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*Proposed Attorneys for VidAngel, Inc.*

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

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In re:

VIDANGEL, INC.,

Debtor.

Case No. 17-29073

Chapter 11

Judge Kevin R. Anderson

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**DEBTOR'S REPLY TO THE STUDIOS' LIMITED  
OBJECTION TO THE DEBTOR'S MOTION TO  
EMPLOY KAPLAN, VOEKLER, CUNNINGHAM &  
FRANK, PLC AS SPECIAL COUNSEL**

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VidAngel, Inc. ("Debtor" or "VidAngel") respectfully submits this reply to 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.'s (collectively, the "Studios") Limited Objection to the Debtor's Application to Employ Kaplan, Voekler, Cunningham & Frank, PLC ("KVCF") as Special Counsel under Section 327(e) and 328(a) of the Bankruptcy Code [ECF No. 158] (the "Application").

## INTRODUCTION

This Court should overrule the Studios' Limited Objection because the Debtor's employment of KVCF is permissible under Sections 327(e) and 328(a) of the Bankruptcy Code, and the Studios have made no cognizable objection under the applicable law. As described herein, it is in the best interest of the estate for the Debtor to employ KVCF to ensure the Debtor's compliance with securities laws, and the proposed compensation is reasonable, understandable, and fair in that it does not violate the priority rules that are at the core of Chapter 11's safeguards.

The Studios claim they require additional details regarding the scope of KVCF's engagement and that the Debtor's proposed compensation of stock options creates an adverse interest and cannot be objectively evaluated for reasonableness. These arguments fail under Section 327(e). The Debtor has provided sufficient details of the scope of KVCF's engagement to show the necessity for the employment in order to ensure the Debtor's compliance with securities law. Section 327(e) allows employment "if such attorney does not represent or hold any interest adverse to the debtor or to the estate *with respect to the matter on which such attorney is to be employed.*" 11. U.S.C. § 327(e) (emphasis added). The Application's proposed compensation creates no interest adverse to the Debtor's compliance with securities law. Finally, the stock option compensation can be determined for its reasonableness because the amount of stock and the trigger price are both articulated in the Application. For these reasons, VidAngel the Studios' Limited Objection should be overruled.

## ARGUMENT

- I. **THIS COURT SHOULD APPROVE THE APPLICATION BECAUSE IT IS IN THE BEST INTEREST OF THE DEBTOR'S ESTATE AND MAINTAINS THE EXISTING PRIORITY OF THE ESTATE'S CREDITORS.**

It is in the best interest of the estate for VidAngel to employ KVCF and compensate KVCF with stock options. VidAngel requires the employment of KVCF, a law firm specializing in securities law, because VidAngel has businesses and investments that require compliance with securities laws. VidAngel seeks to employ KVCF to create a stock transfer agent and to ensure that VidAngel complies with all securities law and regulations. Since it is in the best interest of the Debtor's estate to comply with securities law, it is in the best interest of the Debtor's estate to employ KVCF.

VidAngel's proposed compensation for KVCF is also in the best interest of the Debtor's estate because it maintains the cash assets of the estate and does not violate any section of the Bankruptcy Code, precedent, or policy. VidAngel proposes to pay KVCF with \$100,000 cash from the estate, as well as a face value \$275,000 paid in options for 203,706 shares of common stock from VidAngel's authorized option pool with the trigger price set at the lesser of \$3.00 or the current fair market price at the time of issuance, issued pursuant to a filed Chapter 11 Plan of Reorganization and subject to the approval of the Bankruptcy Court. *See* Application at 4. Although VidAngel could compensate KVCF solely with cash from the estate, this would impoverish the Debtor's estate. By contrast, the stock options only have of *any* value if VidAngel's financial restructuring succeeds, and the issuance of such stock options remain explicitly subject to the approval process for the Debtor's chapter 11 plan under section 1129 of the Bankruptcy Code. If VidAngel's Chapter 11 restructuring fails and VidAngel converts to liquidation, the stock options become worthless. Thus, it is KVCF that bears the risk with the stock option compensation, not VidAngel's creditors.

VidAngel's proposed compensation preserves the preexisting priorities among the Debtor's estate's creditors. Common stock is the absolute bottom priority in any distribution of

the estate under the Bankruptcy Code. See 11 U.S.C. § 726(a)(6). By agreeing to a stock option compensation, KVCF is agreeing to come behind all administrative priority claims and all preexisting creditors, including the Studios (to the extent the Studios have any claim at all). Because the Studios are, at best, unsecured creditors of the estate, the Studios would necessarily receive payment in full before KVCF's stock would receive any payment whatsoever. Thus, KVCF's stock option compensation does not disadvantage any preexisting creditors of the estate.

**II. THE DEBTOR'S DISCLOSURE REGARDING KVCF'S PROPOSED EMPLOYMENT IS SUFFICIENT.**

VidAngel has provided sufficient details regarding the nature of KVCF's intended retention to demonstrate that the Application is in the best interest of the estate. The Application states that "[t]he professional services that the Debtor may request KVCF to provide may include the following: Advising the Debtor on matters relating to the restructuring of the Debtor, including formation of a broker-dealer and transfer agent, and creation of agreements related to intended new business lines of the Debtor." In addition to VidAngel's streaming service, VidAngel has other businesses and investments for which VidAngel needs to raise capital. In order to raise capital, VidAngel seeks to employ KVCF to create a stock transfer agent and to ensure that VidAngel complies with all securities law and regulations. This information sufficiently demonstrates VidAngel's need to employ KVCF. Therefore, the Studios' claim that they require additional disclosure of the nature of KVCF's intended retention is unfounded.

**III. EMPLOYING KVCF FULLY COMPLIES WITH 11 U.S.C. § 327(E) BECAUSE IT DOES NOT CREATE AN INTEREST ADVERSE TO THE ESTATE WITH RESPECT TO THE MATTER ON WHICH KVCF IS EMPLOYED.**

Pursuant to 11 U.S.C. § 327(e), "[t]he trustee, with the court's approval, may employ, for a specified purpose . . . an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the

estate *with respect to the matter on which such attorney is to be employed.*” (emphasis added). Here, the Application seeks to employ KVCF to advise the Debtor on compliance with securities law. KVCF does not become adverse on the matter for which it is employment for creating a stock transfer agent. Although KVCF would be adverse on the matter of its employment if KVCF was suing VidAngel for security law violations, this is not the case. Additionally, it is essential that VidAngel employ KVCF so that VidAngel can avoid security law violations. KVCF could even provide such services to the Debtor if it were a pre-Petition Date creditor or equity holder, because such interests are not adverse “*with respect to the matter on which [KVCF] is to be employed.*” *Id.* The fact that KVCF may become an equity holder down the road though stock options does not make KVCF adverse on the matter for which it is employed, securities law, and therefore the proposed compensation satisfies 11 U.S.C. § 327(e).

The Studios’ cite cases that discuss adverse interests, but these cases are inapplicable because they primarily address adverse interest under Section 327(a) and (c), neither of which is the relevant standard for the Application (Section 327(e)). A cursory examination of these cases only highlights their inapplicability to the matter at hand.

In *In re Greystone*, a wholly-owned subsidiary of the counsel to the unsecured creditors committee had a conflict of interest that disqualified the subsidiary from serving as the financial advisor to the same creditors’ committee as its parent company. *In re Greystone Holdings, L.L.C.*, 305 B.R. 456. DKW Law Group was counsel to the unsecured creditors committee. *Id.* at 458. Subsequently, the unsecured creditors committee selected DKW Value Recovery, a wholly-owned subsidiary of DKW Law Group, as its financial advisor. *Id.* The United States Trustee objected to the application on the grounds that DKW Value Recovery’s status as a wholly-owned subsidiary of DKW Law Group compromised the independence of both the Committee’s counsel and its

financial advisor. *Id.* Another case cited by the Studios, *In re Amdura*, also presents vastly different circumstances than those at hand. In *In re Amdura*, the court held that law firms, which represented a creditor as well as six related debtor entities, were not disinterested. *In re Amdura Corp.*, 121 B.R. 862, 865 (Bankr. D. Colo. 1990).

In contrast to the cases cited by the Studios, the Application is permissible of under Section 327(e). And unlike the cases cited by the Studios, KVCF's proposed compensation poses no direct conflict. Unlike in *In re Greystone*, no conflict of interest exists on the administration of the Debtor's estate. And as the court said in *In re Greystone*, "interests are not considered adverse merely because it is possible to conceive a set of circumstances under which they might clash . . . . horrible imaginings alone cannot be allowed to carry the day." *In re Greystone Holdings, L.L.C.* at 461. And unlike *In re Amdura*, KVCF does represent any creditor to the estate. Therefore, the Application's proposed compensation complies with Section 327 because it does not create an interest adverse to VidAngel's estate with respect to the securities work for which KVCF will be employed.

**IV. KVCF'S PROPOSED COMPENSATION WITH STOCK OPTION DOES NOT CONSTITUTE IMPERMISSIBLE *SUB ROSA* PLAN OUTSIDE OF THE PLAN CONFIRMATION PROCESS.**

VidAngel's corporate governance continues during its status in Chapter 11 bankruptcy. As a C corporation, VidAngel has delineated its stock in shares and authorized (but not issued) these shares in its bylaws. Issuance of these previously authorized stock to KVCF does not constitute interference with the confirmation of VidAngel's capital structure.

The Studios cite to *Czyzewski*, in which the estate engaged in a priority-violating distribution that did not make the disfavored creditors better off, did not promote the possibility of a confirmable plan, did not help restore the status quo ante, and did protect reliance interests. *Czyzewski v. Jevic Holding Corp.*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 973, 986 (March 22, 2017). The

Studios' attempt to apply *Czyzewski* to this situation is laughable; if *Czyzewski* applies, all professional retentions violate *Czyzewski* because they effect distributions that violate the prepetition priority scheme because they create administrative priority claims under section 503 of the Bankruptcy Code. The argument is untenable. Even if the court considers this argument, contrary to hundreds of years of precedent with respect to administrative priority claims, VidAngel's compensation to KVCF with stock options does not harm preexisting creditors because the stock option is subordinate to all preexisting creditors, so it actually preserves prepetition priorities. Furthermore, the proposed stock option compensation only occurs in the event that the Debtor proposes and confirms a chapter 11 plan. Thus it remains subject to all the protections of Section 1129 and approval of the Bankruptcy Court. KVCF bears the risk if VidAngel's reorganization fails and the stock option becomes worthless. KVCF will receive the majority of its compensation only in the event that the equity value of the Debtor increases beyond the trigger price, which only gives KVCF the incentive to aid the Debtor to achieve success.

The Studios cite several inapplicable *sub rosa* cases that address sales and distributions outside of the plan process, not stock options. A *sub rosa* plan arises when a debtor in bankruptcy seeks to enter into a transaction outside of a plan of reorganization that could have a significant effect upon the bankruptcy case and the bankruptcy estate. THE SUB ROSA PLAN OF REORGANIZATION: SIDE-STEPPING CREDITOR PROTECTIONS IN CHAPTER 11, 16 Bankr. Dev. J. 37 (1999). The law review article cited by the Studios even acknowledges that "generally case law exhibits objections to three types of transactions as plans *sub rosa*: sales of property of the estate outside the ordinary course of business, leases, and settlement agreements." *Id.*

Unlike the cases cited by the Studios, KVCF's compensation does not involve an asset sale, lease, or settlement agreement. The compensation provides KVCF with stock options, which will only be worth *anything* if VidAngel's reorganization succeeds. The purpose of the chapter 11 safeguards are to protect the current assets of the debtor. The Application's proposed compensation does not risk the assets of VidAngel or devalue the estate.

**V. KVCF'S PROPOSED COMPENSATION IS KNOWABLE AND REASONABLE.**

The Application's proposed stock option compensation can be evaluated for reasonableness because the Application articulates the precise compensation and the low priority of the stock option ensures that preexisting creditors suffer no detriment. The Studios argue that the Court cannot determine the reasonableness of the compensation because of the unknown value of the stock option. However, the Application articulates the exact trigger price of the options upon issuance: \$275,000 paid in options for 203,706 shares of common stock from VidAngel's authorized option pool with the trigger price set at the lesser of \$3.00 or the current fair market price at the time of issuance. These parameters of the issuance of the stock are exact and consequently sufficient to determine reasonableness. Further, the objection is meritless in that this court has routinely approved contingency fee and hourly rate compensation plans that also do not articulate the exact final amount of the compensation. Furthermore, since the stock option comes behind all administrative priority claims and all preexisting creditors, the Studios suffer no detriment to their claim by the proposed compensation.

**CONCLUSION**

For the foregoing reasons, VidAngel respectfully asks the Court to overrule the Studios' Objection and grant the Debtor's Application to employ KVCF with the terms set forth in the Application.

Dated this 30th day of March, 2018.

/s/ Grace S. Pusavat

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**PROOF OF SERVICE**

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I hereby certify that on March 30, 2018, I caused a true and correct copy of the foregoing **DEBTOR'S REPLY TO THE STUDIOS' LIMITED OBJECTION TO THE DEBTOR'S MOTION TO EMPLOY KAPLAN, VOEKLER, CUNNINGHAM & FRANK, PLC AS SPECIAL COUNSEL** to be filed with the ECF system, which electronically served the following:

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On March 30, 2018, I served the following parties by dropping a copy of the foregoing pleadings by U.S. Mail, First Class, postage prepaid, as follows:

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