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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

MOVANTS' 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), AND MEMORANDUM IN SUPPORT

MOTION

Pursuant to 11 U.S.C. § 1112(b), Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film Corporation, Warner Bros. Entertainment Inc., MVL Film Finance LLC, New Line Productions, Inc. and Turner Entertainment Co. (collectively, the "Movants"), through counsel, respectfully move to dismiss the above-entitled Chapter 11 petition filed by VidAngel, Inc. ("VidAngel" or the "Debtor"), for cause. Cause exists to dismiss the Debtor's petition because it was filed in bad faith and for an improper purpose.

In the alternative, if the Court declines to dismiss the Debtor's petition, Movants move to lift the automatic stay with respect to the California Action (as defined below), pursuant to 11 U.S.C. § 362(d)(1), Federal Rule of Bankruptcy Procedure 4001(a) and Local Rule 4001-1.

Pursuant to Local Rule 9013-1, this Motion is accompanied by a Memorandum in Support which is set forth immediately below.

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PRELIMINARY STATEMENT

By its own admission, in a press release, blog post and online video featuring its CEO, VidAngel—which has "millions of dollars in the bank" and is "generating millions in revenue"—did not file for bankruptcy protection out of any legitimate need to reorganize, but rather to forum shop a two-party litigation dispute.

VidAngel is the defendant in an action in the Central District of California challenging its violations of the Digital Millennium Copyright Act ("DMCA") and infringement of Movants' copyrights.[1] The California District Court found that VidAngel was running an illegal DVD and Blu-ray disc ("Discs") ripping and streaming service, and enjoined VidAngel from continuing its unlawful conduct. That decision was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit").

After being enjoined, VidAngel claimed that it stopped ripping Movants' Discs, but it nonetheless has continued to copy and stream movies in violation of the copyright owners' rights and the injunction. VidAngel filed two motions in the California Action (as defined below) to get a ruling clarifying that its "modified" streaming service was outside the scope of the injunction and not illegal. The California District Court denied those motions, finding the terms of the injunction to be clear and proper in scope. Having failed to get the relief it was seeking (and after being sanctioned for filing the third frivolous motion), VidAngel filed a declaratory relief action based on the same issues in Utah, a forum it believes could be more favorable, and then filed its bankruptcy petition.

[1] The Movants are jointly represented by the same counsel and act as one party to the litigation.

VidAngel brazenly acknowledges that it filed for Chapter 11 to "pause" the California Action and to use the automatic stay so it can litigate its declaratory judgment action filed in Utah, all part of a transparent effort to prevent the California District Court from enforcing the injunction that VidAngel has continued to violate post-petition and forestall a final and preclusive court ruling on the legality of its ongoing unauthorized streaming service. VidAngel's public statements make clear this bankruptcy proceeding is improper.

Movants therefore seek an order: (1) dismissing VidAngel's Chapter 11 petition as a bad-faith filing, 11 U.S.C. § 1112(b); or, in the alternative, (2) granting Movants relief from the automatic stay with respect to the California Action to enforce the injunction against VidAngel's ongoing, post-petition copyright infringement and obtain a final judgment, *id*. § 362(d)(1).

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are §§ 1112(b) and 362(d)(1) of Title 11 of the United States Code, and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

1. Background and Ongoing Proceedings

VidAngel streams popular motion pictures and television shows over the internet, without authorization and in violation of copyright owners' rights. Starting in 2015, VidAngel began ripping Discs—e.g., circumventing the technological protection measures that control access to the copyrighted works—and streaming the illicitly copied works to VidAngel's subscribers.

In 2016, Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film Corporation and Warner Bros. Entertainment Inc. (collectively, the "California Plaintiffs") sued VidAngel in the U.S. District Court for the Central District of California (the "California District Court") for violating the DMCA's anti-circumvention prohibition and for infringing the California Plaintiffs' exclusive rights under copyright (the "California Action").[2] The California District Court held that the California Plaintiffs would likely succeed on their claims and preliminarily enjoined VidAngel from violating the DMCA or infringing their copyrights (the "Injunction").[3] The Ninth Circuit affirmed.[4] VidAngel refused to comply with the Injunction for 17 days after it was issued, leading the California District Court to hold it in contempt and impose sanctions.[5]

While its appeal to the Ninth Circuit was pending, VidAngel announced it was modifying its service to what it termed a "Stream-Based Service."[6] VidAngel filed two "motions to clarify" the Injunction, asking the California District Court to hold that the Injunction does not apply to the Stream-Based Service. The California District Court denied both motions, making clear that the Injunction bars VidAngel from violating the California Plaintiffs' rights under the DMCA or infringing their copyrights, regardless of the label VidAngel uses to describe its service.[7] The

[2] Complaint, Case No. 2:16-cv-04109-AB-PLA, Dkt. 1 (C.D. Cal.) (June 9, 2016).
[3] *Disney Enters., Inc. et al. v. VidAngel, Inc.*, 224 F. Supp. 3d 957 (C.D. Cal. 2016).
[4] *Disney Enters., Inc. et al. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).
[5] Civil Minutes, *Status Conference re: Ex Parte Application for an Order to Show Cause Why VidAngel Should Not Be Held in Contempt for Violating the Preliminary Injunction Order [161]*, Case No. 2:16-cv-04109-AB-PLA, Dkt. 175 (C.D. Cal.) (Jan. 6, 2017).
[6] Rather than obtaining unauthorized copies of movies and television shows by ripping discs, as VidAngel did originally, VidAngel claims that it now obtains unauthorized copies from the streams (or other digital copies) of licensed streaming services, such as Amazon. Regardless of how it obtains the copies, VidAngel is in violation of the Injunction because it is still making unauthorized copies of movies and television shows and illegally streaming from those copies to its users.
[7] Civil Minutes, *Order Denying Defendant's Motion to Clarify or Construct the Court's December 12, 2016 Preliminary Injunction Order (Dkt. No. 182)*, Case No. 2:16-cv-04109-AB-PLA, Dkt. 198 (C.D. Cal.) (Aug. 2, 2017); Civil Minutes, *Order Denying Defendant's Motion to Clarify or Construct the Court's December 12, 2016 Preliminary Injunction Order (Dkt. No. 200)*, Case No. 2:16-cv-04109-AB-

California District Court also held that VidAngel's purported attempt to have the court hold VidAngel's Stream-Based Service lawful in reality sought declaratory relief, which was an improper use of a motion to clarify.[8] In response, the California Plaintiffs offered to stipulate that VidAngel could amend its counterclaims to bring a declaratory action in the California District Court, but counsel for VidAngel represented that VidAngel was not interested in a declaratory action. Notably, the California District Court also sanctioned VidAngel for filing a third "motion to clarify" the Injunction—which sought permission to use its "disc-based" model to stream the California Plaintiffs' movies and television shows to thousands of users—finding the motion was frivolous and a bad faith litigation tactic.[9]

On August 31, 2017, rather than seeking declaratory relief in the California District Court, the venue familiar with the facts and the law, VidAngel filed a new lawsuit in the Utah district court against a dozen corporate affiliates and business partners of the California Plaintiffs. VidAngel sought a declaration from Utah's district court (the "Utah Declaratory Action") on issues that the California District Court had addressed in response to VidAngel's "motions to clarify"—and on which it had issued a preliminary injunction.[10] VidAngel admitted in an SEC filing that it filed the Utah Declaratory Action to "avoid the prospect of again litigating in an unfavorable forum" and to forestall claims by the California Plaintiffs "that the preliminary injunction . . . applies to [new] business models."[11] In other words, VidAngel

PLA, Dkt. 207 (C.D. Cal.) (Sept. 13, 2017).

[8] Civil Minutes, *Order Denying Defendant's Motion to Clarify or Construct the Court's December 12, 2016 Preliminary Injunction Order (Dkt. No. 182)*, Case No. 2:16-cv-04109-AB-PLA, Dkt. 198 (C.D. Cal.) (Aug. 2, 2017) at 3-6.

[9] Civil Minutes *Order Granting in Part and Denying in Part Plaintiffs' Motion for Sanctions Pursuant to Local Rules 11-9 and 83-7 (Dkt. No. 205)*, Case No. 2:16-cv-04109-AB-PLA, Dkt. 225 (C.D. Cal.) (Oct. 5, 2017).

[10] Complaint, Case No. 2:17-cv-00989-EJF, Dkt. 2 (D. Utah) (Aug. 31, 2017).

[11] *See* VidAngel, Inc. Form 1-SA, at 5 (filed on September 28, 2017 for the six-month period ending June 30, 2017) (henceforth, "VidAngel Form 1-SA," a true and correct copy of the cited portion of which is

admitted it was forum-shopping. Those affiliates (defendants in the Utah Declaratory Action) have filed a motion to dismiss, transfer or stay the Utah Declaratory Action.[12] Three of the defendants in the Utah Declaratory Action—Marvel, New Line and Turner—are also plaintiffs in the California Action.[13,14]

On September 29, 2017, the California Plaintiffs moved for partial summary judgment on liability.[15] VidAngel's response to that motion was due October 20, 2017. However, two days before that deadline, VidAngel filed this proceeding.

2. VidAngel's Bankruptcy Petition

VidAngel filed a voluntary Chapter 11 petition in this Court (the "Petition") on October 18, 2017. The purpose of the Petition was to evade the California District Court's jurisdiction and frustrate enforcement of the Injunction against VidAngel's modified service. VidAngel's CEO described the Petition as part of VidAngel's "legal and business strategy," to "pause[]" the California Action while "continu[ing its] *new* lawsuit in Utah," i.e., the Utah Declaratory Action.[16] The CEO stressed, in a blog post following the filing, that VidAngel has "millions of dollars in the bank" and is "generating millions in revenue."[17]

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attached hereto as Exhibit "A").

[12] Motion to Dismiss or, in the Alternative, to Transfer or Stay, Case No. 2:17-cv-00989-EJF, Dkt. 58 (D. Utah) (Oct. 26, 2017).

[13] First Amended Complaint, Case No. 2:16-cv-04109-AB-PLA, Dkt. 228 (C.D. Cal.) (Oct. 6, 2017).

[14] VidAngel's counsel stated in a letter dated November 7 that as of that date it removed Marvel, New Line and Turner titles, implicitly admitting that their prior streaming had been in violation of the Injunction. Plaintiffs have not been able to confirm whether these titles are in fact removed from VidAngel's service.

[15] Plaintiffs' Motion for Partial Summary Judgment on Liability, Case No. 2:16-cv-04109-AB-PLA, Dkt. 222 (C.D. Cal.) (Sept. 29, 2017).

[16] "Per federal law, chapter 11 reorganization automatically pauses our lawsuit with Disney and the other plaintiffs in California. This strategy also allows us to continue our *new* lawsuit in Utah, where we are seeking a legal determination that our new filtering system is legal." *See VidAngel uses Chapter 11 Protection to Pause Los Angeles Lawsuit to Reorganize its Business Around the New Streaming Model*, available at: http://blog.vidangel.com/ ("Bankruptcy Press Release," a true and correct copy of which is attached hereto as Exhibit "B").

[17] *Id.*

At First Day Hearings on October 20, 2017, VidAngel struggled to present a basis for being there, notwithstanding vague references to "reorganizing" around the latest iteration of its ongoing copyright infringement: the "Stream-Based Model." A review of VidAngel's financial disclosures illustrates that it is not a company in need of restructuring, and in fact, is not restructuring; it lists only a handful of unsecured creditors with total claims that are less than the "millions" of cash on hand VidAngel has represented it has.[18] Reorganization, here, is not VidAngel's true objective. As VidAngel's counsel informed the Court, its intention is transferring the now-stayed California Action to Utah and seeking to thwart the rulings of a federal district court judge—not a proper purpose for seeking protection from this Court.[19]

ARGUMENT

I. VIDANGEL'S BAD FAITH PETITION SHOULD BE DISMISSED UNDER § 1112(B)(1)

"The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation."[20] Yet, that is precisely what VidAngel—a twice sanctioned litigant, flush with "millions of dollars in the bank"—is seeking to do through this Petition. By its own admission, VidAngel is seeking a new (and, in its view, more favorable) forum for a do-over of two-party litigation it knows it will "probabl[y]" lose, all part-and-parcel of a long-running strategy to prevent the California District Court from enforcing the Injunction. VidAngel's Petition was filed in bad faith and should be dismissed for cause under § 1112(b)(1).

[18] *See* VidAngel Form 204, *List of Creditors who have the 20 largest Unsecured Claims and are not Insiders* (filed October 19, 2017), Dkt. 49, Case No. 17-29073 (Bankr. Ct.); *See also* VidAngel Form 1-SA (listing cash and cash equivalents in excess of $5 million and over $1 million in restricted cash).
[19] *See* Declaration of Lev E. Breydo ("Breydo Decl."), attached hereto as Exhibit "C".
[20] *Furness v. Lilienfield,* 35 B.R. 1006, 1013 (D. Md. 1983).

Section 1112(b)(1) of the Bankruptcy Code gives the Court discretion to dismiss a Chapter 11 proceeding "if the movant establishes cause."[21] Section 1112 does not define "cause," aside from a non-exhaustive list of examples enumerated in § 1112(b)(4), allowing a Court to "consider other factors as they arise."[22] Determination of "cause" is based on a flexible framework that "gives wide discretion to the court to make an appropriate disposition of the case."[23]

A Chapter 11 petition must be filed in good faith; otherwise, dismissal for "cause" under § 1112(b) is an appropriate remedy.[24] In evaluating a debtor's good faith, courts in the Tenth Circuit look to a combination of factors articulated in *Laguna Associates* to analyze the totality of the circumstances.[25] The *Laguna* factors include, as relevant here:[26] (1) whether the debtor's pre-petition conduct was improper, *i.e.*, in bad faith; (2) if the petition effectively allows the debtor to evade court orders; (3) if the bankruptcy was filed as a tactical step in connection with a two-party litigation; and (4) the lack of a possibility of reorganization. These factors strongly favor dismissal.

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[21] Although § 1112(b) also allows for conversion to a Chapter 7 liquidation, dismissal of the case is the more appropriate remedy at this juncture.
[22] 11 U.S.C. § 1112 His. & Rev. Notes, Notes on Committee on the Judiciary, S. Rep. No. 95-989.
[23] *Id.*
[24] *In re Trident Assocs. Ltd. P'ship*, 52 F.3d 127, 131 (6th Cir. 1995) (finding that a Debtor's bad faith can constitute cause under § 1112(b)); *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994) ("[C]ourts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal."); *In re SB Properties, Inc.*, 185 B.R. 198, 204 (E.D. Pa. 1995) ("[A] Chapter 11 case can be dismissed for 'cause' under § 1112(b) if filed in bad faith.").
[25] *In re Mushkogee Envtl. Conservation Co.*, 236 B.R. 57, 66 (Bankr. N.D. Okla. 1999) (finding that "[t]he *Laguna* analysis was adopted by the Tenth Circuit in *In re Nursery Land Dev., Inc.* 91 F.3d 1414, 1416 (10th Cir. 1996)).
[26] *In re Laguna Assocs. Ltd. P'shp*, 30 F.3d 734, 738, (6th Cir. 1994); *see e.g., In re Trident Assocs. Ltd. P'ship*, 52 F.3d 127 at 131 (noting that "[b]ecause the 'totality of the circumstances' must be considered, no single test for good faith can be recited[.]"); *In re Nichols*, 223 B.R. 353, 359 (Bankr. N.D. Okla. 1998) (discussing only the Laguna "factors most pertinent to [the] case" and reaffirming that the "determination . . . is a matter left to the sound discretion of the bankruptcy court.")

1. VidAngel's Pre-Petition Conduct Was Improper and Illustrates Its Bad Faith in Filing the Petition

VidAngel's pre-petition conduct demonstrates that it invoked this Court's jurisdiction lacking clean hands and with no intention of utilizing the bankruptcy process for legitimate purposes. Indeed, as illustrated by multiple rounds of pre-petition sanctions, VidAngel has engaged in a pattern of improper conduct—effectively playing games with the judicial system—of which this Petition is merely the latest example.

After the California District Court issued the Injunction on December 12, 2017, VidAngel simply refused to comply for 17 days. The California District Court held VidAngel in civil contempt and sanctioned it in the amount of $10,231.20.[27] Subsequently, while VidAngel's Ninth Circuit appeal of the Injunction was pending, VidAngel filed duplicative and unmeritorious "motions to clarify" the Injunction before the California District Court. On October 5, 2017, the California District Court sanctioned VidAngel once again, after holding that one of those motions, which VidAngel withdrew after forcing the California Plaintiffs to file an opposition, was "frivolous" and filed in "bad faith."[28] VidAngel's continued pattern of improper litigation tactics and violations of court orders should not be permitted to continue post-petition.

2. VidAngel Is Using the Petition to Evade Court Orders

VidAngel seeks to use this Bankruptcy Court as "a protective cover for a fraudulent design"[29]—namely, continuing its copyright infringement while attempting to use the automatic

[27] Civil Minutes, Case No. 2:16-cv-04109-AB-PLA, Dkt. 175 (C.D. Cal.) (true and correct copy of which is attached hereto as Exhibit "D"); *see also* Form 1-K, at 8.
[28] Civil Minutes *Order Granting in Part and Denying in Part Plaintiffs' Motion for Sanctions Pursuant to Local Rules 11-9 and 83-7 (Dkt. No. 205)*, Case No. 2:16-cv-04109-AB-PLA, Dkt. 225 (C.D. Cal.) (Oct. 5, 2017). ("The Court finds that VidAngel filed the second motion to clarify in bad faith. The Ninth Circuit holds that "[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument. . . ." *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996) (quoting *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986)).
[29] *Matter of Nw. Recreational Activities, Inc.*, 4 B.R. 36, 39 (Bankr. N.D. Ga. 1980) (quoting *Shapiro v.*

stay to prevent the California District Court from enforcing the Injunction and Protective Order (as defined below).

VidAngel has continued to make available copyrighted content from the Movants and their subsidiaries, including Marvel (a Disney subsidiary), Turner Entertainment Co. and New Line Productions, Inc. (both Warner Bros. subsidiaries). Because Marvel, Turner and New Line are all plaintiffs in the California Action, VidAngel's continued streaming of their works violates the Injunction, while at the same time using Movant's works to enrich VidAngel's principals.

Along with its ongoing post-petition violations of the Injunction, VidAngel has also brazenly flouted a protective order governing certain disclosures of information with respect to the California Action (the "Protective Order").[30] The Protective Order included strict, mutually-negotiated "attorneys' eyes only" provisions, which prohibited subsequent dissemination of information to third-parties, including VidAngel employees, and certainly including the general public.[31] In an earlier deposition, in accordance with these provisions, VidAngel's counsel learned highly-confidential, commercially-sensitive information regarding one of the Movants. Subsequently, in a widely-syndicated October 31, 2017 podcast, VidAngel's CEO disclosed this sensitive information—which, as a non-attorney, he was never supposed to learn in the first place—to the public at large.[32]

Wilgus, 287 U.S. 348, 355 (1932)).

[30] November 6, 2017 letter from Kelly M. Klaus to Jaime Marquart regarding Disclosure of Fox's Highly Confidential, Attorneys' Eyes Only Information (a true and correct copy of which is attached hereto as Exhibit "E").

[31] Protective Order, Case No. 2:16-cv-04109-AB-PLA, Dkt. 23 (C.D. Cal.) (Aug. 19, 2016).

[32] *See* Exhibit C. In subsequent correspondence, VidAngel's counsel represented that Mr. Harmon made a "reasonable inference" regarding the contents of the confidential contracts. That explanation—in light of Mr. Harmon's specific representation that he was revealing what was said during a deposition—is not credible.

VidAngel's ongoing and persistent abuses threaten to "compromise []the bankruptcy system and the integrity of the court."[33] Movants urge the Court to dismiss VidAngel's bad faith Petition.

3. The Petition is Nothing More Than a Tactical Maneuver in Two-Party Litigation

"As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith."[34]

In *SGL Carbon Corp*—a quintessential "litigation tactic" case, concerning a financially healthy manufacturer filing Chapter 11 to escape an antitrust judgment—the Third Circuit concluded that SGL's "petition was not filed to reorganize the company" and dismissed it for "bad faith" pursuant to § 1112(b).[35] Here, akin to *SGL*, VidAngel is not in financial distress; it is, by its own admission, a "very healthy company" with "millions of dollars in the bank" and "generating millions in revenue."[36] That is the exact sort of evidence on which the *SGL* court based its finding of bad faith: "the company's president insisted SGL Carbon was 'financially healthy' and that its 'normal business operations' would continue despite bankruptcy," showing that "the company did not need to reorganize under Chapter 11."[37]

Further, like *SGL*, VidAngel filed for bankruptcy not due to inability to meet its current financial obligations, but purely as a litigation tactic. As VidAngel has conceded, liability is, in its own words, "probable,"[38] indeed, the Ninth Circuit had already dismissed its primary defenses to infringement. Consequently, VidAngel's self-acknowledged motive for the Petition

[33] *In re Nikron, Inc.*, 27 B.R. 773 (Bankr. E.D. Mich. 1983).
[34] *In re HBA E., Inc.*, 87 B.R. 248, 259–60 (Bankr. E.D.N.Y. 1988).
[35] *In re SGL Carbon Corp.*, 200 F.3d 154, 166-7 (3d Cir. 1999).
[36] *See* Exhibit C.
[37] *In re SGL Carbon Corp.*, 200 F.3d at 166-67.
[38] *See* Exhibit A at 5.

is not to stay all litigation, but to abuse the automatic stay to "pause[]" the California Action while "continu[ing their] *new* lawsuit in Utah."[39] Indeed, VidAngel does not want its bankruptcy filing to interfere with its chosen litigation strategy and, to that end, has requested approval in this Court to be permitted to *continue* paying its litigation experts and counsel.[40] Courts "universally demand more of Chapter 11 petitions than a naked desire to stay pending litigation,"[41] which is precisely what VidAngel seeks to do with respect to the California Action.

4. The VidAngel Bankruptcy Filing Has No Valid Reorganization Purpose

A Chapter 11 debtor "must owe real legitimate debts to real creditors constituting an unsecured creditor body."[42] According to its statement of financial affairs, VidAngel has nearly $3.5 million in cash and equivalents, against approximately $200,000 of unsecured claims (excluding claims from its law firms and "customer account credits") and no secured debt.[43] While VidAngel will "probabl[y]" be subject to a significant additional claim once damages in the California Action are determined, given its current financial position, filing for bankruptcy serves no valid reorganization purpose. [44]

To the contrary, VidAngel's Petition is designed to shield an unlawful business from the application of the Injunction while it attempts to implement its litigation forum-shopping strategy. In that regard, VidAngel's strategy closely parallels that of *Rent-Rite Super Kegs West*, a Colorado debtor engaged in marijuana-related activities—arguably, legally "in flux" in

[39] *See* Exhibit B.
[40] Application to Employ Baker Marquart LLP, Case No. 17-29073, Dkt. 49 (Bankr. Ct.) (Nov. 2, 2017); Application to Employ Analysis Group, Inc., Case No. 17-29073, Dkt. 58 (Bankr. Ct.) (Nov. 7, 2017).
[41] *In re Integrated Telecom Express, Inc.*, 384 F.3d 108 (3d Cir. 2004).
[42] *In re Harvey Probber, Inc.*, 44 B.R. 647, 649 (Bankr. D. Mass. 1984) (internal quotations omitted).
[43] VidAngel also lists $579,367.75 in legal retainers, deposits and prepayments. *See* VidAngel, Inc., *Summary of Assets and Liabilities for Non-Individuals* [Dkt. 47], filed November 1, 2017.
[44] *In re Coastal Cable T.V., Inc.*, 709 F.2d 762, 764 (1st Cir. 1983) (finding that there must be "some relation" between filing and the "reorganization-related purposes that [Chapter 11] was designed to serve").

Colorado, but clearly prohibited under federal law.[45] In *Rent-Rite*, the Colorado bankruptcy court dismissed the case because "[t]he Debtor has knowingly and intentionally engaged in conduct that constitutes a violation of federal criminal law," including on a post-petition basis.[46] Like the debtor in *Rent-Rite*, VidAngel has sought bankruptcy protection to continue generating revenues in violation of the Injunction, i.e., engaging in illegal conduct.[47] Consequently, the *Rent-Rite* court's basis for dismissing the petition is equally applicable here: delaying the California District Court's enforcement of its Injunction only serves to increase the potential pre- and post-petition damages for which VidAngel will ultimately be liable.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE MOVANTS RELIEF FROM THE AUTOMATIC STAY

Upon a finding of "cause," the Court has discretion to either dismiss the case pursuant to § 1112(b) or, alternatively, to lift the automatic stay with respect to the California Action, pursuant to § 362(d).[48] If the Court declines to dismiss VidAngel's Petition at this juncture, the Movants ask the Court to lift the automatic stay so that the California District Court can enforce its Injunction and Protective Order, rule on the pending motion for partial summary judgment on liability, and proceed to trial in order to liquidate damages.

Pursuant to § 362(d)(1), the Bankruptcy Court can lift the automatic stay "for cause," which is widely recognized to include both (1) "bad faith" conduct, including abusing the stay or forum shopping and (2) the continuation of ongoing litigation in a different forum if appropriate under the relevant factors (as is true here).

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[45] *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 804 (Bankr. D. Colo. 2012).
[46] *In re Rent-Rite, 484 B.R.* at 807.
[47] *See* Ex. B.
[48] *See In re Syndicom Corp.*, 268 B.R. 26, 55 (Bankr. S.D.N.Y. 2001) (finding "cause for each of relief from the stay and dismissal" and concluding that "[o]n balance . . . the former is more appropriate, at least at this time.")

1. VidAngel's Bad Faith Is Cause to Lift the Automatic Stay

Courts routinely grant relief from the automatic stay in bankruptcy cases filed to abuse the protection of the stay or to facilitate forum shopping. This is because "[t]he protection of the automatic stay is not *per se* a valid justification for a Chapter 11 filing; rather, it is a consequential benefit of an otherwise good faith filing."[49] For instance, in *Premier Automotive Services,* the court found relief from the stay appropriate because the debtor, like VidAngel, "resort[ed] to the Chapter 11 device merely for the purpose of invoking the automatic stay."[50] Likewise, in *Scarborough-St. James Corporation*, based on facts similar to this case, the court found it appropriate to lift the stay because:[51]

> In filing its bankruptcy case, Debtor is not seeking "breathing room" from its litigation; it is continuing litigation. Not only did Debtor remove the Michigan Litigation to federal court, it has filed an adversary proceeding in this court regarding interpretation of the Lease. Thus, it appears that Debtor is not shying away from litigation; rather, Debtor seeks to litigate only issues of its choosing and in its preferred forum. Debtor is using its bankruptcy case as a "sword" and not a "shield."

VidAngel has now filed its own motion for summary judgment in the new lawsuit in Utah, thereby abusing the stay by temporarily pausing the California Plaintiffs' motion on liability so it can bring its own motion in what it believes to be a more favorable forum. Like the debtor in *Scarborough-St. James Corporation*, VidAngel is using the Petition as a sword—not genuinely seeking breathing room from litigation so it can reorganize, but using the automatic stay to litigate in its preferred forum despite the inefficiencies and inequities of doing so.

[49] *In re HBA East, Inc*., 87 B.R. 248, 262 (Bankr. E.D.N.Y. 1988).
[50] *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 280 (4th Cir. 2007).
[51] *See In re Scarborough-St. James Corp.*, 535 B.R. 60, 70 (Bankr. D. Del. 2015).

2. Movants Meet the Tenth Circuit Standards for Lifting the Stay to Continue Ongoing Litigation

Independent of a petitioner's bad faith, Courts in this Circuit also regularly provide stay relief to permit the continuation of ongoing litigation in a different forum. In that context, "the Tenth Circuit has emphasized one criterion": the movant's likelihood of success, which, alone can prove "dispositive" in determining that stay relief is appropriate.[52] In addition, courts in the Tenth Circuit also look to the broader *Curtis* factors, which primarily relate to "judicial efficiency and economy."[53] In this case, the most relevant *Curtis* factors include: (1) whether allowing litigation to proceed in the existing forum would interfere with the bankruptcy case, (2) whether the existing forum has expertise to administer the action, and (3) whether judicial economy would be furthered by lifting the stay. Here, all the relevant factors weigh heavily towards lifting the stay with respect to the California Action.

A. Movants Prevail on the "Dispositive" Likelihood of Success Factor

In the Tenth Circuit, "one factor that can be dispositive in determining whether a party can successfully move for relief from the automatic stay under § 362(d)(1)—namely, the likelihood that the movant would prevail in the litigation if the stay were lifted."[54] That analysis, articulated in the *Gindi* decision, looks to the expected outcome of the underlying litigation if it were permitted to proceed.[55] VidAngel's likely defenses with respect to the California Action have already been invalidated by the Ninth Circuit and VidAngel acknowledges, as it must, that

[52] *In re Dampier* (10th Cir. BAP (Colo.) Nov. 5, 2015).
[53] *In re Busch,* 294 B.R. 137, 141 (BAP 10th Cir. 2003) ("The *Curtis* factors have been widely adopted by bankruptcy courts."); *See also In re Horizon Womens Care Prof'l LLC,* 506 B.R. 553, 557-58 (Bankr. D. Colo. 2014) (listing all the *Curtis* Factors citing *In re Curtis*, 40 B.R. 795, 805 (Bankr. D. Utah 1984)); *See also In re Dampier,* at 5 (noting that while the *Curtis* "factors should be considered in connection with our analysis of this appeal" they need not all be relevant to the analysis and upholding the decision despite the bankruptcy court finding "that the third, fourth, fifth, sixth, and eighth *Curtis* factors were either inapplicable or neutral.")
[54] *In re Dampier* at 4.
[55] *Chizzali v. Gindi (In re Gindi),* 642 F.3d 865, 872 (10th Cir. 2011), overruled on other grounds *by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*,661 F.3d 495 (10th Cir. 2011).

the Movants will "probabl[y]" prevail on the merits with respect to the underlying claim. Here, the Movant's high likelihood of success should be "dispositive" in determining to grant relief from the stay to prevent VidAngel's continuing copyright infringement.

B. *The California Action Would Not Interfere With the Bankruptcy Case*

The California Action and the core Bankruptcy proceeding could readily operate in parallel. In fact, if the Petition is not dismissed, conclusion of the California Action—including a decision regarding the legality of VidAngel's business model and liquidation of damages by the California District Court—would be necessary for VidAngel to exit Chapter 11 with a confirmable plan. VidAngel's CEO acknowledged this, suggesting that they could exit "very quickly if we could just see whether we have damages [and] get them liquidated . . ." and that "the damages would be determined by the California court, because that's where that lawsuit is."[56]

C. *The California District Court Is a Specialized Tribunal With the Expertise to Administer the California Action*

The California District Court is the forum best suited for resolving the remaining issues in the California Action. That Court has had more than a year to develop an understanding of the relevant facts and develop expertise to most efficiently resolve the DMCA and copyright infringement issues implicated by VidAngel's service. And, the most pressing issue, assessment of ongoing violations of the Injunction, requires interpretation of the California District Court's order, which would be most efficiently conducted by that court. At the same time, allowing the case to proceed in the California District Court avoids the risk of inconsistent rulings. Moreover, the issues at the heart of the California Action turn on matters outside of bankruptcy law—namely intellectual property and commercial dealings in the entertainment space—where the

[56] *See* Exhibit C.

California District Court has greater substantive expertise and familiarity. Finally, the statutory damages questions in the California Action include a Seventh Amendment right to a jury trial.[57] While "the constitution prohibits bankruptcy courts from holding jury trials in non-core matters," such as the California Action, without consent of the parties, the California District Court has no such limitation.[58]

D. The Interest of Judicial Economy Is Best Served by Concluding the California Action in the California District Court, Where the Parties Are Prepared for Trial

Pursuant to the *Curtis* analysis, the stay should be lifted to permit an action to proceed to completion in another tribunal when "the debtor is a party to a pre-petition action that has progressed to the point where it would be a waste of the parties' and the court's resources to begin anew in the bankruptcy court."[59] Despite VidAngel's stated intention to use bankruptcy to get a litigation do-over, given the resources exerted in connection with the California Action, shifting to a different forum at this advanced stage of the litigation would simply multiply costs and create undue delays without any legitimate offsetting benefit.

The California Action has progressed to within months of trial. Indeed, the Debtor filed this Petition on the same day discovery responses on the issue of *damages* should have been served—and just two days before the deadline for its opposition to the Movants' pending partial summary judgment motion regarding liability. Accordingly, abetting VidAngel's goal of essentially re-starting the proceeding in Utah would be an inefficient use of judicial resources.

[57] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998).
[58] *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993).
[59] *In re Curtis*, 40 B.R. 795, 805 (Bankr. D. Utah 1984).

III. RELIEF REQUESTED

For the reasons set forth herein, VidAngel's Bankruptcy Petition was filed in bad faith and should be dismissed. Alternatively, if the Court is not inclined to dismiss the Petition, the appropriate alternative would be to grant the Movants relief from the automatic stay in order to conclude the California Action.

DATED this 8th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, I electronically filed the foregoing 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), AND Memorandum in Support 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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