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

In re: VIDANGEL, INC., Debtor.	**Case No. 17-29073** Chapter 11 Judge Kevin R. Anderson

REPLY IN SUPPORT OF NOTICE AND REQUEST FOR HEARING ON MOVANTS' PENDING MOTION FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. §362(d) (DKT. 194)

INTRODUCTION[1]

VidAngel previously urged the Court to allow the Utah Declaratory Action[2] to run its course before deciding Movants' Motion for Relief from the Automatic Stay. However, now that Chief Judge Nuffer has ruled against VidAngel and dismissed the Utah Declaratory Action, VidAngel is taking a different tack to avoid the California Court's jurisdiction and a final judgment in the California Action.[3]

VidAngel makes the specious argument that because Movants filed proofs of claims—which they had to file before the bar date and which specifically reserved Movants' right to have their claims liquidated in California[4]—Movants have "irrevocably consented" to this Court's jurisdiction over the California Action.[5] According to VidAngel, the California Action "is moot (and ought to be dismissed)."[6] That is not the law. VidAngel takes out of context quotations

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[1] Debtor's Resp. to Studios' Notice and Req. for Status Conference and Final Hearing on Pending Motion (Dkt. 197) ("VidAngel's Response") is an improper supplemental memorandum in opposition to Movants' Motion for Relief from the Automatic Stay and, as such, should be stricken. Out of an abundance of caution, Movants have responded substantively here. If it would assist the Court, Movants would provide further supplemental briefing on the application of the *Curtis* factors and other precedent in light of the dismissal of the Utah Declaratory Action.

[2] *VidAngel, Inc. v. Sullivan Entm't Grp., Inc. et al.*, Civil No. 2:17-cv-00989-DN (D. Utah, filed Aug. 31, 2017) (the "Utah Declaratory Action").

[3] *Disney Enters., Inc. v. VidAngel, Inc.*, Case No. 2:16-cv-04109-AB-PLA (C.D. Cal, filed June 9, 2016) ("California Action"). Movants are all plaintiffs in the California Action and asserted claims based on VidAngel's circumvention of the technological protection measures that control access to their copyrighted works in violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(a), and infringement of plaintiffs' exclusive rights of reproduction and public performance under 17 U.S.C. § 106(1), (4).

[4] *See* Proofs of Claims 5-1 to 11-1 at 2-3 ("Claimant hereby asserts a general unsecured claim against Debtor for damages, as alleged in the California Action, in an amount to be determined by the California District Court."; "The execution and filing of this Proof of Claim is not and shall not be deemed or construed as . . . a consent by the Claimant to the jurisdiction . . . of this Court or any other court . . . [or] a waiver or release of the Claimant's right to trial by jury.").

[5] Dkt. 197, VidAngel's Response at 2.

[6] *Id.* at 3.

from inapposite cases concerning core bankruptcy court jurisdiction. The issue here is not, as VidAngel suggests, allowance or disallowance of claims in bankruptcy court, but the liquidation of non-core pre-petition claims pending in federal district court. The cases that are on point confirm what VidAngel previously acknowledged—"the Constitution prohibits bankruptcy courts from holding jury trials in non-core matters, such as the California Action, without the parties' consent"[7]; and what this Court confirmed—"an Article III Federal District Court needs to make that determination [i.e., final judgment and damages], not the Bankruptcy Court, unless the parties would want that."[8]

Movants' pre-petition claims for VidAngel's copyright infringement and DMCA violations should be liquidated where they started, in the California Court. These claims have been pending before the California Court for over two years, that court already determined that Movants were likely to succeed on the merits (a decision the Ninth Circuit affirmed)[9], a summary judgment motion is on file, and an expeditious trial schedule had been set. The Ninth Circuit has also now summarily affirmed the dismissal with prejudice of VidAngel's antitrust counterclaims (a mere eight days after oral argument).[10] VidAngel's meritless appeal and its filing of the Utah Declaratory Action have not only depleted the estate's assets—to which Movants have a claim—but delayed the California Action by nearly a year. Plaintiffs should now be permitted to liquidate their claims in the California Court.

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[7] Dkt. 114, Debtor's Opp'n to Mot. for Relief from Stay at 28.

[8] Dec. 5, 2017 Hearing Tr. at 41:2-41:4.

[9] *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).

[10] *Disney Enters., Inc. v. VidAngel, Inc.*, --- Fed. Appx. --- No. 17-56665, 2018 WL 3947812 (9th Cir. Aug. 17, 2018).

ARGUMENT

I. By Filing Proofs Of Claims, Movants Did Not Consent To Having Their Copyright And DMCA Claims Heard In This Court

VidAngel incorrectly argues that Movants "irrevocably consented" to have pre-petition claims adjudicated without a jury in the bankruptcy court when they filed proofs of claims. *Langenkamp v. Culp*, 498 U.S. 42 (1990), and *Hong Kong and Shanghai Banking Corp. v. Simon*, 153 F.3d 991 (9th Cir. 1998), upon which VidAngel relies[11], are inapposite. These cases stand for the unremarkable proposition that "filing a claim against a bankruptcy estate [] triggers the process of 'allowance and disallowance of claims,' thereby subjecting [the creditor] to the bankruptcy court's equitable power."[12] They do not stand for the proposition that filing proofs of claims divests the pre-petition court of its jurisdiction. On the contrary, the California Court has "concurrent jurisdiction,"[13] which the California Court should be permitted to exercise with the lifting of the stay.

Langenkamp involved post-petition claims filed by the trustee to recover preferential monetary transfers (under Bankruptcy Code § 547) against various third parties (some of which filed proofs of claims and some of which did not).[14] The question before the Supreme Court was whether the parties that filed proofs of claims had a right to a jury. The Court explained that, for

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[11] Dkt. 197, VidAngel's Response at 6.

[12] *Langenkamp*, 498 U.S. at 44 (filing of a proof of claim subjected the creditor to the equitable jurisdiction of the bankruptcy court with respect to the trustees' post-petition preference claim); *see also Hong Kong-Shanghai*, 153 F.3d at 997 (filing of proof of claim prohibited the creditor from filing a post-petition collection action in another jurisdiction).

[13] *In re Dampier*, No. BAP CO-15-006, 2015 WL 6756446, at *4 (10th Cir. BAP 2015) (unpublished) (explaining that pre-petition court has "concurrent jurisdiction to adjudicate the validity of disputes arising under applicable non-bankruptcy law, including the validity and the amount of claims asserted against debtors") (citing *In re Skyline Woods Country Club*, 636 F.3d 467, 471 (8th Cir. 2011); *Buke, LLC v. Eastburg*, 447 B.R. 624, 634 (10th Cir. BAP 2011)); *see also In re Eastburg*, 440 B.R. 851, 863 (Bankr. D. N. M. 2010) (same).

[14] 498 U.S. at 42-44.

those parties that filed proofs of claims, the trustee's "preference action" became an "integral" part of the "claims-allowance process which is triable only in equity"—in other words, a "core" proceeding subject to bankruptcy jurisdiction.[15] That holding does not change the rights of creditors with pending pre-petition claims to seek to liquidate those claims in the original forum (a non-core proceeding) *before* the bankruptcy court engages in the claims-allowance process (a core proceeding).

Hong Kong-Shanghai is likewise inapposite. The Ninth Circuit there addressed the claims of a creditor that, after the bankruptcy was discharged, sought to bring collection proceedings in Hong Kong.[16] The Ninth Circuit said that those post-petition (and *post-distribution*) claims were barred, in part, because the creditor never sought to "modify or lift the automatic stay enjoining it from collection proceedings against the debtor."[17] Again, that case does not apply here, where a party to a pre-bankruptcy action has filed a motion to lift the automatic stay so it can liquidate pre-petition claims.

Langenkamp and *Hong Kong-Shanghai* do not hold that filing a proof of claim is blanket consent to the bankruptcy court's jurisdiction over non-core proceedings.[18] These cases do not

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[15] *Id.* at 44

[16] 153 F.3d at 992.

[17] *Id.* at 997.

[18] Other courts have explicitly held that filing a proof of claim is not necessarily consent to jurisdiction. *See, e.g.*, *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 121 (N.D. Tex. 2006) ("The mere fact that plaintiffs filed proofs of claim in the title 11 cases did not convert the legal claims into equitable claims."); *In re Kamine/Besicorp Allegheny, L.P.*, 214 B.R. 953, 971 (Bankr. D.N.J. 1997) (concluding that a party did not consent to jurisdiction where it "filed an application for stay relief to prosecute the pending state court action, continually objected to the bankruptcy court's jurisdiction and did not file a proof of claim until the claims bar date was only three days away"); *In re Castlerock Props.*, 781 F.2d 159, 162-63 (9th Cir. 1986) (rejecting the debtor's argument that the creditor had consented to the bankruptcy court's jurisdiction by filing a proof of claim against the bankruptcy estate, and holding that "Piombo's filing the proof of claim should not be deemed consent").

bar a creditor with a pre-petition claim from seeking to liquidate that claim in the pre-petition forum. Lifting the stay, as Movants request, will not result in the California Court conducting a core proceeding to decide whether to allow Movants' claims under § 502. Lifting the stay will allow the California Court to conduct the non-core proceeding of liquidating Movants' claims. "[L]iquidation is *not* the same as allowance of a claim."[19] Once Movants' damages are determined before a jury in the California Action, the claims-allowance process can proceed in this Court. Simply put, the cases on which VidAngel relies do not address the circumstances here—i.e., a motion to lift the automatic stay to liquidate pre-petition claims in the pre-petition forum.

Applicable law makes clear that the California Court can and should exercise its concurrent jurisdiction to liquidate Movants' claims. For example, in *In re Touchstone Home Health LLC*, 572 B.R. 255 (Bankr. D. Colo. 2017), the bankruptcy court was presented with circumstances similar to those at issue here—pre-petition claims that were being litigated in another forum (there, arbitration[20]) when the debtor filed for bankruptcy, triggering the automatic stay and proofs of claims process. That bankruptcy court analyzed the same question

[19] *In re Touchstone Home Health LLC*, 572 B.R. 255, 275 (Bankr. D. Colo. 2017) (explaining that, "[w]hile liquidation may, in some cases, be part of allowance under Section 502," the two are not equivalents and citing cases in which liquidation was held to be a distinct process that can take place outside the bankruptcy court) (citing *G–I Holdings, Inc.*, 323 B.R. 583, 607 (Bankr. D.N.J. 2005) ("bankruptcy court jurisdiction over the claims allowance process is distinct from liquidation for purposes of distribution"); *In re Chateaugay Corp.*, 111 B.R. 67, 74 (Bankr. S.D.N.Y. 1990) ("Allowing or disallowing claims is clearly a separate and distinct function from liquidating or estimating that claim."); *In re Comstock Fin. Servs., Inc.*, 111 B.R. 849, 856–57 (Bankr. C.D. Cal. 1990) (explaining that "liquidation" is merely one step in the allowance process)).

[20] Although *In re Touchstone Home Health* involved an arbitration clause and the bankruptcy court found that it was "required to enforce the arbitration agreement," the court reiterated that "[e]ven if the Court had discretion, the Court would exercise such discretion in favor of arbitration." 572 B.R. 260, 261-63.

presented here: "where liquidation of the claim[s] should occur"?[21] The court rejected the debtor's argument, based on *Langenkamp*, that the bankruptcy court had to decide the underlying contract dispute and damages in the context of the claims allowance process, explaining:

> The Debtor is correct that . . . [t]he filing of a proof of claim subjects a creditor to the bankruptcy court's jurisdiction . . . But the bankruptcy claims allowance and disallowance process is not the *only* way to liquidate a claim in a bankruptcy case. Instead, creditors routinely request relief from stay for cause under Section 362(d)(1) to liquidate claims outside of bankruptcy through pending federal and state court proceedings. . . . such requests are granted every day in bankruptcy courts across the country.[22]

In short, the filing of proofs of claims is no impediment to lifting the automatic stay for claims to be liquidated in the pre-petition forum. "Creditors [] often ask for permission to liquidate their claims against debtors through continuance of lawsuits pending prior to bankruptcy."[23] Holding otherwise would force creditors to make the Hobson's choice between filing a proof of claim to protect the creditors' interest and their right to receive an estate distribution and waiving their right to seek relief from the automatic stay and their right to a jury—that is simply not the law. In addition to burdening bankruptcy courts with litigation that should be resolved elsewhere, resulting in tremendous inefficiencies and duplication of effort (as would occur here), it would run counter to the maxim that "[b]ankruptcy courts should be reluctant to entertain questions which may be equally well be resolved elsewhere."[24]

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[21] *Id.* at 262 n.4, 265.

[22] *Id.* at 276-77 (collecting cases) (emphasis in the original).

[23] *Id.* at 259; *see e.g.*, *In re: Xinergy Ltd.*, No. 15-70444, 2015 WL 3643418, at *2 (Bankr. W.D. Va. 2015) (granting motion for relief from the automatic stay to liquidated pre-petition claims in the original forum irrespective of the fact that creditor had filed a proof of claim); *McCulloch v. McClintock*, No. 2:13-CV-374, 2014 WL 1276146, at *2 (S.D. Tex. 2014) (same); *In re Bock Laundry Mach. Co.*, 37 B.R. 564, 568 (Bankr. N.D. Ohio 1984) (same).

[24] *First State Bank & Tr. Co. of Guthrie, Okla. v. Sand Springs State Bank of Sand Springs, Okla.*, 528 F.2d 350, 354 (10th Cir. 1976).

II. The Motion For Relief From The Automatic Stay Is Ripe For Decision And Should Be Granted So The California Court Can Liquidate Movants' Claims

VidAngel is also wrong that the Motion for Relief from the Automatic Stay is moot.[25] VidAngel opposed the Motion for Relief from the Automatic Stay on grounds that it needed a decision in the Utah Declaratory Action *before* liquidation of Movants' claims in California would be appropriate. VidAngel's counsel told this Court that there were "two paramount questions": first, the viability of VidAngel's so-called "Stream-Based" model; and second, "how much is owed to the studios with regard to damages, if any, in respect of the old Disc-Based model."[26] He then argued that "answering the first [question] with respect to viability supplants the importance of answering the second [question] with respect to damages" because "if the new model is not viable, then the other question in regard to damages is academic."[27]

In response to VidAngel's argument, the Court deferred ruling on the Motion for Relief from the Automatic Stay until the Utah District Court decided whether the Utah Declaratory Action would go forward (and if so, where it would proceed): "[W]e can deal with these issues when we have a better sense of how the Utah/California litigation is going to proceed."[28] Accordingly, at the December 7, 2017 hearing, the parties agreed to continue the Motion and to apprise this Court when Chief Judge Nuffer of the Utah District Court ruled on Movants then-pending (now-granted) Motion to Dismiss.[29] The Motion for Relief from the Automatic Stay is ripe for decision.

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[25] Dkt. 197, VidAngel's Response at 2, 6.

[26] Dec. 5, 2017 Hearing Tr. at 17:24-18:5.

[27] *Id.* at Tr. 18:5-18:10.

[28] Dec. 7, 2017 Hearing Tr. at 6:7-11.

[29] *Id.* at Tr. 3:22-4:18.

III. VidAngel's Adversary Proceeding Is Stayed And, In Any Event, Is Irrelevant To This Motion

VidAngel suggests that Movants' claims should be adjudicated in this Court because VidAngel filed an adversary complaint.[30] The propriety and merits of that case aside, it was stayed by stipulation until after the Utah District Court rules on VidAngel's pending Motion for Withdrawal of the Reference.[31] Chief Judge Nuffer can decide VidAngel's arguments regarding withdrawal in that forum.[32] Nothing about that filing prevents this Court from granting relief from the automatic stay so Movants can liquidate their claims in California.[33]

CONCLUSION

Movants have not irrevocably consented to this Court's jurisdiction to resolve the issues pending in the California Action, and the California Court is the most efficient and logical forum in which to liquidate Movants' claims. Movants respectfully request that this Court grant the Motion for Relief from the Automatic Stay at the upcoming preliminary hearing on August 28, 2018 or schedule the Motion for a Final Hearing.

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[30] Dkt. 197, VidAngel's Response at 7-8.

[31] The parties filed a joint stipulation, which this Court entered, extending Movants' time to respond to the adversary complaint until 28 days after the Utah District Court ruled on the Motion for Withdrawal. *VidAngel, Inc. v. Disney Enters., Inc.*, Case No. 18-02016, Dkt. Nos. 8, 10. The Utah District Court has not yet ruled on the Motion for Withdrawal.

[32] Movants opposed VidAngel's Motion for Withdrawal as premature. *See generally VidAngel, Inc. v. Disney Enters., Inc.*, Case No. 2:18-cv-00145-TS, Dkt. 3, Opp'n to VidAngel's Mot. to Withdraw the Reference of Adversary Proceedings Related to a Chapter 11 Case.

[33] As VidAngel acknowledges, this Court has authority under Rule 5011(c) to lift the automatic stay, irrespective of VidAngel's Motion for Withdrawal.

DATED this 20th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2018, I electronically filed the foregoing *Reply in Support of Notice of Ruling in Support of Movants' Motion for Relief from the Automatic Stay Pursuant to 11 U.S.C. §362(d), and Request for a Status Conference and Final Hearing on Pending Motion* 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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