Michael R. Johnson, Esq. (7070)
David H. Leigh, Esq. (9433)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
Email: mjohnson@rqn.com
Email: dleigh@rqn.com

Kelly M. Klaus (*pro hac vice*)
Rose Leda Ehler *(pro hac vice)*
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Email: kelly.klaus@mto.com
Email: rose.ehler@mto.com

Brent O. Hatch (5715)
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: 801-839-4811
Facsimile: 801-363-6666
Email: bhatch@hjdlaw.com

Attorneys for the California Studios

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

THE CALIFORNIA STUDIOS' RESPONSE TO THE DEBTOR'S MOTION TO EMPLOY CALL & JENSEN AS SPECIAL COUNSEL UNDER SECTIONS 327(e) AND 328(a) OF THE BANKRUPTCY CODE

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 "California Studios") respectfully file this Response to the *Debtor's Motion to Employ Call & Jensen as Special Counsel Under Sections 327(e) and 328(a) of the Bankruptcy Code* (the "Call Jensen Application") [Dkt. 277].

RESPONSE TO CALL JENSEN APPLICATION

The Debtor proposes to employ Call & Jensen as special counsel under Section 327(e) of the Bankruptcy Code. "Compensation of attorneys employed under § 327(a) or (e) is subject to court approval and §§ 328 and 330." *In re CW Mining Co.*, 440 B.R. 878, 886 (D. Utah 2010). The California Studios ask this Court to require additional information, disclosure, and clarification from the Debtor before considering the Call Jensen Application, which substitutes new, potentially duplicative counsel who are not yet familiar with the case, and potentially jeopardizes funds that would otherwise be available to satisfy creditors.

The California Studios seek answers to the following questions:

A. Does the Interim Compensation Order Apply to Call & Jensen, and Will Call & Jensen Be Required to Seek Approval of Compensation from the Court?

The California Studios object to the Call Jensen Application to the extent it seeks authorization for the Debtor to compensate Call & Jensen without compliance with the Interim Compensation Order or Sections 328 and 330 of the Bankruptcy Code.

The Call Jensen Application and the unsigned engagement letter (the "Engagement Letter") attached thereto provide, among other things, that Call & Jensen will be compensated in the ordinary course for all attorney and paralegal fees incurred up to $275,000 and for any attorney and paralegal fees exceeding $495,000. For example, the second paragraph of page 1 of the Engagement Letter provides that "You will pay to us, promptly as earned and billed, one hundred percent of the first $275,000 in attorney and paralegal fees reflected in our billings" [Dkt. 277, Ex. A at 2]. Based on this language it appears that the Debtor is proposing to compensate Call & Jensen directly, as and when invoiced, and that Call & Jensen will not have to comply with (a) the Court's *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Retained Professionals* (the "Interim Compensation Order")

entered November 22, 2017 [Dkt. 100], or (b) the standard fee application and approval process required by Sections 329 and 330 of the Bankruptcy Code.

Call & Jensen, like all other estate professionals, (1) should submit its Monthly Statement in compliance with the Interim Compensation Order and thereafter receive 80% of fees and 100% of expenses on a monthly basis, barring any objections; and (2) should file interim and final applications for compensation, as required by both the Interim Compensation Order and Sections 328, 330 and 331 of the Bankruptcy Code. Finally, if and to the extent additional compensation beyond reimbursement of hourly fees is sought under the compensation tiers set forth on page 3 of the Engagement Letter, the Debtor should seek court approval.[1]

B. Are the Call & Jensen Employment Terms Reasonable?

Section 328(a) provides that a professional, such as Call & Jensen, may be employed by a debtor "on any reasonable terms." "The trustee seeking to employ a professional . . . bears the burden of showing that the provisions of the proposed employment are reasonable." *In re Potter*, 377 B.R. 305, 307-08 (Bankr. D.N.M. 2007). This Court "has an obligation to determine the reasonableness of terms and conditions before authorizing the employment of professionals under § 328(a) and may eliminate, modify, or impose additional terms and conditions to satisfy the requirement of reasonableness." *In re High Voltage Engineering Corp.*, 311 B.R. 320, 333 (Bankr. D. Mass. 2004). For this Court to make that determination, the Debtor "must establish that the terms and conditions of employment are reasonable, and evidence, not conclusory statements, is required to satisfy that burden." *Id.*

[1] The Call Jensen Application, at 4, states that *if* Call & Jensen incur reimbursable expenses, it will "submit an application for reimbursement" in accordance with the Interim Compensation Order. As noted above, Call & Jensen, like all other estate professionals, should be required to fully comply with the Interim Compensation Order, as well as the applicable requirements of the Bankruptcy Code.

Here, the Debtor has failed to meet its burden of establishing that the employment terms it has negotiated with Call & Jensen are reasonable. Although the Debtor has disclosed the basic compensation structure for the proposed engagement, depending upon the outcome of the California Litigation, the Debtor could owe substantial consideration to Call & Jensen for its services. Specifically, under any scenario the Debtor will owe Call & Jensen $275,000 (assuming that much time is billed) plus any billed hourly fees in excess of $495,000. Further, under "[d]amages and fees" scenario on page 3 of the Engagement Letter, the Debtor might also end up owing Call & Jensen (a) an additional $747,500, and (b) 166,118 stock options with a strike price of $0.32 per share [Dkt. 277, Ex. A at 3]. In short, the total value of the consideration to Call & Jensen could easily exceed $1,100,000.

Last fall during the evidentiary hearing on the California Studios' motion for relief from stay the Debtor, through Mr. Quinto, provided a "range" of likely trial expenses for the trial of the California Action. At the time of that hearing Baker Marquart was going to serve as trial counsel, and the Debtor had not yet (to the California Studios' knowledge) hired Mr. Philpot. The range provided was between $483,734.85 and $806,224.75. Now, the Debtor is apparently telling the Court that it might have to pay Call & Jensen well over $1.1 million in cash plus valuable stock options even with (a) hiring Mr. Philpot as a second in-house lead trial lawyer who has appeared as counsel of record in the California Action, and (b) Baker Marquart continuing to provide "consulting and advisory services." In other words, a trial of the California Action may now cost the estate and creditors many hundreds of thousands of dollars more than was estimated just last fall.

For the Court to properly evaluate reasonableness, the following additional information and disclosures should be provided:

1. Further Information Regarding the Role of Messrs. Quinto and Philpot.

The first paragraph of the Engagement Letter makes clear that Messrs. Quinto and Philpot, who are in-house counsel for the Debtor, will have an active role in the trial of the California Action. The Engagement Letter provides: "We will work closely with your other counsel, each of whom we understand are employed by VidAngel as in-house counsel, including David Quinto (VidAngel general counsel) and Morgan Philpot, with one or both of them as co-counsel of record with us. In mutual cooperation with us, they will assist and/or take primary responsibility for various trial preparation tasks, including motions, briefs, depositions, etc." [Dkt. 277, Ex. A at 2].

In order for the Court to analyze whether this arrangement is reasonable, the Court needs a detailed understanding of the respective roles that Messrs. Quinto and Philpot, on the one hand, and Call & Jensen, on the other hand, will play at trial. If Messrs. Quinto and Philpot will be doing most of the work then perhaps the arrangement is not reasonable, whereas if Call & Jensen will be doing most of the work then perhaps it is reasonable (and perhaps the retention of Mr. Philpot is not). Because none of this information is provided, however, it is impossible for the Court and creditors to know one way or the other.

2. Further Information Regarding the Reasonableness of VidAngel's Decision to Change Trial Counsel.

The Debtor must provide further detail and explanation for its decision to change counsel on the eve of trial. Baker Marquart has represented the Debtor in the California Action since its inception, and a trial of the California Action with Baker Marquart as outside counsel would apparently have cost no more $806,224.75. While VidAngel has elsewhere accused Plaintiffs of

going beyond their stated need for discovery (an accusation Plaintiffs dispute[2]), VidAngel (not Plaintiffs) has been engaged in unnecessary and excessive motion practice—opposing summary judgment on *every* conceivable ground, filing a baseless and redundant motion to change the injunction, and serving a 160+ page motion to compel on over 70 requests. Baker Marquart has technically withdrawn as trial counsel, but has continued to play a role in discovery. Why has the Debtor now decided to engage a new law firm that will need to get up to speed and that may end up charging much more to the estate than Baker Marquart?

3. Further Information Regarding the Continuing Role of Baker Marquart.

Likewise, in order to properly evaluate reasonableness the Court also needs additional information regarding the continuing role of Baker Marquart. Page 3 of the Call Jensen Application states that "Baker Marquart, Debtor's counsel previously approved by this Court, will continue to provide consulting and advisory services on an as-needed basis." VidAngel has since withdrawn Baker Marquart as counsel of record from the California Action, but the firm is continuing to play a role in discovery.

Further detail should be provided regarding the role Baker Marquart will play as compared to Call & Jensen. How active will Baker Marquart be, and what additional fees will be incurred by Baker Marquart going forward? Will its "consulting and advisory services" be limited to a few thousand dollars, or will it continue to provide substantial work to the Debtor with the corresponding substantial fees that would accompany that substantial work? Again, in order to evaluate the reasonableness of the Call Jensen Application the Court needs a full understanding of the entire cost the Debtor anticipates for preparation and trial of the California

[2] VidAngel has threatened to imminently file an *ex parte* order in the California Action for a protective order limiting Plaintiffs to two depositions (Plaintiffs have sought to take four, and reserve their rights to take others if VidAngel includes other individuals on its witness list).

Action. This would include not only the anticipated consideration to be paid to Call & Jensen for its work but also an analysis of that consideration in light of the work that will apparently be performed by the lawyers at Baker Marquart. The Call Jensen Application should not be approved without this additional information.

4. Further Information Regarding the Compensation Tiers

Finally, a proper reasonableness analysis cannot be conducted without disclosure, at least to the Office of the United States Trustee, regarding the various damage tiers, which correspond to different compensation tiers, redacted from the draft Engagement Letter filed with the Court. The Debtor has not provided the California Studios or other creditors with the actual damage tiers that establish the possible compensation structures for Call & Jensen, although the California Studios understand that an un-redacted version of the Engagement Letter with those tiers has been provided to the Court. The same un-redacted version of the Engagement Letter also should be provided to the United States Trustee's Office so that the United States Trustee's Office can fulfill its independent obligation to review the reasonableness of the proposed fee structure.

As the California Studios understand the Engagement Letter, the Debtor must pay $275,000.00, plus any actual attorney and paralegal fees incurred that exceed $495,000, regardless of the outcome of the trial. If the ultimate result is the "Medium Range [of] Damages" [Tier 2 on page 3 of the Engagement Letter] then the Debtor will pay an additional cash and stock bonus, and if the ultimate result is the low range of damages [Tier 3 on page 3 of the Engagement Letter] then the Debtor will pay even more. To evaluate reasonableness of the range from $275,000, at the low end, to as high as $1,022,500 plus any fees over $495,000 plus 166,118 in vested stock options, the Court *and* United States Trustee must know the damages tiers that would trigger these additional payments. For example, depending on the outcome of

trial, it may not be reasonable for Call & Jensen to be paid a cash and stock bonus as high as the middle tier if it will jeopardize payments to California Studios. This is not a straightforward contingency application—the Debtor is seeking to pay new (and potentially duplicative and unnecessary counsel) funds that might otherwise be used to fully (and timely) pay creditors. Before approving the Call Jensen Application, the Court, with guidance from the United States Trustee's Office, must be convinced that the damage tiers being proposed are reasonable and that the proposed engagement will likely be beneficial to the estate and all of its creditors.

C. How Will the Call Jensen Application Impact VidAngel's Chapter 11 Plan?

Finally, because the Debtor is asking the Court to approve the Call Jensen Application under Section 328(a) of the Bankruptcy Code the Court needs to evaluate how approval of that application may impact other aspects of this case, including the Debtor's pending Chapter 11 Plan. *See In re High Voltage Engineering*, 311 B.R. at 332 (noting that in evaluating a fee agreement under Section 328(a) the court "must persuade itself that the terms and conditions of the proposed employment . . . are reasonable in view of developments capable of anticipation" including how approval will impact a proposed Chapter 11 plan). Pursuant to the Engagement Letter the Debtor may have substantial cash obligations to Call & Jensen between now and shortly after the conclusion of the California Action in a few months. Specifically, it is required to pay $275,000 in billed fees and any billed fees in excess of $495,000 as and when invoiced by Call & Jensen. Additionally, the Debtor is required to pay any "cash amounts earned under item (2) or (3)" of the Engagement Letter, i.e., either $597,500 or $747,500 in possible additional compensation based on trial outcomes, "in two equal quarterly payments." [Dkt. 277, Ex. A at 3]. Yet there is no discussion or analysis at all concerning how approval of the Call Jensen Application with these substantial quarterly obligations might impact the Debtor's overall

reorganization plan.[3] Simply put, the Debtor should be required to disclose how approval of the Call Jensen Application will impact the Debtor's pending Chapter 11 plan and the timeline for getting that plan confirmed.[4]

RELIEF REQUESTED

"'[A] Bankruptcy Court need not approve or reject an application as presented [under Section 328(a)] but may approve an application with modified terms that the Court finds necessary to render the proposed employment reasonable.'" *In re Brooke Corp.*, 2013 WL 6782877, at *4 (Bankr. D. Kan. Dec. 20, 2013) (quoting *In re Federal Mogul-Global, Inc.*, 348 F.3d 390, 398 (3rd Cir. 2003)). Here, the Call Jensen Application should not be considered until the additional information, disclosures and clarifications outlined above are made and the California Studios have had an opportunity to brief any objections based on those disclosures.

DATED this 1st day of March, 2019.

Kelly M. Klaus (*pro hac vice*)
Rose Leda Ehler *(pro hac vice)*
Munger, Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Email: kelly.klaus@mto.com
Email: rose.ehler@mto.com

[3] The Debtor has not filed for approval of its disclosure statement and, based on disclosures to date, the California Studios will object.

[4] There also is no discussion in the Call Jensen Application about whether Call & Jensen (or anyone else) may be asked to represent the Debtor on appeal of the California Action, and what the compensation arrangement will be for any appellate work. Perhaps Call & Jensen will have no role in any appeal. If so, then that should be disclosed along with information about who will represent the Debtor in any such appeal.

—and—

Brent O. Hatch
Hatch, James & Dodge, P.C.
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: 801-839-4811
Facsimile: 801-363-6666
Email: bhatch@hjdlaw.com

—and—

Michael R. Johnson, Esq.
David H. Leigh, Esq.
Ray Quinney & Nebeker P.C.
36 South State Street, 14th Floor
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
Email: mjohnson@rqn.com
Email: dleigh@rqn.com

/s/ Michael R. Johnson
Michael R. Johnson

Attorneys for the California Studios

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2019, I electronically filed the foregoing 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:

- **J. Thomas Beckett** tbeckett@parsonsbehle.com, ecf@parsonsbehle.com; brothschild@parsonsbehle.com;kstankevitz@parsonsbehle.com
- **Michael Ronald Brown** mbrown@parsonsbehle.com
- **Laurie A. Cayton tr** laurie.cayton@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- **Rose Leda Ehler** rose.ehler@mto.com, cynthia.soden@mto.com
- **Michael R. Johnson** mjohnson@rqn.com, docket@rqn.com;dburton@rqn.com
- **Kelly M. Klaus** kelly.klaus@mto.com
- **David H. Leigh** dleigh@rqn.com, dburton@rqn.com;docket@rqn.com
- **Grace S. Pusavat** gpusavat@parsonsbehle.com
- **Brian M. Rothschild** brothschild@parsonsbehle.com, ecf@parsonsbehle.com
- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov

I further certify that on this 1 st day of March, 2019, I caused to mailed a true and correct copy of the foregoing to the following parties via first class mail:

ANALYSIS GROUP, INC.
333 S HOPE ST 27TH FL
LOS ANGELES CA 90071

DOUGLAS D. GEYSER
PETER K. STRIS
STRIS & MAHER LLP
725 S FIGUEROA ST STE 1830
LOS ANGELES CA 90017

BRENT O. HATCH
JOHNSON & HATCH
10 W BROADWAY STE 400
SALT LAKE CITY UT 84101

KAPLAN VOEKLER CUNNINGHAM
& FRANK PLC
PO BOX 2470
RICHMOND VA 23219

KELLY M. KLAUS
TODD ROSEN
MUNGER TOLLES & OLSON
350 S GRAND AVE 50TH FL
LOS ANGELES CA 90071-3426

GIL MILLER
ROCKY MOUNTAIN ADVISORY
215 S STATE STREET STE 550
SALT LAKE CITY UT 84111

TANNER LLC
36 S STATE ST STE 600
SALT LAKE CITY UT 84111-1400

/s/ Dianne Burton