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Co. (collectively, "Studios")*

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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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**LIMITED OBJECTION TO APPLICATION TO EMPLOY WINSTON & STRAWN,  
LLP AS SPECIAL COUNSEL (DKT. 380) AND PROPOSED ORDER (DKT. 381)**

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The Studios respectfully submit this limited objection ("Limited Objection") to the Chapter 11 Trustee's Application to Employ Winston & Strawn, LLP ("Winston") as special counsel. While the Studios do not per se object to the Trustee's employment of Winston, they

believe it is important that any Order approving the employment clarify and limit the scope of Winston's engagement. These limitations are essential to preserving the Estate's limited assets and ensuring that Winston provides disinterested advice.

The Trustee does not propose any budget, cap on fees, or other limitation on the scope of Winston's representation. The Studios—which are by far VidAngel's largest creditors—are concerned with the open-ended nature of the Trustee's request to employ Winston. Without limitations on fees and the scope of Winston's representation, the employment of yet another law firm will further deplete the Estate's limited and diminishing assets, duplicate the work of other lawyers who also are billing the Estate, and potentially provide advice that is not disinterested or in the best interests of the Estate.

For these reasons, the Studios seek an Order [1] limiting the engagement to no more than \$50,000 in compensable fees for work advising the Trustee on VidAngel's likelihood of success as to any post-trial motions and/or appeal from the judgment in the Central District of California ("California Action") and [2] providing that the Trustee is not authorized to incur or pay fees to Winston for advising (other than the advice the Order specifically authorizes) or representing VidAngel in connection with the California action or any other actual or potential litigation.

### **BACKGROUND**

The Trustee proposes to employ attorneys from Winston at very substantial hourly billing rates. Even after the discount, Michael Elkin's time would be billed at \$950 per hour; Ms. Emily Ellis's time would be billed at \$590 per hour. The Trustee states that he will ask Winston to provide "unbiased legal counsel to help guide [the Trustee's] decision making with respect to the California litigation, as well as to advise him on other copyright issues related to the Debtor's business." Application to Employ (Dkt. 380) ("App") ¶ 3.

The Trustee has asked the law firm of Call & Jensen – which represented VidAngel at trial and which has already been approved by the Court as counsel for the Debtor in the

California Action – to represent it with post-trial motions. Further, while Call & Jensen has never submitted a fee application so the total amount of fees paid to Call & Jensen is currently unknown, the engagement letter the Court approved for its engagement provides that Call & Jensen will be paid one hundred percent of the first \$275,000 in attorney and paralegal fees and one hundred percent of any attorney and paralegal fees in excess of \$495,000 to represent the Debtor in the California Action. The engagement letter is less than clear about whether post-trial motion practice was included in the scope of work outlined in the Call & Jensen engagement. In any event, the Debtor previously told the Court that Call & Jensen would do the post-trial motions and appeal for VidAngel for \$120,000. [7/23/2019 Hr'g Tr. at 12:16-19, 59:14-23].

### ARGUMENT

Section 327(e) of the Bankruptcy Code allows the Debtor to retain an attorney for “a specified special purpose . . . if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate.”

**I. If Not Limited, Winston’s Employment Threatens To Drain The Estate’s Limited (And Diminishing) Assets**

The proposed employment of Winston could drain the estate of already dwindling assets—a substantial amount of which has been spent on professional fees, \$548,980 accrued and paid in July alone—with no corresponding benefit to Estate or any reorganization.

First, it is unclear what Winston will be doing in connection with the post-trial motions or appeal. The Trustee’s only proposed limitation is that Winston will not appear as counsel in the California Action. [See Appl. ¶ 3]. If Winston is simply going to review Call & Jensen’s proposed arguments for a post-trial motion and appeal and advise the Trustee on the likelihood of success, that is not an issue. But there is no reason this limited work could not be done subject to a cap on total charges to the Estate and with an express limitation on the scope of representation in the Order.

There is a significant risk of duplication of effort and multiplication of expense if Winston does work on the substance of any post-trial motions or appeal. VidAngel has able counsel for those purposes – Call & Jensen – and VidAngel has represented that Call & Jensen will litigate through the appeal for a maximum of \$120,000, *see* 7/23/2019 Hr'g Tr. at 12:16-19, 59:14-23. Given Winston's high rates (even when discounted), that firm's additional work preparing motions and advising on any appeal could very quickly dwarf the amount VidAngel will be paying Call & Jensen. Hence, any Order approving the retention should clarify the scope and place a cap on payments to Winston for this work.

VidAngel's post-trial motions and appeal issues are not legally complex. Winston should be able to tell the Trustee whether Call & Jensen's proposed post-trial motions and appeal justify the expense for a maximum of \$50,000 (the Studios believe the work could likely be done for less than half that amount, and this amount would be nearly half the cost of the post-trial motions and appeal). This represents over 50 hours of Mr. Elkin's time, and he should be able to do the process more efficiently with a lower-billing colleague doing most of the work.

Second, the proposal that Winston be approved to "to advise [the Trustee] on other copyright issues related to the Debtor's business" is too vague and open-ended, and potentially allows the Trustee to pay Winston to do work that is not in the best interests of the Estate or its creditors, including the Studios. [Appl. ¶ 3]. The Trustee should be required to state what "other copyright issues" require advice, demonstrate that a lawyer billing the Estate \$950 per hour makes sense to provide that advice, and further demonstrate how providing that advice will further the Debtor's attempts to reorganize and pay its creditors. The Studios' counsel asked the Trustee to delineate these issues and propose a budget, but the Trustee expressed that he did not want to limit the engagement (other than to agree that Winston would not be retained as counsel to represent the Debtor in any action involving the Studios or their affiliates). Through discussions with the Trustee, the Studios understand that Winston may advise regarding whether

VidAngel's so-called "stream-based service" is legal. But that is exactly what VidAngel represented to this Court that it would stop spending money pursuing: "we're not spending another penny on validating the streaming model." [7/23/2019 Hr'g Tr. at 59:21-23]. The Debtor has consistently represented that its reorganization strategy focuses on its original content business—the only business that has shown even a glimmer of viability. The Trustee does not need independent legal counsel to know that there are not copyright issues in VidAngel's creation and distribution of original content.

## **II. Winston Should Not Be Employed To Further A Litigation Opportunity**

The Trustee recently represented to counsel for the Studios that he was interested in engaging Winston, not as partisan litigation counsel, but rather to provide impartial, neutral advice to the Trustee regarding important issues.

If that is the Trustee's goal, the Studios question whether Winston is the right choice. Mr. Elkin, the lead lawyer from Winston, is a litigator who has made his career trying cases against the Studios and other copyright owners. As just one example—he represented the notorious defendant Aereo during preliminary stages of what became the Supreme Court case *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431, 436 (2014). Winston and Mr. Elkin would not be providing disinterested advice if their work involves planning for other, as-yet-unfiled litigation. On the contrary, that work would be done with an eye toward generating fees in connection with future litigation.

The Trustee has represented that he will not employ Winston or Mr. Elkin as litigation counsel in the California Action or any other matter. But even if Winston is not engaged to appear as counsel of record, the Trustee's representation does not foreclose the possibility that the authorized payments to Winston will be for legal advice in connection with as-yet-unfiled litigation. To ensure that the Trustee's employment of Winston aligns with the best interests of

the Estate, as well as furthers the Trustee's stated goals from the retention, the scope of Winston's representation should be limited to advice solely related to assessing the likely success of post-trial motions and any appeal in the California Action. The Order should specifically provide that the Trustee is not authorized to utilize Winton to provide other advice or representation in connection with the California Action, or to provide advice regarding potential litigation.

The Studios respectfully seek an Order limiting Mr. Elkin and Winston & Strawn from serving in any capacity as it relates to the estate's (or VidAngel's) litigation or litigation strategy, other than as expressly permitted by the Order as limited above.

#### **CONCLUSION**

The Studios respectfully request the Court limit the employment of Winston & Strawn as follows:

1. The Trustee is authorized to employ Winston as his special counsel, pursuant to Bankruptcy Code § 327(a) and (e), so long as the total fees do not exceed \$50,000 and Winston's work is limited to advising the Trustee regarding the likely success of any post-trial motions or appeal in the California Action.
2. The Trustee is not authorized to employ Winston for any work relating to any other matters, including the legality or lack thereof of the Debtor's streaming service which, just a few months ago, the Debtor told the Court it would not spend another penny on trying to validate.
3. Final compensation to Winston will be paid in such amounts, up to the cap, as may finally be allowed by the Court upon proper application or applications therefore.

DATED this 20<sup>th</sup> day of September, 2019.

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*/s/ Michael R. Johnson*

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Michael R. Johnson

*Attorneys for the Studios*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 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:

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*/s/ Dianne Burton*

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