

FILED* US Bankruptcy Court - UT
OCT 4 2019 PM 3:26
lren

IN RE: VIDANGEL, INC.

COURT HEARING

September 30, 2019



333 South Rio Grande
Salt Lake City, Utah 84101
www.DepoMaxMerit.com

Toll Free 800-337-6629
Phone 801-328-1188
Fax 801-328-1189

23

September 30, 2019

1

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

IN THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF UTAH

IN RE: VIDANGEL, INC.,)	CIVIL NO. 17-29073
)	
Debtor.)	COURT HEARING
)	
)	JUDGE KEVIN R. ANDERSON
)	
)	
)	
)	

TRANSCRIPTION OF ELECTRONICALLY RECORDED PROCEEDINGS
HELD SEPTEMBER 30, 2019
10:03 A.M.

* * *

RENEE L. STACY
Registered Professional Reporter
Certified Realtime Reporter

ORIGINAL

September 30, 2019

2

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

A P P E A R A N C E S

FOR THE CHAPTER 11
TRUSTEE:

GEORGE HOFMANN
JEFFREY TROUSDALE
Attorneys at Law

FOR THE STUDIOS
CREDITORS:

MICHAEL R. JOHNSON
Attorney at Law
RAY QUINNEY & NEBEKER

FOR THE STUDIOS
CREDITORS:

KELLY KLAUS
Attorneys at Law
MUNGER TOLLES & OLSON

ALSO PRESENT:

MICHAEL ELKIN
WINSTON & STRAWN

September 30, 2019

3

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

September 30, 2019
10:03 a.m.

(Transcriber's note: Speaker identification may not be accurate with audio recordings.)

P R O C E E D I N G S

THE CLERK: United States Bankruptcy Court for the District of Utah, the Honorable Kevin R. Anderson presiding, is now in session. God save the United States of America and this Honorable Court. Please be seated.

THE COURT: Good morning. This is the Chapter 11 trustee's application to employ Winston & Strawn as special counsel.

Can we get notice of appearances?

MR. HOFMANN: Good morning, your Honor. George Hofmann and Jeff Trousdale for the Chapter 11 trustee, and on the telephone line I should have an attorney from Winston & Strawn, should the Court have any questions of them.

MR. JOHNSON: Good morning, your Honor. Michael Johnson of Ray Quinney & Nebeker on behalf of the studios. Also on the phone is Kelly Klaus from

September 30, 2019

4

1 Munger Tolles & Olson. And I think Mr. Klaus will be
2 addressing primarily the trustee's application.

3 THE COURT: All right.

4 MR. KLAUS: Good morning, your Honor.

5 THE COURT: Yes, and can you state your
6 name for the record?

7 MR. KLAUS: Yes, of course. It's Kelly
8 Klaus from Munger Tolles & Olson for the studios.

9 THE COURT: Mr. Klaus, yes. I know you.
10 I'm thinking of the attorney for Winston & Strawn
11 who's on the --

12 MR. ELKIN: Yes. Good morning, your Honor.
13 Michael Elkin from Winston & Strawn.

14 THE COURT: Very good. All right,
15 Mr. Hofmann. I have read the papers that were filed
16 in connection with the motion, so I'm familiar with
17 the objections and your response, so you don't need
18 to re-cover or repeat those issues, but it's your
19 motion. Proceed.

20 MR. HOFMANN: Yes, your Honor. First of
21 all, let me thank the Court for taking this up on --
22 fairly quickly, because the issues are time sensitive
23 here. Of course, no hearing is necessarily required
24 on a professional employment application, but given
25 the objection, I thought it would be appropriate to

September 30, 2019

5

1 have a hearing, and I also appreciate the studios'
2 attorneys in accommodating a hearing fairly quickly
3 this morning. So thank you for that.

4 The issues presented, your Honor -- I won't
5 belabor the points in the application, but I just
6 want to emphasize, number one, the time factor here,
7 because I have to make some decisions fairly quickly.
8 Number two, you know, recognizing the rates of the
9 Winston & Strawn attorneys, it's greater, admittedly,
10 than is typical around here, but I require the
11 highest quality legal advice in this particular
12 matter to get the second opinion that the Court
13 mentioned in the last hearing in this case where I
14 obviously was not present at that hearing. I was not
15 appointed at that time.

16 And the issues presented, your Honor, are
17 some of the most, if not the most, fundamental issues
18 presented in this case. They're very, very important
19 issues. I don't think it's appropriate, necessarily,
20 to constrain the scope or nature of the engagement.
21 If fees are excessive, parties have the right to
22 object, and the studio creditors will have the right
23 to object if they believe the fees are excessive, but
24 in my judgment, I deem this -- the advice of these
25 attorneys essential. I believe they will be

September 30, 2019

6

1 objective and give me the legal advice I need to
2 address the Manifold copyright law issues that are
3 presented in this case. So I would ask the Court to
4 approve the applications without the limitations the
5 studio creditors have asked to be imposed.

6 THE COURT: All right. I have some
7 questions. Help me better understand the issue with
8 the trustee's determination of who is an affiliate.
9 I understand the language in the term injunction.

10 MR. HOFMANN: Right.

11 THE COURT: I understand generally, but
12 I -- I guess, is the debtor still streaming other
13 movies?

14 MR. HOFMANN: Yes. So let me give the
15 Court an example.

16 THE COURT: Let me just say my --

17 MR. HOFMANN: Sure.

18 THE COURT: -- concern. It seems to me
19 the -- and I'm speaking possibly somewhat in an
20 uneducated capacity, because copyright is not my area
21 of expertise, but it seems to me the broader outcome
22 of the litigation was that the streaming model -- I
23 should say more specifically, filtering model used by
24 VidAngel violated the copyright laws, and so my
25 impression is should the debtor be streaming any

September 30, 2019

7

1 videos from any movie producers?

2 MR. HOFMANN: That's an excellent question
3 and that's exactly one of the tasks that I've asked
4 Winston & Strawn to perform. Let me just address the
5 Court more specifically --

6 THE COURT: All right.

7 MR. HOFMANN: -- however. So my
8 understanding, and Mr. Klaus will correct me if I
9 misstate something, I'm sure, is that what was at
10 issue in the California litigation was the debtor's
11 former disk-based streaming model --

12 THE COURT: Yes.

13 MR. HOFMANN: -- which was discontinued
14 prepetition by the debtor, so the debtor has the new
15 model that's the streaming-based model that it has
16 used -- only used post bankruptcy.

17 Now, the debtor does not stream any content
18 that belongs to, for example, Mr. Klaus's client
19 Disney at all on the streaming model, but, for
20 example, Paramount, which I understand is not a
21 plaintiff, not affiliated with the plaintiff, has
22 content that is being currently streamed using the
23 debtor's streaming model, not the disk-based model
24 that was found to be invalid.

25 THE COURT: And you're correct. I didn't

September 30, 2019

8

1 make that distinction between the disk-based and the
2 streaming, the new streaming model.

3 MR. HOFMANN: So the question is, is that
4 appropriate or not, and that's exactly one of the
5 tasks I've asked Winston & Strawn to help me with.

6 THE COURT: All right. Is -- is there an
7 issue identifying who the affiliates are so that the
8 debtor doesn't violate the permanent injunction?

9 MR. HOFMANN: Yes, definitely. And
10 we've -- I've been working through that --

11 THE COURT: Can studios provide a list of
12 who they think are -- you know, come under the
13 umbrella of the permanent injunction and --

14 MR. HOFMANN: More or less. What we've
15 done, your Honor, is we've provided the studios with
16 a list of all of the titles that are currently being
17 streamed. The studios came back with a list of those
18 titles, a subset of those that they believe are
19 affiliates. We have stopped -- VidAngel has stopped
20 streaming any of those titles identified by the
21 studios.

22 Now, there's some that we have unanswered
23 questions about that we haven't been able to
24 ascertain if the studios are correct or not as to
25 whether they're identifying them as affiliate, but

September 30, 2019

9

1 pending further investigation or determination, we
2 have stopped streaming any titles identified by the
3 studios.

4 THE COURT: And you're actively involved in
5 that process?

6 MR. HOFMANN: Very actively.

7 THE COURT: You -- in your response, you
8 indicate "The trustee has agreed not to use Michael
9 Elkin of Winston & Strawn for litigation purposes."
10 Is -- is -- what about in the future if you determine
11 that --

12 MR. HOFMANN: I don't intend to, and if I
13 did, I would file a further application.

14 THE COURT: Seek additional --

15 MR. HOFMANN: And let me just say, what I'm
16 looking for from Mr. Elkin is advice to guide me in
17 my decision-making as to litigation matters. As to
18 litigation matters, the existing litigation in
19 California, it's subject to the Court's approval. I
20 intend to use the existing counsel --

21 THE COURT: All right. So you're --

22 MR. HOFMANN: -- Colin Jensen.

23 THE COURT: -- going to go with Colin
24 Jensen.

25 MR. HOFMANN: I am. There --

September 30, 2019

10

1 THE COURT: In the litigation.

2 MR. HOFMANN: There --

3 THE COURT: At this point in time. I
4 understand.

5 MR. HOFMANN: Yes.

6 THE COURT: All right. All right.
7 Anything else?

8 MR. HOFMANN: No, your Honor.

9 THE COURT: All right. Mr. Johnson or
10 Mr. Klaus?

11 MR. JOHNSON: I believe Mr. Klaus will
12 address the Court's concerns or questions, to the
13 extent the Court has any, and the studios' limited
14 objection.

15 THE COURT: All right.

16 MR. KLAUS: Thank you --

17 THE COURT: Mr. Klaus?

18 MR. KLAUS: Thank you, your Honor. This is
19 Kelly Klaus. Thank you. Just briefly, your Honor,
20 the limited objection that we have is to the
21 open-ended nature of the engagement here.
22 Mr. Hofmann said, and I appreciate that one of the
23 questions that he would be asking Winston & Strawn to
24 advise him on is the advisability of continuing to
25 operate the stream-based service vis-a-vis the rights

September 30, 2019

11

1 of copyright owners who were not before the Court in
2 the California litigation. That was something that I
3 don't think was actually spelled out in the trustee's
4 application to employ Winston & Strawn, and with
5 respect to giving advice regarding the legality of
6 what VidAngel calls the stream-based service or with
7 respect to advising on the post-trial motions and the
8 advisability of filing the same in California, our
9 request is that there be some limitation in terms of
10 scope and in terms of amounts.

11 I appreciate what Mr. Hofmann has said
12 about once the -- once the application for fees is
13 submitted, we would have a right to object. On the
14 other hand, we now know, as a result of a filing that
15 came in at the end of last week, that Colin Jensen,
16 who we had not seen any of their applications for
17 fees that had come in, they submitted something on
18 Thursday, the 26th asking for \$562,000 in fees.

19 THE COURT: I thought it was 857,000 in
20 fees.

21 MR. KLAUS: Correct.

22 THE COURT: Yes, I'm aware of the
23 application.

24 MR. KLAUS: And so the -- the issue here is
25 that fees can run up very, very quickly,

September 30, 2019

12

1 particularly -- and we appreciate the fact that the
2 Winston fees are substantially discounted from what
3 their top line rates are, but they are still very,
4 very high rates, and for -- with respect to the
5 California litigation, I can understand the
6 advisability of trying to seek some advice different
7 from the -- or to get an objective check on the
8 advice of some of the lawyers who had been advising
9 VidAngel for the past four years and whose results
10 were very unsuccessful at every juncture, and what we
11 would ask is for there to be some limitation on
12 advising the debtor as to the -- and the trustee as
13 to the advisability of the post-trial motions.

14 Just within the last several days, I've
15 received correspondence from VidAngel's still general
16 counsel identifying, last count, 22 or 23 issues that
17 he says VidAngel would like to raise in their
18 post-trial motions, so it seems like there is a kind
19 of "everything but the kitchen sink" approach to
20 filing post-trial motions that we've got on the
21 VidAngel side. Perfectly happy for there to be some
22 check on some of that.

23 On the other hand, Colin Jensen -- they
24 were trial counsel. They came in relatively late.
25 They are giving advice and they are charging the

September 30, 2019

13

1 estate for their time, and it seems reasonable for
2 there to be some limitation on -- on the scope of
3 that work. And then more broadly than just what's
4 going on with respect to post-trial motions and any
5 appeal in the California action is the question of
6 what else at which he's going to be advising -- what
7 other issues are there? Part one, which is what is
8 the legality of the so-called stream-based model, but
9 if there are others, I think that the trustee should
10 say what those issues are. It has never revealed the
11 scope of any privileged information.

12 But if there's anything else that Winston &
13 Strawn is going to be advising on, I think that
14 should be spelled out, and we would request that
15 there be some limit to what those fees are before
16 they -- before they're -- before they're incurred.

17 THE COURT: All right. Mr. Hofmann, do you
18 wish to respond?

19 MR. HOFMANN: I do. Your Honor, as I said,
20 these are some of the most fundamental issues in this
21 particular case, are copyright issues, and like your
22 Honor, I am no copyright expert. I'm coming up to
23 speed on this. I'm learning quite a bit. But I,
24 myself, based on my own knowledge, am not well
25 equipped to address the technical copyright issues

September 30, 2019

14

1 involved, and there are many, and there's some that I
2 can't anticipate right now that I'm sure will come up
3 in the future.

4 And the way I view Winston & Strawn is to
5 be my objective sounding board divorced from the
6 debtor's prior advice it received that, as Mr. Klaus
7 said, resulted in some very poor results. I need a
8 second take on these things, and that's what
9 Mr. Elkin from Winston & Strawn is there to do.

10 I don't think it's appropriate to limit in
11 advance the scope of what he has to do. That results
12 in additional inefficiencies and my potentially
13 having to come back to court every time I need
14 copyright advice on some new aspect of this case that
15 I hadn't thought of as of this moment.

16 I do intend to monitor his services and
17 ensure that the bill does not run amok. As to the
18 points about Colin Jensen, those fees all predate my
19 appointment, your Honor. I didn't have any control
20 over those. As to the 20 or more post-trial motions,
21 well, that's exactly what I needed unbiased advice to
22 evaluate. As I said in the papers, I asked Mr. Klaus
23 to stipulate to give me more time to evaluate those
24 issues to maybe whittle them down, and he rejected
25 that, and so now I'm left with this time frame that's

September 30, 2019

15

1 reducing every day that I have in which to address
2 these post-trial issues and decide if they're --
3 should be whittled down.

4 THE COURT: That's October 21st?

5 MR. HOFMANN: Yes. It's not very far away.
6 So, anyhow, I've requested the Court to approve the
7 application. I definitely think it's inappropriate
8 to limit the scope of the advice I received from
9 Winston & Strawn.

10 THE COURT: All right. Well, I have
11 carefully reviewed the papers filed by the parties
12 and considered their arguments, and I understand
13 where they are coming from, but I agree with
14 Mr. Hofmann that he is in a -- he was brought into a
15 case at a critical point in time in light of the
16 ruling not only by the jury but now at the entry of
17 the permanent injunction. I agree with Mr. Hofmann
18 that the Court felt that perhaps the debtor -- not --
19 I don't want to say that I believed a trustee should
20 absolutely have been appointed, at least based at the
21 time we were considering that issue, but that the
22 debtor needed to get some second opinions as to the
23 viability of the -- of the legal arguments.

24 And at the risk of being overly
25 complimentary, but I think, Mr. Klaus, it might be

September 30, 2019

16

1 helpful for you to know that the Court has great
2 confidence in Mr. Hofmann. Mr. Hofmann has a
3 reputation for being astute and efficient and
4 effective and an economical administrator of estates,
5 and so the Court believes that if Mr. Hofmann
6 feels -- and the Court agrees that this is a very
7 specific type of -- very specialized area in the
8 practice of law. Apparently there is a great deal of
9 lack of clarity in connection with the streaming and
10 filtering services as to what does or does not
11 violate copyright laws.

12 The Court believes that Congress intended
13 the filtering of movies to be made available to the
14 public as expressed in the Family Movie Act, and yet
15 the devil is in the details as to how to accomplish
16 that without concurrently violating copyright laws.

17 So, in addition, the Court agrees that
18 under the rationale of (inaudible) Valley that it
19 should honor the selection of special counsel and
20 that it should do so on the terms stated in the
21 motion, so I'm not going to limit the scope.

22 What I am going to do is that if it appears
23 that fees are going to be in excess of \$100,000 for
24 Winston & Strawn that the trustee seek additional
25 approval and provide the information, because as I

September 30, 2019

17

1 understood -- correct me if I'm wrong. I understood
2 your comment to be you didn't anticipate the fees to
3 exceed 50,000. I understand that they may. My
4 intent is to give you sufficient leeway.

5 But I agree with Mr. Klaus that if you
6 start exceeding this initial disclosure as to what
7 Winston & Strawn is going to do, that it would be
8 helpful both to the Court and parties to get some
9 additional disclosures as to where -- if that
10 representation of Winston & Strawn leads the trustee
11 in different directions, that that be disclosed and
12 addressed and approved by the Court.

13 MR. HOFMANN: I think that makes sense,
14 your Honor. I agree.

15 THE COURT: All right. So if you'll
16 prepare an order, Mr. Hofmann, to that extent. I'm
17 not going to make a ruling, but I think we have an
18 understanding that Winston & Strawn at this point is
19 not going to be doing litigation. I'm not -- you may
20 seek an application at a different time, and I'm not
21 saying that I'll approve it, but that at this point
22 they're advising you on legal strategies and actions
23 that you should take as the trustee of this estate.

24 MR. HOFMANN: Yes, your Honor. Can I alert
25 the Court to one other issue concerning

September 30, 2019

18

1 professionals?

2 THE COURT: All right.

3 MR. HOFMANN: And perhaps the Court has
4 already seen this through the fee application of
5 Colin Jensen's and some other filings that have been
6 made, but before my appointment, there were -- the
7 debtor perhaps didn't do what it should have done
8 with respect to retaining and paying professionals,
9 and I just wanted to alert the Court to this issue,
10 which will come up through a variety of different
11 motions and applications the Court will see, but in
12 some cases it appears the debtor may have used
13 professionals that were never approved by the Court,
14 and an example of that is Strong & Hanni, which is an
15 application I filed to approve their employment the
16 debtor never had before, and it appears the debtor
17 may have paid them prepetition as well -- or, excuse
18 me, post petition.

19 With respect to Colin Jensen, the Court
20 approved their employment, but the order specifically
21 said that Colin Jensen needed to comply with the fee
22 procedures order and also file periodic fee
23 applications. It appears that did not happen,
24 either, and they were paid over \$300,000.

25 So these are issues that I'm struggling

September 30, 2019

19

1 with, especially because, for continuity, I need many
2 of these same professionals, despite those issues
3 that are present. That's why I filed the application
4 to establish an administrative claim bar date to kind
5 of bring all of these issues to a head, but I just
6 wanted to give the Court a preview that that is going
7 to become an issue in this case, I'm sure.

8 THE COURT: Thank you, Mr. Hofmann. There
9 were some suggestions in connection with the motion
10 to appoint a trustee that that was happening, so it
11 appears that will be an issue and an issue we will
12 address going forward.

13 MR. HOFMANN: Thank you.

14 MR. JOHNSON: Just briefly on that, your
15 Honor --

16 THE COURT: Mr. Johnson, you can remain
17 seated. I appreciate the show of respect, but we get
18 a better recording and you look less uncomfortable --

19 MR. JOHNSON: Thank you, your Honor. There
20 are at least two others that are problematic. One is
21 from Fred Pena and his law firm.

22 THE COURT: What -- what --

23 MR. JOHNSON: Fred Pena, P-E-N-A, and his
24 law firm. The debtor -- and this, of course -- this
25 is not Mr. Hofmann's doing. This is pre trustee.

September 30, 2019

20

1 THE COURT: I understand.

2 MR. JOHNSON: But Mr. Pena was retained and
3 paid without court approval, as was Morgan Philpot,
4 hundreds and -- over \$200,000, is my memory, was paid
5 to those professionals without -- not only without
6 court approval of fees, but not -- we don't even have
7 court approval of their employment. And so the long
8 and short of it is just that the studios, of course,
9 are going to reserve their rights with respect to all
10 of these professionals, and we may -- we may file
11 objections.

12 THE COURT: Thank you. I understand that
13 the law is, I think, very clear on these issues.

14 MR. HOFMANN: One of the things I've done,
15 your Honor, is I've asked my accountant, Mark
16 Hashimoto, to compile a list of all payments to
17 professionals throughout the Chapter 11 pre trustee
18 period.

19 THE COURT: All right. Very good. Well,
20 we will address that at a future date. So thank you
21 for making the Court aware of that.

22 Anything else?

23 MR. HOFMANN: Not at this time, your Honor.

24 THE COURT: All right. Thank you, Counsel.
25 The court is in recess.

September 30, 2019

21

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

UNIDENTIFIED SPEAKER: Thank you, your Honor.

THE CLERK: All arise.

(Record closed at 10:26 a.m.)

* * * *

September 30, 2019

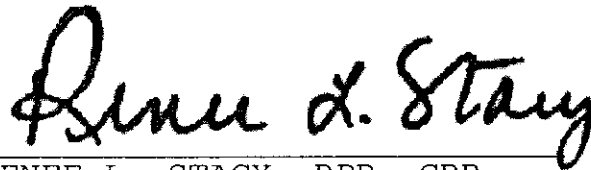
22

1 STATE OF UTAH)
 2 COUNTY OF SALT LAKE) ss.

3
 4 I, RENEE L. STACY, Registered Professional
 5 Reporter and Certified Realtime Reporter for the
 6 State of Utah, do hereby certify that the foregoing
 7 transcript was written stenographically by me from an
 8 electronic recording and thereafter transcribed;

9 That the foregoing pages contain a true and
 10 accurate transcription of the electronically recorded
 11 proceedings and was transcribed by me to the best of
 12 my ability.

Signed this 2nd day of October, 2019.



16 RENEE L. STACY, RPR, CRR
 17 Notary Public in and for the
 18 County of Salt Lake, State of Utah

19
 20
 21
 22
 23
 24
 25