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*Attorneys for the Movants 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.*

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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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**THE STUDIOS' MOTION TO CONVERT CASE TO CHAPTER 7, AND  
MEMORANDUM IN SUPPORT OF MOTION**

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**MOTION**

Pursuant to 11 U.S.C. § 1112(b)(1), 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 “**Studios**”), all of whom are Plaintiffs in *Disney Enterprises Inc., et al. v. VidAngel, Inc.*, Case No. 2:16-cv-04109-AB-PLA in the Central District of California (the “**California Action**”), and are soon to be substantial judgment creditors of VidAngel, Inc. (“**VidAngel**” or the “**Debtor**”), the debtor-in-possession in the above-captioned chapter 11 bankruptcy case (the “**Bankruptcy Case**”), through counsel, respectfully move this Court for the entry of an Order converting the Debtor’s Bankruptcy Case to Chapter 7, for cause.

This Motion is accompanied by a Memorandum in Support set forth immediately below. Cause exists to convert the Bankruptcy Case to Chapter 7 because of: (i) the substantial and continuing losses the estate has suffered since the Petition Date; (ii) the absence of a reasonable likelihood of rehabilitation; and, (iii) conversion (rather than dismissal) is the only means of protecting VidAngel’s remaining assets for the creditors.

VidAngel’s ongoing losses are substantial. Between the Petition Date and May 31, 2019, the Debtor’s cash assets decreased from \$3,449,285 to \$1,781,840, a decline of over 48%. During that same time period, its total assets decreased from \$6,107,971 to \$3,845,868, a decline of over 37%. In May alone the Debtor had negative net cash flow of over \$400,000. Between the Petition Date and May 31, 2019, negative net cash flow was \$1,667,445. The Debtor also reported accrued and unpaid post-petition accounts payable as of May 31, 2019, in the amount of \$332,602.

VidAngel cannot be rehabilitated and cannot propose a feasible plan for reorganization. During the hearing on the motion for relief from the automatic stay, counsel for VidAngel acknowledged that if the statutory damages award in the California Action was “over and above what VidAngel projects it can afford to pay over time”—\$7 million over ten years, as projected in its Proposed Chapter 11 Plan—“then I’m afraid it’s a conversion.” (Hearing Tr. at 78:1-12.) On June 17, 2019, the jury in the California Action awarded over \$62 million in statutory money damages to the Studios based on VidAngel’s willful infringement of the Studios’ copyrights, and its violations of the Digital Millennium Copyright Act. The jury verdict will soon be reduced to judgment.

Additional facts show the Debtor is engaged in questionable transactions that threaten to dissipate what remains of the estate unless a trustee is appointed. In January of 2019, the Debtor transferred its ownership interest in VAS Portal, LLC, to Harmon Ventures, LLC, an entity controlled by the Debtor’s CEO Neal Harmon, for \$1. It then made unsecured loans to VAS Portal, LLC, without seeking or obtaining court-approval, of at least \$100,000. On June 10, 2019, the day before the damages trial in the California Action was set to begin, the Debtor executed a contract pursuant to which it agreed to transfer its valuable IP assets to a newly-formed entity named Skip Foundation, Inc. (“**Skip**”), for no consideration other than a promise to be a “founding member” of Skip.

Conversion of the Bankruptcy Case to Chapter 7 is appropriate under Section 1112(b) and is the only option to prevent the Debtor from squandering the estate’s remaining assets.

## MEMORANDUM IN SUPPORT

### Introduction

VidAngel filed its petition on October 18, 2017. At that time, VidAngel had almost \$3.5 million in cash and over \$6 million in total assets. Instead of using those limited resources to reorganize its affairs, however, VidAngel used them to open up a new litigation front against the Studios in Utah before Judge Nuffer, and to strenuously resist the Studios' efforts to lift the automatic stay so that the California Action could proceed to judgment. Ultimately, Judge Nuffer dismissed VidAngel's complaint, and this Court lifted the automatic stay so that the California Action could proceed. Now, 20 months after the Bankruptcy Case began, VidAngel has less than \$1.8 million in cash, less than \$3.9 million in total assets, and substantial accrued, but as yet unpaid, post-petition debts associated with its litigation strategies. Moreover, the jury in the California Action found that VidAngel *willfully* infringed over 800 of the Studios' copyrighted works, and returned a \$62.4 million verdict against VidAngel that will soon be reduced to judgment.

Notwithstanding the insurmountable obstacles to confirming a plan of reorganization, VidAngel refuses to evaluate its circumstances objectively. It intends to continue dissipating the estate's limited assets on its failed litigation strategy. The day the jury returned its verdict, the Deseret News quoted Mr. Harmon as saying: "VidAngel plans to appeal the District Court ruling, and explore options in the bankruptcy court. Our court system has checks and balances, and we are pursuing options on that front as well." Art Raymond, *VidAngel Ordered to Pay \$62 Million to Disney, Others for Copyright Infringement*, Deseret News, June 17, 2019, [www.deseretnews.com/article/900075780/provo-vidangel-copyright-infringement-trial-disney-](http://www.deseretnews.com/article/900075780/provo-vidangel-copyright-infringement-trial-disney-)

[netflix-warner-brothers.html](#). Of course, Mr. Harmon failed to note in his remarks to the Deseret News that the Ninth Circuit previously rejected the legal argument on which VidAngel relied to argue its service was not infringing and did not violate the Digital Millennium Copyright Act. In short, Mr. Harmon and VidAngel apparently want to spend all of VidAngel's remaining cash fighting an unwinnable battle instead of using those assets to pay at least something to VidAngel's legitimate creditors. Whether or not VidAngel should take an appeal, or continue further with its failed litigation strategy, is a decision that an unbiased Chapter 7 trustee, who is not influenced by emotion or passion, should make.

The time has come for this Chapter 11 case to transition into Chapter 7. VidAngel must stop wasting assets that belong to its creditors, not VidAngel. Under the Bankruptcy Code, a Chapter 11 case should be converted for "cause," which is shown by a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of reorganization." 11 U.S.C. § 1112(b)(4)(A). Post-petition losses totaling over 30% and negative cash flow exceeding \$1.6 million are "substantial" and "continuing" losses by any measure. With a \$62.4 million verdict against it, VidAngel has no reasonable likelihood of rehabilitation using the limited assets it has left. If the Court does not convert this case now, VidAngel will use its remaining assets on litigation and continue to transfer whatever assets it has left without consideration, to the detriment of its creditors.

### **Factual Background**

1. On June 9, 2016, the Studios sued VidAngel in the United States District Court for the Central District of California, in an action entitled Disney Enterprises, Inc. et al. v.

VidAngel, Civil No. 2:16-cv-04019-AB-PLA, for copyright infringement and for violations of the Digital Millennium Copyright Act.

2. VidAngel filed its Chapter 11 Bankruptcy Case on October 18, 2017 (the “**Petition Date**”).

3. On August 31, 2017, shortly before the Petition Date, VidAngel filed an action in the United States District Court for the District of Utah against a number of the Studios’ affiliates. That action, entitled VidAngel v. Sullivan Entertainment Group et al., Civil No. 2:17-cv-00989, was assigned to District Judge David Nuffer (the “**Utah Federal Case**”).

4. As of the Petition Date, VidAngel reported having unencumbered cash assets totaling \$3,449,285.34. (Dkt. 47 at 2.)

5. It also reported total liabilities, consisting solely of unsecured debt, totaling \$5,284,803.50. (*Id.* at 1.) Further, the bulk of its unsecured debt consisted of customer account credits owed to its customers in the amount of \$4,957,946.89. (*Id.* at 13.)

6. In its initial Schedules and Statements, VidAngel did not include the claims the Studios were asserting against it in the California Action, even as contingent, unliquidated and disputed claims. (*Id.*)

7. For a number of reasons, including that the California Action had already been pending for over two years and that the Studios’ claims needed to be liquidated, the Studios filed a motion with this Court to terminate the automatic stay, and allow the California Action to proceed to judgment. (Dkt. 69.) The Studios’ motion for relief was initially filed on November 9, 2017.

8. In its initial opposition to the Studios' motion for relief, filed on November 27, 2017, VidAngel asserted that it filed for bankruptcy "to preserve its going-concern value as it reorganizes around its new Stream-Based Service." (Dkt. 114 at 21.)

9. Neal Harmon, however, told its investors that VidAngel filed its bankruptcy petition to "pause" the California Action, which it perceived to be an unfavorable forum. (<http://blog.vidangel.com/2017/10/18/vidangel-uses-chapter-11-protection-pause-los-angeles-lawsuit-reorganize-business-around-new-streaming-model/>.)

10. Consistent with its public statements about "pausing" the California Action in favor of litigating in Utah, VidAngel also argued that Judge Nuffer should first be permitted to decide issues concerning the legality of its services before this Court resolved the Studios' motion or lifted the stay. (Dkt. 114 at 4.)

11. Thereafter, at a December 7, 2017 hearing on the Studios' motion, this Court stated that "we can deal with these issues when we have a better sense of how the Utah/California litigation is going to proceed." (Dkt. 119, Audio Transcript of 12/7/2017 hearing, 4:18 to end.) Based upon the stipulation of the parties, this Court then ordered the hearing on the Studios' motion for relief continued without setting a new hearing date. (*Id.*)

12. On July 27, 2018, Judge Nuffer ruled that he lacked personal jurisdiction to hear and decide the issues in the Utah Federal Case. He also ruled that, if VidAngel's claims asserted in the Utah Federal Case were to proceed, they needed to be heard in California. (Dkt. 194 and Ex. A.)

13. In light of Judge Nuffer's decision, the Studios set a status conference and final hearing on their motion for relief from stay for August 28, 2018. (Dkt. 196.)

14. At the status conference, this Court ordered supplemental briefing concerning the Studios' motion for relief, and it also set a final hearing on the motion for October 17, 2018. (Dkt. 205.)

15. VidAngel filed its supplemental brief on September 28, 2018. (Dkt. 217.) In its supplemental brief, VidAngel made the following assertions and representations to the Court (among others):

- a. "The evidence will show that VidAngel's business has turned a corner and is now profitable" (*id.* at 4);
- b. "[T]he evidence will show that VidAngel's fortunes have risen substantially in 2018 and will continue to improve going forward" (*id.* at 5); and,
- c. "[T]he cost of a legal war in California will prevent the Debtor from growing its business, which it must do to confirm a feasible plan." (*id.* at 15).

16. On November 9, 2018, this Court issued its *Memorandum Decision Granting the Studios' Motion for Relief from Stay* (the "**Lift Stay Ruling**"). (Dkt. 252.)

17. In the Lift Stay Ruling, the Court noted that VidAngel, having lost the Utah Federal Case, "primarily argues that the stay should remain in place, at least until the summer of 2019, to give it an opportunity to grow its business and strengthen its financial ability to pay any judgment that might be entered in the California Copyright Action. This is a change from VidAngel's original argument that the copyright litigation could be resolved in the Utah Bankruptcy Court or the Utah District Court—which now seems improbable." (Lift Stay Ruling at 10.)

18. The Court also noted that, in the time between the Petition Date and the date of the Court's Lift Stay Ruling, VidAngel did very little to reorganize and, instead, used the time to pursue its litigation strategies: "[F]or more than a year, the automatic stay has provided VidAngel with a break from the California Copyright Litigation. However, during this time, it has pursued its legal strategy of obtaining a declaratory determination in the Utah District Court that its new filtering techniques do not violate copyright laws. Unfortunately for VidAngel, these efforts have been unsuccessful." (*Id.* at 24.)

19. The Court also noted that while VidAngel had complained about the impact of litigating the California Action on its reorganization efforts, "VidAngel's argument loses much of its validity because the evidence also showed that VidAngel has spent more than \$216,000 in litigation costs pursuing the Utah Declaratory Relief Action." (*Id.* at 25.)

20. Finally, the Court noted that "[t]he Studios, subscribers, other creditors and potential lenders and investors are entitled to know the extent of damages arising from VidAngel's alleged violation of copyright laws and how these claims will factor into a plan of reorganization." (*Id.* at 26.)

21. After the Court lifted the automatic stay, the Court in the California Action granted partial summary judgment to the Studios on the question of liability, and scheduled a jury trial on damages to commence on June 11, 2019.

22. On June 10, 2019, the day before the trial in California began—a new Utah entity was formed by the name of Skip Foundation, Inc. ("**Skip**"). On that very same day, i.e., the day before the start of trial, VidAngel entered into several proposed contracts with Skip pursuant to which the Debtor agreed, subject to court approval, to transfer its valuable intellectual property

assets to Skip in exchange for (i) “membership as a Founding Member” of Skip; (ii) that the assets be licensed in accordance with “Creative Commons,” “GNU Free Documentation License,” or a “patentleft license”—in other words, freely available; and (iii) that the exclusive forum for any dispute regarding the transfer be the U.S. District Court for the District of Utah, in the city of Provo, Utah.<sup>1</sup>

23. On June 17, 2019, the jury in the California Action returned its verdict. The jury found that VidAngel had violated the DMCA and willfully infringed the Studios’ copyrights, and awarded the Studios statutory damages in excess of \$62 million. A copy of the Special Verdict Form from the California Action is attached hereto as Exhibit “A.”

24. The Debtor filed its Monthly Operating Report for the period ending May 31, 2019, on June 19, 2019. (Dkt. 315.) Page 2 of that document shows that for the month of May 2019, the Debtor had negative net cash flow of \$402,027, and from the Petition Date through May 31, 2019, net cash flow was negative \$1,667,445.

25. The Comparative Balance Sheet on page 17 of the May 2019 Monthly Operating Report also discloses the following:

- a. Since the Petition Date, total current assets have declined from \$5,930,974 to \$3,775,773;
- b. Since the Petition Date, total assets have declined from \$6,107,971 to \$3,845,868; and,

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<sup>1</sup> The Studios attempted to depose Mr. Harmon prior to the trial of the California Action, but were told he was busy preparing for the trial and would not be available until after the trial concluded. Mr. Harmon, however, was not too busy during this time period to negotiate a transfer of VidAngel’s valuable IP technology to Skip for no consideration.

c. As of May 31, 2019, total accrued and unpaid post-petition liabilities totaled \$409,985.

26. The Profit and Loss Statement on page 18 of the May 2019 Monthly Operating Report also discloses the following: (a) the Debtor had negative net income in May of \$501,787, and (b) since the Petition Date, the Debtor has had negative net income of \$1,955,437.

### Argument

#### *A. Law Applicable to Dismissal or Conversion of a Chapter 11 Case.*

11 U.S.C. § 1112(b) provides, in relevant part, that “on request of a party in interest . . . the court *shall* convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause.” 11 U.S.C. § 1112(b)(1) (emphasis added). The specifically enumerated Section 1112(b)(4) “cause” supporting this motion is Section 1112(b)(4)(A), which includes “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(4)(A).

VidAngel cannot avoid this result unless (i) “the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interest of creditors of the estate” *and* (ii) the debtor (or any other party in interest) establishes that “the grounds for converting or dismissing the case include an act or omission of the debtor under paragraph 4(A) for which there exists a reasonable justification for the act or omission.” 11 U.S.C. § 1112(b)(1) and (2)(B)(i).

As shown below, there has been a substantial or continuing loss or diminution of the estate in the 20 months this Bankruptcy Case has been pending. Further, in light of the jury’s

\$62 million verdict, there is no reasonable likelihood of rehabilitation in this case. Accordingly, the Court should convert this Bankruptcy Case to Chapter 7.

*B. There has been a Substantial or Continuing Loss or Diminution in this Case.*

This prong of Section 1112(b)(4), addressing substantial or continuing loss or diminution of the estate,

requires the court to determine whether post-petition, the debtor has suffered or continued to experience a negative cash flow, or, alternatively, declining asset values. The legislative amendments in 2005 set forth in the BAPCPA, added the word “substantial” to the first inquiry. With the addition of the word “substantial,” Congress has indicated that a loss need not be continuing. Rather if the loss has been substantial based on the financial circumstances of the debtor, the test may be satisfied.

*In re Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 713-14 (Bankr. D. Md. 2011); *see also In re Westgate Props., Ltd.*, 432 B.R. 720, 723 (Bankr. N.D. Ohio 2010) (“The first half of this equation is often met by showing that the debtor continues to incur losses or maintains a negative cash-flow position after the entry of the order for relief”). And in the case *In re McTiernan*, the court stated:

In evaluating whether a bankruptcy debtor has suffered continuing losses or diminution of the estate to support conversion or dismissal of a chapter 11 bankruptcy case, the court considers all relevant information, including the bankruptcy estate’s financial history and financial prospects and the financial records on file in the case. Under certain circumstances, negative cash flow alone can establish a continuing loss to or diminution of the estate for the purposes of establishing the first element. Diminution of the estate may also be established by showing declining asset values.

519 B.R. 860, 866 (Bankr. D. Wyo. 2014).

Here, the Debtor’s own financial disclosures to the Court demonstrate that the Debtor has suffered continuing losses or diminution to the estate. Between the Petition Date and May 31,

2019, the Debtor's cash assets decreased from \$3,449,285 to \$1,781,840, a decline of over 48%. (See Dkt. 315 at 2 (May 2019 Monthly Operating Report).) During that same time period, its total assets decreased from \$6,107,971 to \$3,845,868, a decline of over 38%, and its total current assets declined from \$5,930,973 to \$3,775,773, a decline of over 36%. (*Id.* at 17.) The Debtor also reported accrued and unpaid post-petition liabilities as of May 31, 2019, in the amount of \$409,985. (*Id.*) The current amount of accrued and unpaid post-petition liabilities will be dramatically higher. Obviously, the \$62.4 million verdict in the California Action will increase VidAngel's liabilities from \$4.7 million to \$67.1 million *plus* whatever is awarded to the Studios as costs and attorneys' fees under 17 U.S.C. § 505. Moreover, the Debtor no doubt owes substantial amounts to the lawyers it hired to try the California Action.

The Debtor's expenses for June 2019 (not yet reported) will include the lawyers' fees for trying a five-day jury trial. Further, the Debtor has reported a net operating loss from the Petition Date through May 31, 2019, of \$1,963,515. (*Id.* at 21.) In May alone, the net operating loss was over \$500,000. Last September, the Debtor predicted a dramatic financial turnaround by the summer of 2019 after the release of its original television series. (See Dkt. 217.) That prediction has proved to be disastrously incorrect.

The Debtor has suffered substantial and continuing losses since the Petition Date, and the estate is being diminished. Indeed, the Debtor's assets are only worth a fraction of what they were worth as of the Petition Date, and the Debtor is hemorrhaging money. Further, the Debtor intends to transfer its valuable IP assets to Skip in return for no monetary consideration, but merely a "founding member" interest in this new entity. Thus, the first prong of Section 1112(b)(4) has been established. See *In re East Coast Airways, Ltd.*, 146 B.R. 325, 336 (Bankr.

E.D.N.Y. 1992) (“There need not be a significant diminution in the estate to satisfy Section 1112(b)(1).”); *In re Congaree Triton Acquisitions, LLC*, 492 B.R. 843, 851 (Bankr. D. S.C. 2012) (“The Court finds that cause exists under § 1112(b)(4)(A). It appears that the Debtor has incurred substantial losses, including an operating loss of \$561,972 from the commencement of the Chapter 11 case through April 2012.”); *In re Pinnacle Labs., Inc.*, 2008 WL 5157981, at \*3 (Bankr. D.N.M. June 19, 2008) (ordering conversion of case to Chapter 7; “Pinnacle Laboratories has a negative cash flow, is depleting its current assets, and is demonstrating through its growing accounts payable figure that it cannot meet current demands. The estate is suffering continuing losses.”); *In re Galvin*, 49 B.R. 665, 669 (Bankr. D.N.D. 1985) (post-petition negative cash flow is considered by courts to be evidence of continuing losses).

*C. There is No Reasonable Likelihood of Rehabilitation in this Case.*

Before a court can dismiss or convert under Section 1112(b)(4)(A), it must also find the absence of a reasonable likelihood of rehabilitation. However, “‘rehabilitation’ is a different and, unfortunately for the debtor, much more demanding standard than ‘reorganization.’” *In re Brutsche*, 476 B.R. 298, 301 (Bankr. D.N.M. 2012). “Whereas confirmation of a plan could include a liquidation plan, rehabilitation does not include liquidation.” *Id.* In other words, “[r]ehabilitation is more than reorganization. It signifies something more, such as ‘to put back in good condition’ or ‘to re-establish on a firm, sound basis.’ It contemplates the successful maintenance or reestablishment of the debtor’s business operations. Rehabilitation starts in Chapter 11 with a confirmable plan.” *ARS Analytical, LLC*, 433 B.R. 848, 863 (Bankr. D.N.M. 2010); *see also In re Ashley Oaks Dev. Corp.*, 458 B.R. 280, 287 (Bankr. M.D.N.C. 2011) (“Rehabilitation is not synonymous with reorganization and the determination is not whether a

debtor can confirm a plan, but whether the debtor has sufficient business prospects for the benefit of creditors and the estate”); *In re Park*, 436 B.R. 811, 817 (Bankr. W.D. Va. 2012) (stating rehabilitation requires the prospect of re-establishing a business at minimum).

There is no reasonable prospect of rehabilitating the Debtor here. In the 20 months since the Petition Date, the Debtor’s cash and the value of its assets has each declined in value by well over a third, and the Debtor has posted an aggregate net operating loss of almost \$2 million. The Debtor lost over half a million dollars in May 2019 alone. Further, the growth in revenues and increase in profitability that the Debtor promised last fall has not materialized. In May of 2019, the Debtor reported negative cash flow for the month of \$402,027, and negative cash flow since case filing of \$1,667,445. (Dkt. 315 at 2.) Now, the Debtor wants to transfer to Skip its IP assets, i.e., the assets Mr. Harmon asserted would fuel the Debtor’s turnaround and allow it to reorganize, for no monetary consideration. While the Debtor does not disclose in its Section 363 motion the value of these IP assets, Exhibit 2 to the Debtor’s Disclosure Statement, filed on January 15, 2019, valued the Debtor’s “Intangible Assets” at \$3 million. (See Dkt. 267-2 at 2.) The Debtor now wants to give them away.<sup>2</sup>

Faced with a \$62 million plus judgment, the only possible plan the Debtor could hope to confirm would be a liquidation plan. Liquidation, however, is not rehabilitation. The Debtor has lost the ability to operate as a viable, ongoing business, and cannot be “put back in good condition,” and it cannot be re-established “on a firm, sound basis.” The Court should find that cause exists for dismissal or conversion of the Debtor’s Bankruptcy Case under Section

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<sup>2</sup> That same Disclosure Statement, which the Debtor has never asked this Court to approve, also estimated the Studios’ judgment at \$7 million, and we now know that it will be many multiples of that. (Dkt. 267-2 at 2.)

1112(b)(4)(A). See *Pinnacle Labs.*, 2008 WL 5157981, at \*3 (“[T]he Court finds that there is an absence of a reasonable likelihood of rehabilitation of the Debtor in Chapter 11. Debtor cannot fund a plan, and is unable to repay its creditors out of current or future income.”); *In re Westgate Props., Ltd.*, 432 B.R. 720, 723 (Bankr. N.D. Ohio 2010) (cause existed because of post-petition losses and no showing of ability to reorganize or rehabilitate); *In re Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 714 (Bankr. D. Md. 2011) (same); *In re LG Motors, Inc.*, 422 B.R. 110, 116 (Bankr. N.D. Ill. 2009) (“[T]he issue of rehabilitation for purposes of § 1112(b)(4)(A) is not the technical one of whether the debtor can confirm a plan, but, rather, whether the debtor’s business prospects justify continuance of the reorganization effort.”) (internal quotations omitted).

*D. The Failure of Mr. Harmon to Act as a Fiduciary is Further Cause.*

In the *Landmark Atlantic Hess Farm* case cited above, the court also found cause under Section 1112(b) based upon the failure of the debtor’s principal to satisfy his fiduciary obligations to the debtor’s creditors. 448 B.R. at 716. In so holding, the court noted that the debtor’s principal, Mr. Herrick, filed the bankruptcy “to avail himself of the preference laws which exist only in bankruptcy,” and that “Herrick seeks to delay or reduce payment of his guaranty to Virginia Heritage Bank and it is unlikely that he will pursue the estate’s asset (his guaranty) in order to repay creditors of the estate.” *Id.*

The same is true here. Mr. Harmon stated that he initiated the Debtor’s bankruptcy to pause the California Action. As the Court noted in its Lift Stay Ruling, VidAngel has done very little to reorganize in the 20 months it has been in bankruptcy and, instead, has used the time (and the automatic stay) to pursue its litigation strategies: “[F]or more than a year, the automatic

stay has provided VidAngel with a break from the California Copyright Litigation. However, during this time, it has pursued its legal strategy of obtaining a declaratory determination in the Utah District Court that its new filtering techniques do not violate copyright laws. Unfortunately for VidAngel, these efforts have been unsuccessful.” (Dkt. 252 at 24.) Further, in response to the \$62 million plus jury verdict, Mr. Harmon intends to spend what little money VidAngel has left pursuing appeals and lobbying Congress rather than preserving the Debtor’s remaining assets for the benefit of its creditors. These facts also constitute cause. (The Studios have discussed all of these points in further detail in their pending motion to appoint a Chapter 11 trustee. (Dkt. 310.))

*E. The Court Should Convert the Bankruptcy Case, not Dismiss it.*

If the Court finds cause under Section 1112(b), the Court must decide whether conversion or dismissal would be better for the estate and its creditors. This is not a close question. Conversion is the only option.

First, conversion to Chapter 7 will protect the Debtor’s remaining assets, including its cash and its receivables, and insure that a neutral and impartial trustee uses those assets for proper purposes such as paying the Debtor’s creditors and investigating the Debtor’s business and financial affairs. In this regard, Exhibit 2 to the Debtor’s Disclosure Statement, filed on January 16, 2019, estimated that in the event of Chapter 7 liquidation general unsecured creditors would receive total payments of between \$2,639,065 and \$5,655,476. These assets, or at least what remains of them, need to be protected.

Second, if the case were simply dismissed, the Debtor undoubtedly would continue with its plan to transfer its assets to third parties. Like the recent effort to transfer its valuable IP assets

to Skip for no consideration, the Debtor would continue its plan to hinder, delay or defraud the Studios in the pursuit of their efforts to enforce any part of the substantial money judgment that the California Court will enter on the jury verdict.

Finally, conversion of the case would allow the Chapter 7 trustee to investigate the numerous transactions that the Debtor has entered into with related entities also controlled by Neal Harmon, and to pursue avoidance claims against those entities if warranted. In addition to the transactions involving VAS Portal that a Chapter 7 trustee could review, a Chapter 7 trustee also could review all of the post-petition payments that were made by the Debtor to Harmon Brothers.

In short, the question of whether to dismiss or convert the case is not a close call. Only conversion will protect the Studios and the Debtor's other legitimate creditors from future harm at the hands of the Debtor and its current management.

**Relief Requested**

The Studios respectfully request that the Court convert this Chapter 11 case to Chapter 7 pursuant to Section 1112(b) of the Bankruptcy Code. Since the Petition Date, the Debtor has experienced substantial and continuing losses and a diminution of the estate, and its financial picture is getting worse, not better. Further, the Debtor has no reasonable likelihood of rehabilitation. Thus, conversion is warranted in this case.

[SIGNATURE PAGE TO FOLLOW]

DATED this 21<sup>st</sup> day of June 2019.

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*Attorneys for the Studios*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 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
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- **Rose Leda Ehler** rose.ehler@mto.com, cynthia.soden@mto.com
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- **Brian M. Rothschild** brothschild@parsonsbehle.com, ecf@parsonsbehle.com
- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov

I further certify that on June 21, 2019, I caused to be mailed a true and correct copy of the foregoing to the following parties via first class mail:

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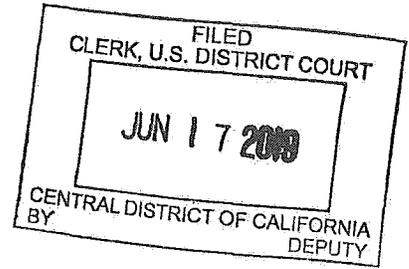
GIL MILLER  
ROCKY MOUNTAIN ADVISORY  
215 S STATE STREET STE 550  
SALT LAKE CITY UT 84111

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

/s/ Dianne Burton

# Exhibit A

**ORIGINAL DUPLICATE**



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DISNEY ENTERPRISES, INC., et al.,

Plaintiffs,

v.

VIDANGEL, INC.,

Defendant.

Case No. 2:16-cv-04109-AB (PLAx)

**SPECIAL VERDICT FORM**

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1 In answering these questions, you are to follow all the instructions the Court  
2 previously gave you. You must reach a unanimous decision for the following  
3 questions as instructed below:  
4

5 WE, THE JURY in the above-entitled action, unanimously find as follows on the  
6 questions submitted to us:  
7

8 **Part I: Statutory Damages for Copyright Infringement**

9 1. Did Plaintiffs prove by a preponderance of the evidence that VidAngel  
10 willfully infringed Plaintiffs' copyrights?  
11 Yes X No \_\_\_\_\_  
12

13 *If you answered "Yes," proceed to Question 2. If you answered "No," skip Question 2*  
14 *and proceed to Question 3.*

15 2. What amount of statutory damages do you award for willful copyright  
16 infringement? Your award must be not less than \$750 or more than  
17 \$150,000 per work.  
18  
19 \$ ~~75,000 x 819 = 61,425,000~~ <sup>AA</sup>  
20

21 *If you answered Question 2, skip Question 3 and proceed to Question 4.*

22 3. What amount of statutory damages do you award for non-willful  
23 copyright infringement? Your award must be not less than \$750 or more  
24 than \$30,000 per work.  
25  
26 \$ \_\_\_\_\_

27 *Proceed to Question 4.*  
28

1 4. Multiply the amount you awarded in Question 2 or 3 by 819 (the total  
2 number of works that were infringed). The total verdict for all copyright  
3 infringements is:  
4 \$ 61,425,000  
5

6 *Proceed to Part 2.*

7  
8 **Part II: Statutory Damages for Violation of the DMCA**

9 5. Did VidAngel prove by a preponderance of the evidence that its  
10 violations of the DMCA were innocent?  
11 Yes \_\_\_\_\_ No X  
12

13 *If you answered "Yes" to Question 5, proceed to Question 6. If you answered "No" to*  
14 *Question 5, skip Question 6 and proceed to Question 7.*

15 6. What amount of statutory damages do you award for VidAngel's  
16 innocent violations of the DMCA? Your award must be between \$0 and  
17 \$2,500 per act of circumvention.  
18  
19 \$ \_\_\_\_\_  
20

21 *If you answered Question 6, skip Question 7 and proceed to Question 8.*

22 7. What amount of statutory damages do you award for VidAngel's  
23 violation of the DMCA? Your award must be not less than \$200 or more  
24 than \$2,500 per act of circumvention.  
25  
26 \$ 1,250

27 *Proceed to Question 8.*  
28

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8. Multiply the amount you awarded in Question 6 or 7 by 819 (the total number of violations). The total verdict for all violations of the DMCA is:

\$ 1,023,750

*Please sign and date this form.*

DATED: 6/17/19

SIGNEE /s/ redacted  
Signature

*After this Special Verdict Form is completed and signed,  
please deliver it to the bailiff.*