

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

| | | |
|-----------------|---|-------------------|
| In re: |) | |
| |) | |
| VIDANGEL, INC., |) | |
| |) | |
| Debtor, |) | Case No. 17-29073 |
| |) | |
| _____ |) | |

Transcript of Electronically-Recorded Motion to Dismiss Debtor's Chapter 11 Petition, or in the Alternative for Relief from the Automatic Stay

BEFORE THE HONORABLE KEVIN R. ANDERSON

December 5, 2017

Karen Murakami, CSR, RPR
8.430 U.S. Courthouse
351 South West Temple
Salt Lake City, Utah 84101
Telephone: 801-328-4800

APPEARANCES OF COUNSEL:

For the Debtor: PARSONS BEHLE & LATIMER
By J. Thomas Beckett
Grace S. Pusavat
Brian M. Rothschild
Attorneys at Law
Suite 1800
201 South Main Street
Salt Lake City, Utah 84111

For the Movants: RAY QUINNEY & NEBEKER PC
By Michael R. Johnson
Attorney at Law
14th Floor
36 South State Street
Salt Lake City, Utah 84111

MUNGER, TOLLES & OLSON LLP
By Todd J. Rosen
Kelly M. Klaus
Attorneys at Law
50th Floor
350 South Grand Avenue
Los Angeles, California 90071

HATCH, JAMES & DODGE, P.C.
By Brent O. Hatch
Attorney at Law
Suite 400
10 West Broadway
Salt Lake City, Utah 84101

For U.S. Trustee: VINCE CAMERON
Attorney at Law
Suite 300
405 South Main Street
Salt Lake City, Utah 84111

1 MR. HATCH: Mr. Hatch, Brent Hatch.

2 THE COURT: Mr. Klaus, if you're going to be
3 making argument or -- can you pull a microphone over or
4 seat yourself in front of a microphone.

5 MR. KLAUS: I will. Thank you.

6 THE COURT: Very good.

7 MR. BECKETT: Good morning Your Honor, Tom
8 Beckett, Parsons, Behle & Latimer, with Brian Rothschild
9 and Grace Pusavat for the debtor, VidAngel. Also with
10 us Neal Harmon, the CEO, at counsel table. And I'm
11 happy to introduce you to David Quinto on the front row,
12 General Counsel of VidAngel.

13 THE COURT: All right, Mr. Quinto.

14 MR. CAMERON: Good morning Your Honor, Vince
15 Cameron for the United States Trustee.

16 THE COURT: Welcome, Mr. Cameron.

17 I'm sorry, did I jump the gun, has the case
18 not been called?

19 THE CLERK: In the matter of VidAngel, Inc.

20 THE COURT: All right. Well, we appreciate
21 the appearances in the case.

22 So who will be making the presentation this
23 morning?

24 MR. ROSEN: I will, Your Honor.

25 THE COURT: Mr. Rosen.

1 Let me ask you initially have there been any
2 changes, developments, possible settlements, proposals,
3 resolutions?

4 MR. ROSEN: No changes, Your Honor.

5 THE COURT: All right. Tell me how you
6 would anticipate proceeding today.

7 MR. ROSEN: Your Honor, I would like to make
8 a relatively short statement to put the case in context,
9 and then would really like to answer questions Your
10 Honor may have regarding arguments or the issues in the
11 case.

12 THE COURT: I do have some questions.

13 MR. ROSEN: Again, good morning Your Honor,
14 Todd Rosen, Munger, Tolles & Olson, for the movants.

15 Your Honor, in this case VidAngel cannot
16 hide the fact that it filed its bankruptcy petition as a
17 litigation forum-shopping strategy. After being
18 frustrated that the U.S. District Court in California
19 found VidAngel's business to be an infringing illegal
20 copyright business, VidAngel's now seeking through its
21 bankruptcy filing to evade the jurisdiction of that
22 California District Court and essentially get a do-over
23 of the same issues in Utah.

24 And VidAngel's been selectively candid with
25 respect to its strategy. In an SEC filing in September

1 VidAngel admitted that it brought the Utah action to,
2 quote, "avoid the prospect of again litigating in an
3 unfavorable forum."

4 VidAngel's asking the Utah District Court to
5 make rulings on the same issues that have already been
6 decided in California and to issue a declaratory ruling
7 that it was free to bring in the California forum. As
8 one of its tactics to orchestrate the litigation between
9 California and Utah, VidAngel is using this case to
10 delay the California litigation while it proceeds that
11 do-over in Utah.

12 In the press release describing --

13 THE COURT: Do you mind if I ask you
14 questions now, or do you prefer that I wait?

15 MR. ROSEN: No.

16 THE COURT: On the do-over argument, and,
17 again, I'm -- you all have much broader-based knowledge
18 than I do as to the history of the case and, of course,
19 the various actions pending in the California and Utah
20 District Court, but, based on my limited understanding,
21 isn't the Utah action for declaratory judgment different
22 in the sense that it is based on what we've colloquially
23 called the Streaming-Based model versus the Disc-Based
24 model that was the basis for the litigation in the
25 California action?

1 MR. ROSEN: Well, the issues are the same.
2 What happened is VidAngel has basically changed its
3 business model to some extent in what they now call the
4 Stream-Based model, but the ultimate copyright and DMCA
5 issues remain the same, it's whether or not they're
6 using unauthorized copies of the studios' works in an
7 infringing basis. And they modified the service, but
8 the copyright and DMCA issues --

9 THE COURT: Do the studios assert that the
10 Streaming-Based model -- and, again, I just have a very
11 superficial explanation of how that functions -- but
12 that likewise violates the Digital Millennium Copyright
13 Act?

14 MR. ROSEN: They do, Your Honor. Although
15 one of the issues is we have not yet had the opportunity
16 to take discovery on what exactly this new Stream-Based
17 service, how it works. So there's discovery that needs
18 to be done, but the studios do believe it's likely also
19 an infringing service.

20 THE COURT: All right.

21 MR. ROSEN: And in its press release
22 describing the bankruptcy, VidAngel's CEO, again, left
23 no doubt what its strategy is, it was to pause the
24 California litigation while pursuing the new Utah
25 lawsuit. And I think it's -- to point out there were no

1 pending creditor enforcement actions or other
2 precipitating events that caused the timing of the
3 bankruptcy.

4 THE COURT: Well, there was an injunction
5 that effectively put the Disc-Based business out of
6 business.

7 MR. ROSEN: And that injunction had been in
8 place for, I believe, over six months at the time of the
9 bankruptcy filing. That was not new.

10 What was about to happen was the California
11 District Court was moving towards summary judgment on
12 VidAngel's liability, and they filed bankruptcy two days
13 before filing their opposition brief.

14 THE COURT: And you can fill me in on what
15 that means, the liability, was that -- the preliminary
16 injunction made the preliminary finding that there had
17 been a violation of the Copyright Act, and so does this
18 liability have a final determination that the --
19 VidAngel was indeed in violation of that, what do we
20 call it, the DMCA?

21 MR. ROSEN: Your Honor, if you don't mind,
22 my colleague, Kelly Klaus, who is the litigator in the
23 California litigation might be able to clarify it.

24 MR. KLAUS: Thank you, Your Honor.

25 The liability summary judgment motion, the

1 basis for it was that there wasn't just the ruling by
2 the District Court in the Central District of
3 California. VidAngel, as was its right, took an
4 interlocutory appeal to the Ninth Circuit. They put
5 before the Ninth Circuit --

6 THE COURT: I've read the opinion.

7 MR. KLAUS: Every one of their defenses and
8 they lost down the line with our position was zero
9 daylight for them to make any additional arguments on
10 liability.

11 On a meet and confer, as we were required to
12 do under the local rules in the Central District before
13 the motion was filed, and VidAngel's counsel,
14 Mr. Quinto, who's here who has taken charge of the
15 litigation for VidAngel, conceded during the meet and
16 confer call that other than the issue of their use,
17 their use defense, VidAngel had no defenses left under
18 the Family Movie Act, would have no defenses left under
19 any theory that it wasn't illegally within DVD's, it had
20 no defense that it was not illegally copying movies to
21 servers, and no defense that it wasn't streaming without
22 a license.

23 So the issues were greatly narrowed before
24 the District Court in Los Angeles to whether the Ninth
25 Circuit opinion left VidAngel any room to argue the use

1 defense. That was the basis for our summary judgment
2 motion.

3 VidAngel's position during the meet and
4 confer was they thought there was bit of daylight that
5 they could squeeze through and raise a fair use defense.
6 They said that would be the basis for their opposition
7 to our motion. And it was never filed, so we haven't
8 seen what they would say about that.

9 But the issues in California there were --
10 there's very little daylight left for them to try to go
11 to. And we think that we would have put the issues
12 before the court and the court would have given us a
13 ruling whether there was anything at all left to do on
14 liability, or whether we were to proceed to the damages
15 phase of the case.

16 THE COURT: And if you could give me an
17 estimate of the amount of time the damage phase would
18 require to come to a final ruling by the --

19 MR. KLAUS: Well, we know that because the
20 judge in the Central District had actually set a trial
21 date of, I believe, June 5th of 2018, and that was -- he
22 didn't pick that date out of a hat. We'd had a meet and
23 confer, again with Mr. Quinto, about how to structure
24 any remaining discovery on the subject of damages. Your
25 Honor probably will not be surprised to understand to

1 know that the parties didn't agree. The plaintiffs
2 wanted a shorter schedule. VidAngel wanted, you know, a
3 schedule that would have taken -- not set a trial for
4 more than a year. And the judge looked at this and said
5 we can get this done by June of 2018. So had we not had
6 this Chapter 11 filing, they would have had to file
7 their opposition to our summary judgment motion, the
8 court would have issued a ruling on summary judgment,
9 and we would have known what the scope of discovery
10 would be. But like every party in every civil
11 litigation, we had a trial date. Once there was a trial
12 date, we would -- the parties obviously would have made
13 everything work to fit within those parameters. So we
14 probably would have had a liability ruling from the
15 District Court, if not by now, in the very near future,
16 and we would have proceeded to a damages phase, not a
17 terribly long damages trial. The question for the jury
18 is where within this range of \$750 per work infringed
19 and \$150,000 per work infringed do they set the
20 statutory award. And then it's a matter of multiplying
21 that times the 1,000 plus work that VidAngel infringed.

22 THE COURT: All right, that's helpful.
23 Thank you.

24 And I'm sorry, Mr. Rosen, I interrupted your
25 presentation.

1 MR. ROSEN: Your Honor, based on their
2 admitted statements of using the bankruptcy as a
3 litigation strategy to pause the case, I think the
4 record as it stands is sufficient for the court to make
5 a finding of that's sufficient to dismiss the case. But
6 the court need not go there at this point. And the
7 court also has broad discretion to lift the stay to
8 allow the California litigation to proceed under 362(d)
9 without having to make a determination of whether or not
10 the case was actually filed in bad faith. There's ample
11 cause in this situation to allow the pending California
12 litigation to continue.

13 VidAngel, in seeking to expedite the proof
14 of claim process, they told the court that it wants to
15 quickly determine the amount of claims against the
16 estate in order to propose a plan of reorganization. On
17 the movants' claims for past infringement, the proper
18 forum to do that is the California court. The
19 California court's been handling the infringement case
20 for well over a year, as Mr. Klaus was describing, it
21 was heading towards summary judgment, and a jury trial
22 on damages was already scheduled for June of 2018.
23 Because of its familiarity with the issue and the
24 advance stage of the litigation, we think the stay
25 should be lifted now to allow that to go forward and for

1 the claim to be liquidated. And stay relief for this
2 purpose is not going to interfere with the bankruptcy
3 case, and actually a necessary element for the case to
4 move forward. And --

5 THE COURT: Is this a good time?

6 MR. ROSEN: Sure, Your Honor.

7 THE COURT: So how does, though, staying the
8 California litigation prejudice or harm the studios,
9 not -- I mean staying it for some period of time, how
10 would that prejudice or harm the studios? And I'm
11 saying that based on the assumption that -- and this
12 we'll get into later -- on the assumption that VidAngel
13 is not presently violating the injunction?

14 MR. ROSEN: Well, I mean I think, Your
15 Honor, as what likely is going to be the largest
16 creditor in this case, I think we have an interest in
17 this case moving forward and it not just languishing in
18 bankruptcy. And I think moving forward and getting on
19 with the business of determining whether the claims
20 against the estate, but the studios are prejudiced and
21 the delay is not going to --

22 THE COURT: But there's not an ongoing harm,
23 again assuming no violation.

24 MR. ROSEN: Again, that potentially could be
25 a big assumption. But, Your Honor, as long as it is

1 going to be liquidated, you know, the ongoing harm is
2 really though the inability to moving the bankruptcy
3 case forward.

4 THE COURT: I don't disagree that sooner or
5 later it needs to be liquidated, but whether now is the
6 time to do that or not, that's an issue we need to
7 decide.

8 Okay. I'm sorry, go ahead.

9 MR. ROSEN: And then there's also the
10 question of which court is ultimately going to determine
11 whether VidAngel's modified business model, what they
12 refer to as the streaming model, continues to violate
13 the DMCA and copyright law. VidAngel would like the
14 Utah District Court to decide that issue. My clients
15 believe that the California court is the right forum to
16 do that, that this court need not determine the answer
17 to that question, that Judge Nuffer is going to be doing
18 that in connection with his decision on the motion to
19 dismiss that's currently pending before him.

20 THE COURT: And on that what's the timing of
21 the determination on that motion?

22 MR. ROSEN: Our reply to complete the
23 briefing is due on Monday, and that will complete the
24 briefing. We'll request an argument date, but, you
25 know, I think that depends on Judge Nuffer's calendar.

1 THE COURT: 60 days, 90 days? Just ballpark
2 where that --

3 MR. ROSEN: I don't know what Judge Nuffer's
4 calendar looks like now. We would obviously like a
5 ruling as soon as possible from him, and we'll make that
6 clear, but subject to --

7 THE COURT: The ballpark you think 90 days.

8 MR. ROSEN: I'll defer to Mr. Hatch on what
9 the ballpark would be.

10 MR. HATCH: I think typically Judge Nuffer
11 gives a hearing pretty quickly, but sometimes he waits
12 awhile on his rulings, but I would say 60 to 90 days is
13 reasonable, but not guaranteed, obviously.

14 THE COURT: Right. That's entirely up to
15 Judge Nuffer.

16 MR. HATCH: Yes, it is.

17 MR. ROSEN: And Judge Nuffer is going to
18 make that determination. But I think what this court
19 should do is lift the stay, so that if Judge Nuffer
20 determines that this claim should properly go forward in
21 California, which we think he's going to do, that
22 there's no automatic stay that prevents the California
23 litigation, including those claims to go forward to its
24 final conclusion.

25 So for those reasons, Your Honor, what we

1 would like is either a dismissal of the case, but if
2 Your Honor is not prepared to go there, what we would
3 like is a lifting of the stay to allow the California
4 case to go forward in all respects, to liquidate the
5 claim, but to make sure that to the extent there's
6 potential violations of the ongoing injunction, the
7 California court has the jurisdiction to do that. The
8 plaintiffs could bring those issues to the attention of
9 the California court, and to litigate the best
10 conclusion, which I think, again, will advance this
11 bankruptcy case, as VidAngel has said, in trying to
12 figure out what the claims are against the estate.

13 THE COURT: Today is a preliminary hearing
14 on your motion for relief from stay. The Code requires,
15 unless you agree otherwise, to have a final hearing
16 within 30 days of this hearing. How much time would you
17 anticipate needing to prepare for an evidentiary hearing
18 on your motion for relief from stay?

19 MR. ROSEN: Your Honor, I mean we're sitting
20 here sort of scratching our heads what is really the
21 evidence that needs to be presented to the court. I
22 mean we think the record as it stands the court can take
23 judicial notice that there's good cause to lift the
24 stay. You know, bad faith may be another issue, but I
25 think there's ample reason to lift the stay.

1 THE COURT: I'm not pushing you one way or
2 the other. I'm just wondering what you anticipate the
3 evidence to be and how much time you would need. Is it
4 your present intent to proceed with a final hearing
5 within 30 days of today?

6 MR. ROSEN: It would, Your Honor.

7 THE COURT: All right. Anything else?

8 MR. ROSEN: No. Save some time for a reply.

9 THE COURT: All right, very good. Thank
10 you. That was helpful.

11 Mr. Beckett.

12 MR. BECKETT: Thank you, Your Honor. Good
13 morning.

14 I would like to actually start with just an
15 observation, if I may. It seems to me that the
16 bankruptcy cases that are most likely to succeed in a
17 Chapter 11 are instances where the debtor has, if you
18 will, been struck by lightning, where there's a company
19 that is well run, that offers a service that people
20 want, and something happens, and in this case it is the
21 injunction, and deteriorating financial condition since
22 then, but leaving enough in resources to answer a couple
23 of questions in bankruptcy. And I'll address those.

24 The first question is is the new streaming
25 model viable, is this new business plan to be

1 profitable?

2 And the second is how much is owed to the
3 studios with regard to damages, if any, in respect of
4 the old Disc-Based model?

5 Those are two paramount questions. I submit
6 that answering the first one with respect to viability
7 supplants the importance of answering the second with
8 respect to damages. And there are two reasons. One is
9 that if the new model is not viable, then the other
10 question in regard to damages is academic. So with
11 consideration to the debtor's limited resources, it
12 makes little sense to focus on the damages issue until
13 the viability issue is clarified.

14 The second comment is that if it is a
15 successful business under the new streaming model, if it
16 can be a successful business, then this debtor will be
17 able to propose a reorganization plan that passes the
18 best-interest-of-creditors test. And so a
19 reorganization will be shown with a profitable company
20 to be superior to a liquidation under Chapter 7. We
21 still must be fair and equitable and we still must be
22 feasible.

23 And we believe, even at this time, that --
24 because we're confident that the new model will be
25 profitable -- that we will be filing a bankruptcy plan.

1 The quantum of the studios' damages under the old regime
2 is not --

3 THE COURT: I'm sorry, what do you mean the
4 "old regime"?

5 MR. BECKETT: Old regime, I'm sorry, the old
6 system, the old delivery system, the Disc-Based system.
7 Determining damages under the old delivery system is not
8 irrelevant, but not as important as determining first if
9 the best-interest-of-creditors test can be passed and if
10 the debtor can propose a feasible reorganization.

11 Now, you've heard more about the District
12 Court case here in Utah and the status of the District
13 Court case in California. I submit that many of these
14 arguments will be made through those courts. And, as my
15 friend says, that is not your decision.

16 I think that if the court is operating under
17 a 30-day final hearing on the lift stay, we don't
18 support that, but we're stuck with that. The
19 evidence --

20 THE COURT: I am too.

21 MR. BECKETT: Yes, understood.

22 But I think what you'll find is that the
23 evidence necessary for the good faith determination, or
24 the lack of bad faith determination, is largely the same
25 as the evidence that will be relevant to the lift stay

1 determination. And so even though there will be a final
2 hearing, it may very well result in a denial without
3 prejudice to bringing a lift stay further on. That's
4 okay.

5 But with respect to the lack of bad faith,
6 we obviously, Your Honor, have a very different story to
7 tell than the studios do, and we have a lot of support
8 in the community. And we have a business that people
9 want filtering that doesn't allow scenes of bullying or
10 other objectionable scenes in Hollywood movies, which
11 makes those movies sell more copies. No one is
12 supplying that now. No one can supply that now.

13 THE COURT: What's the other service,
14 ClearPlay?

15 MR. BECKETT: ClearPlay. And --

16 THE COURT: I'm sorry to interrupt you
17 again.

18 MR. BECKETT: That's all right, Your Honor.
19 I think I would defer on that a little bit to say that
20 there is a detailed story there as well. We have
21 different stories that lawyers are offering the court,
22 and there's a lot more to all of them. And so we want
23 the opportunity to show the court essentially that, yes,
24 there is the opportunity for a reorganization here; yes,
25 it was filed in good faith to use federal law to

1 maintain the viability of this company and to give it
2 the opportunity to rehabilitate and reorganize, which,
3 after all, is purpose number one. So at least with
4 respect to the lack of good faith, we don't have a lot
5 of resources, we don't want to fight too many battles at
6 the same time, but giving Your Honor a record is
7 something that's very important to us, so we would
8 expect to take some time to do discovery and develop
9 that case.

10 THE COURT: All right.

11 Mr. Rosen, do you have -- it's a preliminary
12 hearing on both motions, and it's helpful for me to --
13 and then I will have some questions for both parties.

14 MR. ROSEN: Yeah, I mean, Your Honor, what
15 sort of strikes me is we keep hearing the refrain that
16 VidAngel needs bankruptcy to reorganize its business,
17 get breathing space, find out if the new service is
18 viable, but yet it could be doing all that without being
19 under the protection of the Bankruptcy Code. What I'm
20 sort of struggling to understand is what is it that
21 VidAngel filed bankruptcy protection when it did to
22 obtain, other than to use the stay to try to influence
23 the ongoing litigation as between the California and the
24 Utah courts. I think there is, you know, a lot of
25 caselaw that says if that's your motivation for filing

1 bankruptcy, that's not good faith, that's not why you
2 belong in bankruptcy. I think it's striking --

3 THE COURT: But the cases also allow a
4 creditor -- I'm sorry, a debtor to file in order to stay
5 litigation to create a breathing space, not going to
6 avoid the ultimate consequence of the litigation, but
7 you buy yourself some time to restructure. And I do
8 view the imposition of the injunction as creating a
9 major paradigm shift for the debtor in how it generates
10 income in the services that it provides.

11 MR. ROSEN: But I think there's really two
12 issues there. There's the injunction, which the
13 automatic stay does not prevent them postpetition from
14 complying with the injunction.

15 THE COURT: I agree.

16 MR. ROSEN: With respect to the breathing
17 space from the lawsuit, the lawsuit was not at a point
18 where we had a judgment and we were seeking to enforce
19 remedies. And in fact what we're looking to do now in
20 California is just liquidate the claim. Certainly we
21 understand that we wouldn't be enforcing remedies
22 outside of the bankruptcy context. This is just to
23 liquidate the claim. And I mean is that really all the
24 breathing space they were looking for to not have the
25 claim liquidated? But yet they come into court and on

1 an expedited basis are trying to get a proof of claim
2 process moving very quickly so in fact they can get that
3 very answer that they're saying they need breathing
4 space from. It just -- it doesn't quite add up.

5 THE COURT: But their assertion is that it
6 provides them a breathing space to focus on the Utah
7 litigation without really having to be involved in three
8 cases, the California case, the bankruptcy case, and the
9 Utah District Court case.

10 MR. ROSEN: And again, Your Honor, that is
11 their choice. I mean they went on a forum-shopping
12 strategy. They could have gotten this same relief. We
13 could be in a California court getting that same answer
14 that they're now seeking to get a different answer from
15 a Utah court. And they've chosen to go down that road.
16 And now to use the automatic stay to say pause the
17 California litigation while we go and entertain our
18 forum-shopping strategy, I don't think that the caselaw
19 supports that as a good-faith basis for filing
20 bankruptcy. And I think when you strip it all away,
21 that's all they're doing at this point. I think it's
22 striking there's no creditor's committee in this case,
23 they're not seeking to do anything in bankruptcy so far
24 but to hire a lot of counsel to continue the litigation,
25 again hopefully in their chosen forum from their

1 perspective, and to liquidate claims so they can think
2 about what you need to propose a plan of reorganization.
3 And I think lifting the stay --

4 THE COURT: How is the fact that they filed
5 in the action for declaratory relief in a Utah court any
6 different from the fact that the studios filed in
7 California? On its face that doesn't trouble me.

8 MR. ROSEN: Well, again, I think -- and
9 ultimately Judge Nuffer will decide these issues. And
10 there are reasons why once filed that was the proper
11 forum for all of the issues to be answered. And, again,
12 not looking forward for this court to make that
13 determination, I think that's before Judge Nuffer, and
14 we think he'll see it our way.

15 THE COURT: All right. I do have some
16 questions for both parties, and maybe depending on how
17 we go through this, and it relates to -- and I would
18 like to hear from both parties on this. If you could
19 explain to me perhaps in more detail, one, is there an
20 allegation that VidAngel has or is violating the
21 injunction and -- well, let me start with that.

22 MR. ROSEN: And, Your Honor, my colleague
23 Mr. Klaus.

24 THE COURT: And I ask that because, if I
25 understand it, there was not a pending motion or -- in

1 the California District Court for some kind of further
2 relief, which suggests to me that during this interim
3 period up in until the bankruptcy filing there was not
4 an allegation of an ongoing violation of the injunction.

5 MR. KLAUS: That's correct, Your Honor. And
6 the reason for that is that VidAngel was very careful
7 and very deliberate not to the put on this -- by the way
8 I just have to say, it is not a new delivery system.
9 It's -- Mr. Quinto has said under oath in California,
10 it's exactly the same delivery system. They've got a
11 difference in how they get the content. The delivery
12 system is 100 percent the same, they've told us.

13 But with respect to the -- with respect to
14 whether they were violating the injunction, they have
15 been very careful not to put on the service any works by
16 Disney, any works by Fox, any works by Warner Brothers,
17 and they were very careful not to do that because that
18 would prevent a motion for contempt for doing what the
19 injunction plainly forbids. And they also did that
20 because that would prevent the studios from filing an
21 action for declaratory relief against them. They have,
22 even to this day, what they say in their papers, they
23 said in their objection here, is that they have
24 voluntarily decided not to put up not only Disney, not
25 only Fox, not only Warner Brothers and Lucasfilm, who

1 were the named plaintiffs originally in California, but
2 not Marvel Movies, not Castle Rock Entertainment, not
3 Regency, not Village Roadshow, not any of the other
4 corporate affiliates of the California plaintiffs.
5 They're leaving those off because they don't want to be
6 in a position where we would be able to go and file a
7 motion for contempt.

8 THE COURT: So doesn't that mean they're in
9 compliance with the injunction?

10 MR. KLAUS: As long as they keep those
11 titles off, they are. But that then also goes to a
12 point, Your Honor, with respect to -- we heard
13 Mr. Beckett say the company needs the breathing space to
14 reorganize around this model. In terms of
15 reorganization around the model, they said, and
16 Mr. Harmon said in sworn testimony in the California
17 case, that just the works of Disney, Fox, Warner
18 Brothers and Lucasfilm accounted for more than
19 50 percent of their audience demand. So if they are
20 going to have a viable business model, they could go on
21 continuing to offer 35, 40 percent of the available
22 works out there, and I don't think they will stand up
23 and tell you they think that can be a viable model for a
24 service. They have to change the law that they're
25 subject to in the California case.

1 Now, what they've done with the Utah
2 declaratory relief action is they've been very careful,
3 they did not name Disney, they did not name Fox, they
4 did not name Warner Brothers, they did not name
5 Lucasfilm as declaratory action defendants because that
6 obviously would have been a compulsory counterclaim in
7 the Central District action. What they instead did was
8 they named every corporate affiliate that they could
9 imagine was related to one of those parties, so again
10 that they could try to seek a declaratory action in Utah
11 and then try to take that and say that the affiliates of
12 those companies, who are the plaintiffs in California,
13 are thereby bound by that ruling.

14 Again, a lot of this goes to the questions
15 of the forum shopping, the abuse of the Declaratory
16 Judgment Act that's the basis for our motion before
17 Judge Nuffer. But in terms of being able to reorganize
18 around the new Stream-Based model, as they say, they
19 haven't identified anything in their papers that they
20 need to do business-wise. They haven't said we need to
21 hire X number of people, they haven't said we need to
22 find ten engineers who can figure out which widgets and
23 gadgets to put in which place. Reorganizing around a
24 business model solely means trying to pursue this other
25 action while ignoring the elephant in the room, which is

1 the injunction that they are subject to in California.

2 THE COURT: Well, and again this may be more
3 evidence of my lack of understanding of these technical
4 issues, but isn't ClearPlay doing this in compliance,
5 doesn't its model comply with both the Family Home Movie
6 Act and the Digital Millennium Copyright Act?

7 MR. KLAUS: Yeah, based on what we know.
8 And Your Honor's right, there is another service that's
9 ClearPlay.

10 THE COURT: Because that suggests there is a
11 way to do what VidAngel is proposing to do, provide the
12 service of taking out objectionable material, and so --

13 MR. KLAUS: And there was -- by the way,
14 Your Honor, there was a way before they started the
15 Disc-Based model, that was not -- not to get too far
16 down this hole, but before they went to the Disc-Based
17 model, they actually had a service where they did
18 something very similar to what ClearPlay does, which
19 was, they provided filters for people who had already
20 bought and were receiving authorized streams from the
21 Google Play service, could receive streams from Google
22 Play with the VidAngel overlay. They didn't want to do
23 that -- this is in the evidentiary record in the
24 California case. They didn't want to do that because
25 they thought they couldn't make enough money off of

1 that, and people didn't want to pay money for the Google
2 Play service plus pay them. That's why they went to the
3 other model.

4 THE COURT: Let me bring us back --

5 MR. KLAUS: Which is ClearPlay.

6 THE COURT: It's possible VidAngel could
7 propose a mechanism -- could come up with a mechanism
8 that doesn't violate the Copyright Act.

9 MR. KLAUS: They've said they don't want to
10 do that. That's the problem, Your Honor, they could do
11 that. What ClearPlay does now, just to be clear, what
12 ClearPlay does is if somebody --

13 THE COURT: Let's not talk about ClearPlay.
14 I'm trying to focus on this particular issue. All I'm
15 asking in the abstract it's possible they can come up
16 with a means of --

17 MR. KLAUS: Yes.

18 THE COURT: -- of compliance.

19 MR. KLAUS: Yes. Which they have today
20 indicated absolutely no interest in doing. They
21 haven't -- they've not said that they want to go to the
22 ClearPlay model. They say theirs is better.

23 THE COURT: So if I understand correctly,
24 there's not an allegation today that VidAngel is
25 streaming copyrighted works of the California

1 plaintiffs.

2 MR. KLAUS: That's correct, Your Honor.

3 THE COURT: They're not streaming,
4 displaying -- all right.

5 MR. KLAUS: That's correct.

6 THE COURT: All right. All right.

7 So let me hear from Mr. Beckett on that
8 point. You're right, I think we're all in agreement
9 this court is not going to rule on any of the technical
10 copyright issues, but whether there is an ongoing
11 violation of the injunction I think is relevant to the
12 matters before this court. So that's why I'm making
13 this inquiry.

14 MR. BECKETT: Thank you, Your Honor.

15 To be clear, VidAngel very much wants to
16 comply with the law and offer its services legally. Any
17 suggestion to the contrary is not so. I believe the
18 question was is there an allegation of continuing
19 infringement. The answer I heard was no, and we agree.

20 Can I step back for a second? I just --
21 it's hard to read and listen at the same time. And I'm
22 hardly good at either. I wonder if the 30-day deadline
23 in Section 362(e), if I am looking at the right spot,
24 only applies to stay relief in regard to property of the
25 estate. This is not that. In a hurried refresher led

1 by my partner, Mr. Rothschild, makes us think that the
2 30 days might be a single-asset real estate case or
3 property of the estate, but not otherwise.

4 THE COURT: That's an interesting point.

5 MR. BECKETT: And one other point, I think
6 VidAngel's motion to hire ten new engineers was very
7 recently approved by this Court.

8 THE COURT: Mr. Beckett, in the response at
9 page 27, your response, and I'm quoting, it says, The
10 California plaintiffs seek not only to liquidate their
11 claims, but to enforce the -- I'll give you a moment to
12 grab it. Do you have that?

13 MR. BECKETT: Is this our objection or their
14 response?

15 THE COURT: Your reply.

16 MR. BECKETT: Your reply. Thank you. And
17 the page number is?

18 THE COURT: 27.

19 MR. BECKETT: Yes, Your Honor.

20 THE COURT: It says, The California
21 plaintiffs seek not only to liquidate their claims, but
22 to enforce the injunction, which would interfere with
23 VidAngel's reorganization in bankruptcy. And maybe you
24 can -- how does enforcing the injunction interfere -- I
25 guess I'm thinking, and it goes to my first question, is

1 it the debtor's belief or intent that the bankruptcy
2 case stays the enforcement of the injunction?

3 MR. BECKETT: Yes, sir.

4 THE COURT: So maybe you can explain that.

5 MR. BECKETT: Yes. This is an issue that
6 I'm going to call containment, and that's probably not a
7 very good word for it, but let me try and explain. One
8 of my deep concerns about lifting the stay to go back to
9 California to liquidate the claim in amount is
10 containment of that issue. Once the California case is
11 open for some purpose, then it is our concern that that
12 sole purpose could be contained.

13 THE COURT: Well, that could be accomplished
14 through a modification of the stay rather than a total
15 relief from stay.

16 MR. BECKETT: Yes, I agree. Even if very
17 carefully -- my fear, even if very carefully written,
18 the allowance to go back to California to liquidate the
19 damages from the finding of liability, if such, and the
20 consideration of damages by a jury, might bleed into,
21 well, this injunction covers your new methodology -- and
22 I apologize for calling it a delivery service, if that's
23 not right --

24 THE COURT: I understand what you're
25 referring to.

1 MR. BECKETT: -- those damages might then in
2 California include damages considered there as a
3 violation of the injunction, but a new system, which
4 really has not been part of that litigation, it is part
5 of the litigation down the street in Utah District
6 Court. And so that sentence, Your Honor, I hope this
7 helps explains -- helps explain my fear and our fear of
8 the ability to contain the issue of reduction to the
9 liability judgment in California.

10 THE COURT: Let me ask you, I asked
11 Mr. Klaus, but is there -- Mr. Rothschild -- is VidAngel
12 in any way, shape or form displaying copyrighted works
13 of the California plaintiffs?

14 MR. BECKETT: No. Now, having said that,
15 no, not to our knowledge. There was a sentence in the
16 reply that made us believe that the studios thought that
17 we were. And we set up an apparatus in the last couple
18 of days so that if they told us a title today, we would
19 have it down within two minutes. And so it's with great
20 confidence that I say no. Now, it's a complicated world
21 and not all copyright transfers are immediately
22 reflected in the copyright registry, and if -- the
23 copyright registry may lag a month or two behind
24 production of a film. But I think you have both sides'
25 assurance that there is no continuing -- there is no

1 violation of the injunction.

2 THE COURT: All right.

3 MR. ROSEN: Your Honor, may I be heard on
4 your question about that statement? When we read that
5 line I had a similar reaction, I was sort of struggling
6 what exactly that meant. I think it's really telling I
7 think the answer you heard, this idea that they're
8 worried about containment. It's clearly, Your Honor, to
9 craft an order that only allows the case to go forward
10 for purposes of liquidating the claim. But I think what
11 they're worried about is there's a California judge out
12 there that has an injunction, and he's entitled to
13 interpret his injunction. And what they're really
14 looking for is they're looking for breathing space to
15 make sure that California judge doesn't have the ability
16 to determine whether or not what VidAngel is doing is or
17 is not a violation of their injunction. And I think you
18 heard us say we're not alleging they're in current
19 violation. But I think really this goes to the heart of
20 what they're seeking, and that's breathing space from
21 the California court as opposed to creditors taking
22 enforcement actions.

23 THE COURT: All right.

24 Mr. Rosen, while you're here, there was
25 some, and as I perceived it, inconsistent

1 representations regarding the discovery that had been
2 done in the California action. Can you flesh that out
3 with a little more specificity what discovery requests
4 had been made. Obviously, the initial disclosures --

5 MR. ROSEN: Sure. I might have to defer to
6 my colleague, Mr. Klaus.

7 THE COURT: All right, that would be fine.

8 MR. KLAUS: Thank you, Your Honor.

9 There was, in connection with the
10 preliminary injunction motion, there was limited
11 discovery on both sides. We took some discovery of the
12 way that VidAngel's service operated. We took some
13 discovery of the titles that were available. We had a
14 deposition of Mr. Neal Harmon that explored some of
15 these subjects. They took discovery of a witness of one
16 of the studios on the question of irreparable harm.
17 That was the -- that was the extent of the discovery
18 that took place before the preliminary injunction.
19 There -- and it's hard to sort through all of the back
20 and forth on what the discovery has been with respect to
21 the Stream-Based model.

22 The chronology, if you'll bear with me, Your
23 Honor, is this: Shortly after the Ninth Circuit
24 argument, VidAngel announced it was moving forward with
25 the Stream-Based model, and they filed a motion to --

1 their first motion to clarify the preliminary injunction
2 to say that it didn't apply to the Stream-Based service.

3 We asked for the ability to take some
4 discovery about what they were doing. VidAngel's
5 initial position was no discovery. We will -- we'll
6 just litigate our motion to clarify. They then said we
7 will give you some technical insight into the way that
8 the service works. Our expert had said we think we need
9 more. The court never resolved the issue about whether
10 that was sufficient discovery because the court denied
11 the motion to clarify and said it wasn't a proper motion
12 to clarify.

13 Then when they had come to Utah one of the
14 things they did after the filing of their lawsuit, after
15 we had filed our motion to dismiss, was they filed an
16 early summary judgment motion. And they at that point
17 said, we're willing to give you all of the things that
18 your expert needs to understand the technical workings
19 of our system. The motion for summary judgment has been
20 stayed, however, pending Judge Nuffer's resolution.

21 So we haven't had insight into the complete
22 technical workings of the service, we've had no
23 discovery into the business model that they employ and
24 how that may impact various issues related to their
25 claim that they are -- what they are doing now is

1 subject to a fair use defense that wasn't before. So
2 the answer is there has been some discovery. The issues
3 related to -- the issues relating to the preliminary
4 injunction were frankly the factual issues were largely
5 undisputed, and there were essentially legal issues that
6 were being discussed.

7 THE COURT: All right. I'm going to take a
8 brief recess.

9 (Recess.)

10 THE CLERK: Court resumes session its
11 session. Please be seated.

12 THE COURT: Well, I took a moment to look at
13 the 362(e) issue raised by counsel. But before I
14 address that, the more practical issue is the
15 availability to have a hearing date within 30 days of
16 today.

17 MR. ROSEN: And, Your Honor, if we may, I
18 think we have a proposal that we would like to see if
19 the court would entertain, VidAngel as well.

20 THE COURT: This is all about the
21 entertainment business, isn't it?

22 MR. ROSEN: Indeed, Your Honor. The
23 proposal that we think would make sense here, and given
24 I think Your Honor's inclination, is if VidAngel is
25 willing to stipulate that they're not going to stream

1 the works of the California plaintiffs or the moving
2 defendants in Utah, as they've represented they're not
3 doing, which we allege would be a violation of the
4 existing injunction, we would agree to put off seeking a
5 final hearing on the motion to dismiss or for stay
6 relief until after Judge Nuffer rules. And I think in
7 connection with that, what we would also ask is
8 clarification though that we are not going to be subject
9 to the proof of claim process which is going to be
10 moving a little faster than that potentially -- I mean
11 our position is is clearly that the California court is
12 the proper place for the damages to be liquidated. And
13 if the court feels now is not the time for stay relief
14 for that to happen, at some point we believe that's the
15 place it should be liquidated.

16 And then, finally, we just wanted to make
17 sure that we get a clarification that this stay, and
18 this goes to I think that point in the reply, that the
19 stay doesn't apply to postpetition violations of the
20 injunction. If they were, despite the stipulation or
21 otherwise, do something that would give rise to a claim
22 for violation of the injunction, that we're able to go
23 to the California court and that court is able to
24 interpret the scope of its injunction.

25 THE COURT: All right.

1 Let me ask Mr. Beckett, is this a
2 stipulation, an agreement that -- as to how to proceed,
3 or is it something I need to rule on? That makes a lot
4 of sense to me.

5 MR. BECKETT: Well, first of all, I was
6 listening until about three people started talking to
7 me.

8 THE COURT: Oh, sorry.

9 MR. BECKETT: You're not one of them. What
10 I heard was --

11 THE COURT: Do you want to take a moment and
12 confer with Mr. Rosen?

13 MR. BECKETT: Yeah, I haven't heard of this
14 before.

15 MR. ROSEN: This is a proposal we came up
16 with without consulting with VidAngel.

17 THE COURT: Do you want me to take a brief
18 recess and we can see if there's --

19 MR. BECKETT: If you -- yes, please.

20 THE COURT: All right. The proposal sounds
21 good to the court. That doesn't mean I won't adhere to
22 something else, but it does sound good. But I'll give
23 you a moment to discuss that and see if an agreement can
24 be reached on that regard.

25 MR. BECKETT: Thank you.

1 (Recess.)

2 THE CLERK: Court resumes its session.
3 Please be seated.

4 THE COURT: All right. Would you re-call
5 the third act of this case.

6 THE CLERK: In the matter of VidAngel, Inc.

7 MR. ROSEN: Your Honor, Todd Rosen, for the
8 movants. Thank you for your indulgence. We've been
9 working trying to hammer out an agreement that will
10 address the issues and allow a continuance of this.
11 We're not able to get there today, unfortunately, Your
12 Honor, so what we are hoping to do is schedule a
13 telephonic conference on Thursday, if the court's
14 available, at which time we hope to be able to reach an
15 agreement in that time period and, if so, present it to
16 the court, and, if not, discuss scheduling going
17 forward.

18 THE COURT: All right. Let me -- there's
19 been some comments and suggestion as to where, I guess
20 most importantly, damages will be determined, the forum
21 in which they will be determined. It's difficult for me
22 to imagine a situation where this court would make that
23 determination, that either -- unless the parties
24 consented and wanted me to do that, I would do that, but
25 it seems, on a number of levels, that would be difficult

1 to accomplish, and I don't know if that -- it's been
2 suggested in my mind either an Article III Federal
3 District Court needs to make that determination, not the
4 Bankruptcy Court, unless the parties would want that.

5 I was going to communicate as part of my
6 ruling that -- not part of my ruling, but it's sometimes
7 difficult to ascertain if a judge, giving a preliminary
8 perception of the case is helpful or not, I think it is,
9 but my preliminary perception, based on a review of the
10 allegations in the motion, a review of the response and
11 allegations in debtor's response and the status of the
12 case that a motion to dismiss would be difficult at this
13 juncture in the case, absent some other allegations or
14 compelling evidence of specific bad faith. So -- but
15 that doesn't mean I wouldn't rule that way with the
16 evidence and argument, but that's my perception based on
17 just reading the pleadings and the supporting
18 memorandum.

19 The motion for relief from stay, I don't
20 have a comment on that, other than I think what you've
21 divined from the questions that I've asked about that,
22 that's an issue that needs to be fleshed out with some
23 more information and evidence.

24 So with that, to the extent that might be
25 helpful to know, I wanted to communicate that

1 information.

2 I have some dates here I can propose, if
3 that helps, of my availability, but we can discuss that
4 on Thursday, if that's more convenient.

5 I wanted to give the parties information
6 they might be, well, if the judge would only tell us A,
7 B, C or D, we could come to this. I can't tell you
8 everything.

9 MR. ROSEN: Sure. My inclination is to wait
10 until Thursday to deal with the scheduling if we're not
11 able to reach an agreement.

12 THE COURT: All right. Very good. So do we
13 have a time proposed for -- Thursday is my off day.
14 Judge Thurman has this courtroom scheduled. We have
15 four judges and three courtrooms.

16 THE CLERK: He doesn't have anything
17 scheduled this Thursday.

18 THE COURT: So we can use this courtroom.

19 MR. KLAUS: Friday would work too, Your
20 Honor, if it's better for you.

21 THE COURT: Either time. My job is to sit
22 here and hear cases. I'm here Thursday, I'm here
23 Friday.

24 MR. ROSEN: Thursday we think would be --

25 THE COURT: Any party who wishes, because

1 we're just going to be talking, we're not arguing or
2 having evidence, is welcome to call in rather than incur
3 the expense of -- staying in Salt Lake City, as
4 delightful a place as it is, especially this time of
5 year, but you're certainly welcome to call in, both
6 lawyers. The courtroom's available, we'll plan to have
7 a status conference on Thursday at 1:30?

8 THE CLERK: 3:00.

9 THE COURT: 3:00. I'm used to my normal
10 afternoon calendar. Judianne, do you have a call-in
11 number? Of course, you can always contact my very
12 helpful courtroom deputy, Judianne Genovese, she can
13 assist you with the calling, if necessary.

14 THE CLERK: The number will be 801-524-2013,
15 and it'll ask for a conference number, and the
16 conference number will be 21130 and then the pound key.

17 THE COURT: All right. Thank you.

18 MR. ROSEN: Thank you, Your Honor.

19 THE COURT: Let me say I appreciate the
20 presentation today, it was helpful, it was informative,
21 the briefs were helpful. I will say one, make one very
22 minor suggestion: On your brief you had links to the
23 cases that linked me directly to Westlaw, that's very
24 helpful for me. You don't have to do it, I can
25 certainly look them up, but it's nice as I'm reading the

1 brief, I just click and it opens a link to Westlaw,
2 Lexis any reputable reporting service. But with the
3 length of the briefs and the number of cases cited that
4 helps. That's just a suggestion. But it's not
5 required, there's no demerits, no negative, but that is
6 helpful to the court.

7 So with that, we'll be in recess until we
8 re-call the case on Thursday at 3:00. Thank you all.

9 (Whereupon, the matter was concluded.)

10 * * *

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

State of Utah
County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken by me from an electronic recording, to the best of my ability to hear and understand said recording, at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of August, 2018.

Karen Murakami
Karen Murakami, CSR, RPR