² but also the same legal issues. At a November 14, 2017 hearing, VidAngel’s counsel told this Court there is “a lot of overlap of issues” between the California Action and the Utah Declaratory Action.¹³ That is an understatement. On November 3, 2017, VidAngel filed a summary judgment motion (since stayed by Judge Nuffer) in the Utah District Court.¹⁴ VidAngel’s motion repeats numerous arguments—sometimes verbatim—that VidAngel made, and lost, in the California District Court or Ninth Circuit. Specifically:

<u>VIDANGEL’S UTAH SUMMARY JUDGMENT BRIEF</u>	<u>VIDANGEL’S NINTH CIRCUIT AND PRELIMINARY INJUNCTION BRIEFS</u> ¹⁵
Whether VidAngel filters an “authorized copy,” as required by the FMA: The word “enable” further clarifies that legitimate intermediate steps required to filter a motion	Whether VidAngel filters an “authorized copy,” as required by the FMA: The word “enable” further clarifies that legitimate intermediate steps are not disqualifying.

¹⁰ 17 U.S.C. § 106(4).

¹¹ See *id.*

¹² See Movants’ Mot. for Dismissal, Dkt. 69 (“Motion”) at 10; See also VidAngel’s Opp’n to Plfs.’ Ex Parte Appl. For an Order Striking VidAngel’s Mot. to Clarify at 4, Cal. Dkt. 184.

¹³ See Audio Recording of November 14, 2017 Hearing at 20:30-24:04 (Dkt. 85).

¹⁴ The Utah Declaratory Action defendants (which include three of the Movants) have filed a motion asking the Utah District Court to dismiss, transfer, or stay the Utah Declaratory Action. Chief Judge Nuffer has stayed briefing on VidAngel’s summary judgment motion pending resolution of the defendants’ motion. See Order Granting (In Part) [85] Defs.’ Mot. to Strike, Utah Dkt. 90.

¹⁵ VidAngel’s Opening Brief, *DEI et al v. VidAngel, Inc.*, No. 16-56843 (9th Cir. Jan. 27, 2017) (Dkt. 42); VidAngel’s Reply Brief, *DEI et al v. VidAngel, Inc.*, No. 16-56843 (9th Cir. Feb. 22, 2017) (Dkt. 74); VidAngel’s Opp. to Pls.’ Mot. for Prelim. Injunctive Relief, Cal. Dkt. 42.

<p>picture are not disqualifying. Indeed, the FMA prohibits the making of a “fixed copy of <i>the altered version</i> of the motion pictures.” 17 U.S.C. § 110(11). If Congress meant to prohibit necessary, intermediate copying, it would have prohibited the making of “<i>any</i> copy of the motion picture.” VidAngel’s Motion at 14-15.</p>	<p>Indeed, the FMA prohibits the making of a “fixed copy of <i>the altered version</i> of the motion picture.” 17 U.S.C. § 110(11). If Congress meant what the Studios say, it would have prohibited the making of “<i>any</i> copy of the motion picture.” VidAngel’s Ninth Cir. Reply Br. at 13.</p>
<p>Whether VidAngel filters an “authorized copy,” as required by the FMA: This requirement was included in the FMA to prevent filtering from bootleg copies, not to prevent filtering of lawfully purchased streams. VidAngel’s Motion at 14.</p>	<p>Whether VidAngel filters an “authorized copy,” as required by the FMA: This requirement was included to prevent filtering from bootleg copies, not to prevent filtering from lawfully purchased discs. VidAngel’s Ninth Cir. Reply Br. at 12.</p>
<p>Whether filtering is transformative: To state the obvious: omissions can transform a work. Romeo and Juliet absent the final act is not a tragedy, and the Bible would read quite differently without the resurrection of Jesus. Those choices matter <i>because</i> omissions can transform a work. In the same way, removal of mature content from movies has such a powerfully transformative effect that only then will certain audiences watch those movies. VidAngel’s Motion at 20.</p>	<p>Whether filtering is transformative: To state the obvious: omissions can transform a work. Romeo and Juliet absent the final act is not a tragedy, and the Bible reads quite differently with no resurrection of Jesus. Nor is the transformative power of omission limited to plot. Removal of mature content has such a powerful transformative effect that only then will certain audiences watch those movies. VidAngel’s Ninth Cir. Br. at 29</p>
<p>Whether VidAngel harms the market for copyrighted works: The only effect on the market is <i>positive</i>. Roughly 51% of VidAngel customers would not watch the films offered by VidAngel without filtering. VidAngel’s Motion at 19.</p>	<p>Whether VidAngel harms the market for copyrighted works: VidAngel benefits the Studios’ bottom line by increasing their potential audience. . . . Indeed, a majority (51%) of VidAngel’s customers <i>would not view movies without filtering</i>. VidAngel’s Ninth Cir. Br. at 30.</p>
<p>Whether the nature of the copyrighted works weighs against fair use: However, because defendants’ movies are published and released for streaming before any VidAngel user is able to view a filtered version, this factor would at most weigh slightly against VidAngel. VidAngel’s Motion at 21-22.</p>	<p>Whether the nature of the copyrighted works weighs against fair use: VidAngel filters exclusively published works. Because the copyright owner’s expression of those works occurs before VidAngel’s use, this factor favors fair use. VidAngel’s Opp. to Mot. for Preliminary Injunction at 20.</p>
<p>On whether VidAngel’s verbatim copying weighs against fair use: VidAngel does not</p>	<p>On whether VidAngel’s verbatim copying weighs against fair use: Thus, the amount of</p>

offer a substitute for a licensed stream; its copying is limited to making the intermediate copies necessary to allow the viewer to make imperceptible certain portions of the streamed work that the viewer finds objectionable. VidAngel's Motion at 24.	Plaintiffs' works made accessible is determined by each user and is always limited to the amount necessary to create that particular user's desired filtered work. VidAngel's Opp. to Mot. for Preliminary Injunction at 21.
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In short, the Utah Declaratory Action is simply a continuation of the California Action.

B. Movants Never Tried To "Prevent VidAngel's Stream-Based Service From Getting A Fair Hearing" In California¹⁶

VidAngel says that it filed the Utah Declaratory Action out of necessity because Movants tried "to prevent an adjudication of the legality of the Stream-Based Service" in the California Action.¹⁷ That is complete fiction. Movants objected to the improper *procedure* VidAngel repeatedly used—*e.g.*, a series of "motions to clarify" an Injunction that the California District Court held was clear.¹⁸ Movants did not object to VidAngel filing in California the same declaratory judgment action it has now filed in Utah.

On June 19, 2017, VidAngel filed its first "motion to clarify," asking the California District Court to declare that the Injunction does not apply to the Stream-Based Service.¹⁹ On August 2, 2017, the California District Court denied VidAngel's motion, finding that the Injunction was clear. The California District Court held that VidAngel was not actually seeking to "clarify" anything, but was instead seeking a declaratory judgment without actually filing a claim, which was procedurally improper.²⁰

¹⁶ Objection at 2.

¹⁷ *Id.* at 4.

¹⁸ See Klaus Decl. in Support of Mot. to Dismiss or Stay ¶ 15 (hereinafter, "Klaus Decl."); see also Plfs.' Opp'n to VidAngel's Mot. to Clarify, Cal. Dkt. 189; Plfs.' Opp'n to VidAngel's Third Mot. for Clarification, Cal Dkt. 202.

¹⁹ See VidAngel's Mot. to Clarify, Cal. Dkt. 182.

²⁰ Order Den. Def.'s Mot. to Clarify, Cal. Dkt. 198.

On August 9, 2017, counsel for Movants and VidAngel met-and-conferred on VidAngel’s proposal to file another motion to clarify—this one arguing that the preliminary Injunction does not apply to technologies or business models that are “colorably” different from the “disc-based” model. Movants told VidAngel during the August 9 meet-and-confer that VidAngel should amend its counterclaim in the California Action to add a declaratory judgment claim rather than through a procedurally deficient motion to clarify. VidAngel, however, responded during that same conversation that it was not interested in a declaratory judgment because it would take years to litigate.²¹ Only three weeks later, however, VidAngel did file a declaratory judgment action, only it did so in a brand new forum that it thought would be more favorable.

On August 18, 2017, VidAngel filed its second “motion to clarify,” regarding “colorably” different business models.²² VidAngel claims that the California District Court “declined” to clarify the Injunction.²³ In reality, the California District Court held that the Injunction was already clear, and that it was not directed narrowly to VidAngel’s disc-based business model. Rather, the Injunction barred VidAngel “from using Plaintiffs’ works *in any way* that infringes [their] exclusive rights.”²⁴ The California District Court said that granting VidAngel’s motion “would defeat the purpose of the injunction by giving VidAngel the virtually unfettered ability to make use of the Plaintiffs[’] copyrighted works without penalty,” simply by creating a version of its service that is “more than colorably different” from the disc-based model.²⁵

²¹ Klaus Decl. ¶ 15.

²² See VidAngel’s Mot. for Clarification, Cal. Dkt. 200.

²³ Objection at 9.

²⁴ Order Den. Def.’s Mot. to Clarify at 4, Cal. Dkt. 207 (emphasis added).

²⁵ *Id.*

Neither Movants nor the California District Court have done anything to prevent VidAngel from filing a declaratory judgment claim in the California District Court. The only reason VidAngel has not received an adjudication of the legality of its Stream-Based Service in California is because VidAngel made a strategic decision to forum shop, filing its declaratory judgment claim in Utah and attempting to use its bankruptcy filing to prevent the California District Court from deciding whether the Stream-Based Service violates the Injunction.

II. VIDANGEL IGNORES THE FACTS AND LAW THAT COMPEL DISMISSAL OF ITS PETITION

A. Under The Relevant *Laguna* Factors, VidAngel's Petition Is In Bad Faith And Must Be Dismissed

The Court does not have to find applicable all, or even a majority of, the eight *Laguna* factors to establish “bad faith.”²⁶ The factors are guideposts to assessing whether VidAngel filed its petition in good faith.²⁷ Here, the evidence of VidAngel’s bad faith is manifest under those *Laguna* factors that are directly applicable. The remaining *Laguna* factors (e.g., the number of assets the debtor holds, whether it has an ongoing business) are not pertinent.²⁸

1. VidAngel's Petition Is A Tactical Maneuver In A Two-Party Litigation

VidAngel says it filed this Petition “because a recently-imposed injunction is threatening its ability to survive long enough to determine if its new delivery model comports with copyright law.”²⁹ The Injunction was issued a year ago. There is nothing “recent” about it. More fundamentally, VidAngel filed this petition to get away from the court that issued the Injunction in the first place. Quite simply, VidAngel did not want the legality of the Stream-Based Service

²⁶ See *In re Nichols*, 223 B.R. 353, 359 (Bankr. N.D. Okla. 1998) (holistically analyzing only the “factors most pertinent to this case” and omitting discussion of the other *Laguna* factors).

²⁷ See *In re Trident Assocs. Ltd. P'ship*, 52 F.3d 127, 131 (6th Cir. 1995) (“[b]ecause the totality of the circumstances’ must be considered, no single test for good faith can be recited, but this court has laid out some guidelines.”).

²⁸ Objection at 23.

²⁹ *Id.* at 20.

decided on a complete record, or by the California District Court, so it made a strategic decision to seek a do-over elsewhere. It did not file the Utah Declaratory Action out of necessity; it did so because it wanted a different outcome in what it perceived to be a friendlier forum. And, to further that objective, VidAngel filed this Petition. That is bad faith.

VidAngel also claims this is not really a two-party dispute because it has a significant number of *potential* creditors—namely, an ostensible 250,000 subscribers with credits of approximately \$18 each. That, however, is a red herring. Whatever the theoretical number of creditors, VidAngel has not identified any serious risk that many (or any) of these subscribers are looking to exercise remedies against VidAngel, nor is VidAngel acting as though such a serious risk exists. Indeed, VidAngel has excluded these creditors from the normal proof of claim process.³⁰ Notably, there is no creditors committee in this case, because, according to the U.S. Trustee, there were “too few unsecured creditors willing to serve,” illustrating the demonstrable lack of impact on the interests of parties other than the Movants.³¹

In short, the “nucleus” of this case “is a classic two-party dispute” that involves copyright, not bankruptcy, law.³²

³⁰ Debtor’s Mot. for Order To Set Last Day To File Proofs of Claim, Dkt. 29 (arguing for entry of Order under which “[t]he Debtor’s subscribers and customers are hereby exempt from filing proofs of claim for the value of any credits or refunds unless the Court at a later time orders otherwise and sets a bar date therefore.”).

³¹ Per the U.S. Trustee, “[t]here were too few unsecured creditors willing to serve for the United States Trustee to form a Creditors’ Committee.” See Statement of United States Trustee Regarding Creditors’ Committee, filed Nov. 20, 2017.

³² *In re Muskogee Envtl. Conservation Co.*, 236 B.R. 57, 66-67 (Bankr. N.D. Okla. 1999) (dismissing case as bad faith filing and finding that a party is “not entitled to have the Bankruptcy Court hear [its] complaints merely because [it is] disgruntled with the process” elsewhere); see also *In re 266 Wash. Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992) (single asset real estate chapter 11 case dismissed when the stay was modified and the debtor could not propose a confirmable plan).

2. VidAngel Filed the Petition to Get a Do Over

VidAngel falsely claims it is using the bankruptcy “to reorganize its business to comply with the Injunction.”³³ In fact, VidAngel is using the cover of the bankruptcy proceeding and the automatic stay it provides to try to get a different court to rule differently on the same issues it litigated and lost in the California Action. If VidAngel wanted to comply with the Injunction and get a declaratory judgment ruling regarding the modifications to its service, VidAngel could and should have pursued that course in the California Action.

3. VidAngel’s Pre-Petition Conduct Demonstrates Its Bad Faith

VidAngel claims it spent “millions of dollars in a good faith attempt to comply with the injunction.”³⁴ VidAngel offers no proof of that. What the record actually shows is that VidAngel says it has made some technological modifications but otherwise “maintained virtually all the core functionality” of the pre-existing service.³⁵

To be sure, the flurry of court filings VidAngel has made show it is spending significant amounts of money paying its lawyers. The record, however, shows that this money has been spent frustrating the Injunction and Movants’ rights. The California District Court sanctioned VidAngel for its contempt of the Injunction, when VidAngel operated in defiance of the Injunction for 17 days after it issued. The California District Court again sanctioned VidAngel for filing a frivolous motion to clarify the Injunction.³⁶ And, as described, VidAngel filed other procedurally improper “motions to clarify” rather than amending its counterclaim to seek declaratory relief. In short, VidAngel has deployed its litigation budget on a barrage of motions to frustrate Movants’ rights and evade the Injunction.

³³ Objection at 18.

³⁴ *Id.* at 16.

³⁵ VidAngel’s Opp’n to Plfs.’ Ex Parte Appl. For an Order Striking VidAngel’s Mot. to Clarify at 4, Cal. Dkt. 184.

³⁶ Order Granting in Part and Den. in Part Plfs’ Mot. for Sanctions, Cal. Dkt. 225.

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In sum, VidAngel's bad faith in filing the Petition is self-evident. The Petition should be dismissed.

III. VIDANGEL IGNORES THE RELEVANT *CURTIS* FACTORS THAT DECISIVELY FAVOR LIFTING THE STAY

Even if this Court does not dismiss VidAngel's petition for bad faith, the Court at a minimum should lift the stay so the California Action may proceed to resolution. VidAngel's bad faith and all relevant *Curtis* factors weigh decisively for lifting the stay.³⁷

VidAngel tries to distinguish itself from debtors found to have filed in bad faith. Its arguments do not hold up. VidAngel claims that, unlike the debtor in *Premier*, "VidAngel has a viable path to confirmation of a plan of reorganization, and is not merely stalling an inevitable end."³⁸ VidAngel has not articulated anything resembling a plan. Moreover, and as discussed further below, VidAngel cannot propose a plan unless and until Movants' claims are liquidated and the California District Court determines whether VidAngel's revised service complies with (or violates) the DMCA, the Copyright Act, and the Injunction.

VidAngel also argues it "is not seeking to use the automatic stay as a sword, unlike the debtor in *Scarborough*, which abused the automatic stay solely to pursue litigation against its creditors."³⁹ Yes, that is exactly what VidAngel is doing. VidAngel is using the automatic stay in an effort to pursue the Utah Declaratory Action rather than have the legality of its Stream-

³⁷ The fact that certain *Curtis* factors are not implicated or are neutral (e.g., insurance coverage, third-party exposure) does not make lifting the stay inappropriate. As with the *Laguna* factors, the *Curtis* factors are to be used as guidepost. *In re Curtis*, 40 B.R. 795, 799 (Bankr. D. Utah 1984) (Noting that "[a]lthough Section 362 does not attempt to define the parameters of the term "for cause," case law under the Code has recognized certain relevant factors which may be considered in making a determination of whether or not to modify the stay to permit litigation against the debtor to proceed in another forum.").

³⁸ Objection at 25.

³⁹ *Id.* at 25.

Based Service determined by the California District Court. Cause exists to terminate the stay and allow the California Action to proceed.

A. The California Action Will Allow For A Comprehensive Resolution Of The Issues That Are Critical To VidAngel's Reorganization

The California Court can and should provide resolution of the critical elements that will determine whether VidAngel can reorganize around its Stream-Based Service.

First, the California District Court must liquidate the damages arising from VidAngel's past infringement. VidAngel disingenuously suggested at prior hearings that the only works at issue in the California Action are the 104 titles listed on Exhibit A to the amended complaint in the California Action. That is incorrect. The works listed on Exhibit A are a *representative*, not an exhaustive, list of titles that VidAngel infringed. VidAngel has the specific records of the titles as to which it ripped DVDs and infringed copyright. Based on VidAngel's public statements, Movants estimate that the number of infringed titles owned by Movants exceeds one thousand.⁴⁰

VidAngel also has not been forthright with the Bankruptcy Court in describing the amount of damages it faces with respect to these titles. At the November 14, 2017 hearing, VidAngel said the statutory amount of damages for each title was \$1,000. A thousand dollars is the absolute *minimum* amount of statutory damages VidAngel faces for (1) any act of circumvention with respect to a title (\$250), and (2) its infringement of a title (\$750).⁴¹ The *maximum* amount of statutory damages is \$2,500 for each act of circumvention and \$150,000 for

⁴⁰ See Cal. Dkt. 158 ¶9 (roughly 56% of VidAngel's "sales" are of content owned by the California Plaintiffs); Cal. Dkt. 184-1 para 17 (California Plaintiffs' works are 55% of VidAngel's possible new motion picture content on its "new" service); Cal. Dkt. 77 ¶48 (stating that VidAngel offers more than 2,000 titles).

⁴¹ 17 U.S.C. § 1203(c)(3) (DMCA circumvention statutory damages); *id.* § 504(c) (copyright infringement statutory damages).

each work infringed. The jury in the California Action must decide where within the ranges to set the award.⁴² In short, damages must be liquidated in the California Action.⁴³

Second, the California District Court must determine whether VidAngel's modifications to its service bring it in compliance with the DMCA and the Copyright Act and that court's own Injunction. Obviously, the California District Court itself must decide issues arising out of its own Injunction.

B. Resolution Of The California Action Will Further The Bankruptcy Case, Not Interfere With It

Chapter 11 exists to provide relief from one's creditors. It does not exist so a party can evade a court-mandated injunction. As discussed, the California District Court has jurisdiction over its own Injunction, and VidAngel's ability to operate legally in compliance with that Injunction must be determined if VidAngel is to reorganize. The California District Court is entitled to make that determination. Indeed, it is impossible for VidAngel to proceed with its reorganization without those issues being decided.

C. The California Court Is a Specialized Tribunal For Copyright Litigation

A bankruptcy court is not a specialized tribunal for dealing with copyright claims. In this case, the California District Court's extensive expertise in the subject matter of this case and copyright law renders it such a specialized tribunal. Also, as previously noted, a jury must determine the amount of statutory damages in this case, and this Bankruptcy Court does not have the power on its own to empanel a jury.

⁴² *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998).

⁴³ The range of statutory damages belies VidAngel's assertion that no reasonable litigant would have rejected VidAngel's Rule 68 offer of judgment. The damages component of that offer—\$1,000 per title—was at the absolute bottom of the range of damages.

Finally, the California District Court is the specialized tribunal with respect to the scope and meaning of its own Injunction.

D. Judicial Economy Is Best Served By Using The Efficiencies of The California Court's Extensive Investment in This Case

The California District Court has already considered a record of more than 2,000 pages on the Injunction motion alone.⁴⁴

VidAngel asks the Utah District Court to repeat all of that work and adjudicate the DMCA and Copyright Act issues in this case anew, both wasting tremendous judicial resources and risking conflicting rulings.⁴⁵ Completing long-running litigation in the forum responsible for adjudicating it would neither “eviscerate the utility of this collective debt proceeding” nor “imperil the reorganization process.”⁴⁶ To the contrary, liquidating damages—which all parties have acknowledged must be done before VidAngel can even propose a reorganization plan—in the California District Court is inherently more efficient than starting over in another forum.

E. The California Action Is Ready For Summary Judgment and Trial

VidAngel asserts: “the California Action is not ready for trial, and virtually no fact discovery has been done, much less expert discovery, so this factor weighs in favor of maintaining the stay.”⁴⁷ This is simply incorrect.

Before VidAngel filed its Petition, the California District Court and Ninth Circuit had already ruled on all legal issues relevant to VidAngel’s liability, and a summary judgment motion on liability was pending. Trial was set for June 2018.

⁴⁴ See Appellees’ Answering Br., *DEI et al v. VidAngel, Inc.*, No. 16-56843 (9th Cir., Feb. 24, 2017) at 12 (Dkt. 54).

⁴⁵ Objection at 29.

⁴⁶ *Id.* at 29-30.

⁴⁷ *Id.*

F. The Balance of The Harms Favors Movants

VidAngel faces no cognizable harm from proceeding before the California District Court. If VidAngel “has no reason to believe its Stream-Based Service violates any law,”⁴⁸ then VidAngel should feel confident in defending that position in front of the California District Court. Being deprived of the opportunity to forum shop, and facing a judgment on the merits, does not count as harm. Moreover, VidAngel obviously is not concerned about the cost and distraction of having to litigate issues outside of the bankruptcy process. It has no problem proceeding with the Utah Declaratory Action and, indeed, has made clear that it intends to proceed forward in that case as quickly as possible (as noted above, VidAngel filed a summary judgment motion in that case even though the case was not even filed until August 31 of this year). VidAngel just does not want to litigate in California, as it does not like the rulings that have been made thus far in that forum.

Movants, on the other hand, face continuing harm as the result of the automatic stay frustrating their ability to bring the California Action to a timely resolution. This includes both harm in not having the amount of their damages liquidated, and harm in not having the California District Court interpret the scope and effect of its own injunction. The automatic stay should be terminated.

RELIEF REQUESTED

This Petition was filed in bad faith for the improper purpose of using the automatic stay to evade the California District Court and instead seek relief in a forum—the Utah District Court—that VidAngel believes is more favorable, and thus should be dismissed. If the Bankruptcy Court does not simply dismiss the case, however, it should at a minimum lift the automatic stay with respect to the California Action.

⁴⁸ *Id.* at 23.

DATED this 1st day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2017, I electronically filed the foregoing *Movants' Reply to Debtor's Objection to Motion for Dismissal of the Debtor's Chapter 11 Petition Pursuant to 11 U.S.C. §1112 (b) or, in the Alternative, for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)*, with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the electronic filing users in this case as follows:

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