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15 **IN THE UNITED STATES BANKRUPTCY COURT**
16 **DISTRICT OF NEVADA**

17	IN RE:)	Chapter 11
18	XYIENCE INCORPORATED,)	
19	a Nevada corporation,)	No. BK-S-08-10474-MKN
20	Debtor.)	
21	<hr/>)	
22	DAVID HERZOG,)	Adversary Case No. 09-1402-MKN
23	as Liquidating Trustee,)	
24	Plaintiff,)	
25	v.)	
26	ZYEN, LLC, et al.,)	Hearing: To Be Determined
27	Defendants.)	

28 **LIQUIDATING TRUSTEE'S MOTION FOR SANCTIONS**
29 **AGAINST ALL REMAINING DEFENDANTS**

30 Plaintiff David Herzog, as Liquidating Trustee (the "Trustee") for the
31 estate of Xyience Incorporated ("Xyience," or the "Debtor"), the former debtor and debtor
32 in possession in the above-captioned Chapter 11 case (the "Case"), hereby moves this
33 Court, pursuant to Rule 37(d)(1)(A)(ii) of the Federal Rules of Civil Procedure, as made
34 applicable here by Rule 7037 of the Federal Rules of Bankruptcy Procedure, for the entry
35 of an Order imposing monetary and other sanctions, including attorneys' fees and the
36 entry of partial judgment on certain claims, against defendants Bill Bullard, Fertitta
37 Enterprises and Zyen for their egregious violations of the discovery rules by their failing

1 without cause to produce critical electronically stored information (“ESI”) and other
2 documents for nearly nine months after they were due despite pleas from the Trustee’s
3 counsel that such documents were within defendants’ possession and control and needed
4 to be produced. In support of the motion, the Trustee states as follows:

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6 **INTRODUCTION**

7 On August 23, 2010, the Trustee served his second set of discovery requests
8 on defendants (the “Second Discovery Requests”), directed primarily at obtaining the
9 relevant communications, records and other documents of defendants Bill Bullard, Zyen
10 an Fertitta Enterprises (i.e., the remaining defendants in the case). After agreed
11 extensions, Mr. Bullard produced 107 pages of emails and other documents — all dated
12 from and after January 2, 2008 — that purported to represent all of the documents and
13 electronically stored information stored on his computer that were relevant to the
14 matters at issue in the case.

15 The Trustee found it difficult (actually, impossible) to believe that the
16 individual who — during the period June 2007 through December 2007 — had
17 (i) developed, negotiated, and consummated the Zyen October 2007 \$12 million loan
18 facility with the Debtor, (ii) joined the Debtor (either as a member or at a minimum, as a
19 board observer during October 2007), (iii) declared a default under then accelerated and
20 sought to foreclosure of the October 2007 facility, and (iv) had engaged in extensive
21 discussions with the Debtor’s management during December 2007 about a Chapter 11
22 filing, did not possess a single document or item of electronically stored information for
23 this entire time period. And the Trustee made this disbelief known to defendants’
24 counsel on multiple occasions. *See* Group Exhibit A. The defendants’ counsel insisted,
25 however, that Mr. Bullard had discarded these documents and electronically stored
26 information, and that they simply did not exist anywhere within his possession or
27 control. *See* Group Exhibit A.

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1 For many months, the Trustee, despite his skepticism, accepted the word of
2 Mr. Bullard and his counsel (while frankly, researching whether this destruction of
3 evidence constituted spoliation of evidence under the controlling law). But then, on May
4 2, 2011, with Mr. Bullard's deposition approaching in late May 2011, the Trustee's
5 skepticism got the better of him, and he issued a subpoena to Gordon Biersch Brewing
6 Company (of which Mr. Bullard is president and where all his emails and pertinent
7 documents reside), commanding the production of all relevant documents and
8 electronically stored information. Exhibit B.

9 Over the next two months, beginning on the day of Mr. Bullard's
10 deposition, and with Gordon Biersch identifying Mr. Bullard himself as the "person most
11 knowledgeable" about the Gordon Biersch document and ESI retention system, the
12 Trustee received in excess of 1500 brand new documents — from June 2007 into 2008 —
13 that were directly responsive to the Trustee's August 2010 Second Discovery Requests,
14 and that belonged and were in the possession and control of either to Mr. Bullard himself
15 or of his secretary, Pegi Nadeau. So for fully eight months, whilst the crux of the written
16 and oral discovery was taking place in this case, Mr. Bullard had deprived the Trustee of
17 evidence that was relevant, and in some instances critical, to the Trustee's development
18 of his claims in the case.

19 As discussed further below, no conceivable justification exists, in fact or
20 law, for Mr. Bullard's eight month delay in complying with the discovery rules. Quite the
21 contrary, Mr. Bullard's egregious delay in responding to the Trustee's document requests
22 represents an unquestionable and extraordinary violation of the discovery rules — by
23 both him and his counsel. And as set forth below, because this gross misconduct has
24 caused the Trustee tens of thousands of dollars, and severely impacted the development
25 of his case, Mr. Bullard's conduct warrants not only extensive monetary sanctions, but
26 substantial additional sanctions as well, including the entry of partial judgment on two
27 counts of the Trustee's pending complaint against Mr. Bullard and Fertitta Enterprises.
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PERTINENT BACKGROUND

General Case Background

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3 1. On January 18, 2008 (the “Petition Date”), the Debtor filed in this
4 Court its voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11
5 U.S.C. § 101 et. seq. (the “Bankruptcy Code” or the “Code”).

6 2. On May 19, 2008, Xyience filed its liquidating Plan, which provided,
7 among other things, that substantially all of the Debtor’s remaining assets, including all
8 of its pre-petition claims, rights and causes of action, and all of its right and powers to
9 pursue avoidance actions under Chapter 5 of the Bankruptcy Code, would be transferred
10 to and would vest in a Liquidating Trust for the benefit of various creditors groups.

11 3. The Plan further provided that, upon the Effective Date of the Plan,
12 a Liquidating Trustee would represent the Trust Estate.

13 4. On October 23, 2008, the Court entered an Order approving the
14 Debtor’s Disclosure Statement in connection with the Plan and confirming the Plan.

15 5. On November 12, 2009, the Court entered an Order (the “Plan
16 Implementation Order”) authorizing the Trustee to accept the appointment as
17 Liquidating Trustee, and the Trustee accepted his appointment on that day.

18 6. As this Court is aware, on December 29, 2009, the Trustee, acting as
19 the representative of the Debtor’s estate, filed his 17-count original Complaint (the
20 “Original Complaint”) in this proceeding against Zyen, Fertitta Enterprises and four of
21 the Debtor’s former officers and directors, including Mr. Bill Bullard who is the manager
22 of Zyen LLC.

23 7. The Trustee has subsequently amended his complaint twice, and
24 also has settled with three of the defendants, so that at this time, the Trustee is pursuing
25 his Second Amended Complaint against Fertitta Enterprises, Zyen and Mr. Bullard only.

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1 **The Trustee's Discovery Requests to Bullard and Zyen**

2 8. On August 23, 2010, the Trustee served his second set of discovery
3 requests on defendants (the "Second Discovery Requests").

4 9. The first set of discovery requests had been targeted principally and
5 former defendants Adam Frank and Kirk Sanford — because mediation was approaching
6 and the Trustee was seeking principally to obtain background information regarding
7 their roles as the Debtors' co-CEOs — but the Second Discovery Requests were directed
8 at Mr. Bullard, Fertitta Enterprises and Zyen. A copy of the Trustee's Second Discovery
9 Requests is attached hereto as Exhibit C.

10 10. As reflected in Exhibit C, Interrogatory Nos. 4 through 18 (pages 7
11 through 10) asked Mr. Bullard and Zyen to, among other things, identify communications
12 (internal, with the Debtor and with third parties) and other pertinent documentation
13 during the months leading up to, and then subsequent to, the \$12.0 million October 4,
14 2007, Zyen loan facility that stands as a central aspect and event in this proceeding,

15 11. As further reflected in Exhibit C, Request to Produce #1 (page 10)
16 requested that Mr. Bullard, Fertitta Enterprises and Zyen produce, among other things,
17 all documents identified (or that should have been identified) in the answers to the
18 Interrogatories relating to, among other things, that October 2007 Zyen loan facility.

19 12. After agreed extensions of defendants' time to respond to the Second
20 Discovery Requests, the defendants, on October 14, 2010, served their objections and
21 responses to the Second Discovery Requests (the "Second Discovery Responses"). A copy
22 of the Second Discovery Responses is attached hereto as Exhibit D.

23 13. The Second Discovery Responses did not expressly identify any of
24 the requested documents, but it provided in response to Document Request No. 1 (and
25 certain other document requests) that "to the extent that business records maintained by
26 Zyen, Bullard, and/or Fertitta Enterprises are responsive to this [Request to Produce],
27 said records are being gathered by Defendants and will be produced to Plaintiff."

28 Exhibit D at 20.

1 14. After a series of email exchanges in which the parties worked to
2 clarify and resolve several of defendants' objections and responses — none of which is
3 directly pertinent here — defendants served upon the Trustee, on October 19, 2010, a
4 document styled Defendants' Fourth Supplement to Rule 26 Disclosures (the "Fourth
5 Supplemental Disclosure"). A copy of the Fourth Supplemental Disclosure is attached
6 hereto as Exhibit E.

7 15. As part of the Fourth Supplemental Disclosure, defendants
8 produced a mere 107 pages of emails and other documents — the very earliest being from
9 January 2, 2008 — that purported to represent all of the documents and electronically
10 stored information from Mr. Bullard's computer that were relevant to the matters at
11 issue in the case (the "Bullard Initial Production").

12 16. And defendants adopted this position even though the Bullard
13 Initial Production contained no documents whatsoever pertaining to (a) Mr. Bullard's
14 communications with anyone (e.g., the Debtor or the persons providing the funding for
15 the loan) leading up to the October 2007 \$12 million loan facility, (b) Mr. Bullard's
16 actions as board member (or board observer) during the period following the closing of the
17 loan, (c) Mr. Bullard's dealings with Manchester Consolidated Corporation (an entity
18 consisting of, among other principals, Csaba Reider and Bill Smith), which ultimately
19 allied with Zyen and Mr. Bullard in purchasing the Xyience assets, or (d) Mr. Bullard's
20 actions in declaring a default under, accelerating and then seeking to engage in a strict
21 foreclosure of the Zyen loan.

22 17. In a series of correspondence between the Trustee's counsel and
23 defendants' counsel following the Bullard Initial Production, Trustee's counsel expressed
24 disbelief, bordering on incredulity, that Mr. Bullard would have retained no documents or
25 electronically stored information pertinent to the Debtor during the period surrounding
26 the Zyen loan facility (and the negotiations and activities that began in June 2007 and
27 continued past the closing to the very end of 2007). See Group Exhibit A at 1, 7.

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1 18. Nevertheless, defendants’ counsel repeatedly insisted that because
2 Mr. Bullard used an email address of a relatively small company of which he is an officer
3 (Gordon Biersch), all of the pertinent documents and electronically stored information
4 had been discarded — not just emails, but hard documents and all other records
5 pertinent to the loan — and thus that such documentation and electronically stored
6 information was permanently unavailable. *E.g.*, Group Exhibit A at 2.

7 19. Defendants’ counsel (via Mr. Greg Garman) also informed plaintiff’s
8 counsel verbally that subpoenaing Gordon Biersch would be a waste of time because Mr.
9 Bullard had obtained a full understanding of the small Gordon Biersch server he was
10 using and would be able to explain at his own deposition why no emails or any other
11 documents pertinent to this case existed for period prior to January 2, 2008.

12 20. Still, despite the Trustee’s counsel positive relationship with Mr.
13 Garman, the Trustee’s skepticism prevailed, and on May 9, 2011, in conjunction with
14 scheduling Mr. Bullard’s May 24, 2011, deposition, the Trustee caused to be served upon
15 Gordon Biersch a “person most knowledgeable” subpoena demanding the production (at
16 essentially the same time as Mr. Bullard’s deposition) of essentially the same documents
17 that had been encompassed within the Trustee’s Second Discovery Requests (of August
18 23, 2010) — i.e., Exhibit B.

19 21. On May 24, 2011, at the depositions scheduled both for Mr. Bullard
20 personally and for the person most knowledgeable about the Gordon Biersch’s
21 electronically stored information (and the deletion thereof) — whom Gordon Biersch
22 identified as and produced as Mr. Bullard — Mr. Bullard produced 148 additional
23 documents from Mr. Bullard’s computer that were responsive not just to the subpoena,
24 but to the August 2010 Second Discovery Requests as well (the “Bullard Second
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1 Production”).¹ *See* Exhibit K (Bullard PMK of GB Dep. at 22-24) (testifying regarding his
2 production of the 148 new documents).

3 22. As discussed in the section below, the Bullard Second Production
4 contains numerous emails pertinent to the Zyen \$12 million loan facility — some vitally
5 important to the Trustee’s case — created and exchanged during the period from June
6 2007 through the end of that year.²

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9 ¹ The 148 new documents were marked at the deposition as Group Exhibit
10 500 (Bates Nos. GB00001-GB00148). Although the Trustee is not producing them all
11 here, he does identify, describe and attach several of the most critical ones in the next
12 section below.

13 ² Incredibly, Mr. Bullard not only admitted during his May 2011 “person
14 most knowledgeable” deposition that he was a “novice” in terms of his understanding of
15 the Gordon Biersch computer system (Ex. K (Bullard PMK of GB Dep. at 21), but he also
16 testified during this deposition that — even though he withdrew from the Xyience board
17 because of fears of lender liability — (i) he never received a litigation hold letter from his
18 counsel advising him to cease deleting emails that might relevant to this litigation (Ex. K
19 (Bullard PMK of GB Dep at 13), and (ii) he may well have deleted emails pertinent to this
20 litigation at any time (Ex. K (Bullard PMK of GB Dep.) at 23-24). *See generally* Exhibit
21 R (Xyience Board Meeting November 3, 2007: “Mr. Bullard opened the meeting by
22 expressing his concern that certain threatened shareholder lawsuits aimed at the
23 Corporation and the members of the Board might negatively impact his duties as an
24 officer of Fertitta Enterprises ..., and potentially raise lender liability issues in connection
25 with the recent loan made by Zyen, LLC to the Corporation.”) (Emphasis added”).

26 It is now the settled law everywhere, and has been for some time, that
27 “[o]nce a party reasonably anticipates litigation, it must suspend its routine document
28 retention/destruction policy and put in place a 'litigation hold' to ensure the preservation
of relevant documents.” *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of*
Am. §, LLC, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (citing numerous cases from
around the country) (emphasis added). Thus, Mr. Bullard not only unquestionably
violated the rules regarding the timely production of documents, he very well may have
destroyed evidence critical to the Trustee’s case in direct violation of the discovery hold
rules. And although the wrongdoing we are alleging in this motion, and the sanctions we
are seeking here, do not involve spoliation of evidence *per se* — because we do not know
the scope of the relevant or even critical emails that Mr. Bullard (whether as a “novice” or
intentionally) may unilaterally have decided to discard — Mr. Bullard’s conduct in this
regard certainly will be relevant to the spoliation of evidence motion that the Trustee
intends to pursue for Manzen’s wholesale destruction of the Xyience ESI during the
period June 2007 though May 2008.

1 23. But there's more — much more. After the Trustee's counsel asked
2 during the "person most knowledgeable" deposition whether Mr. Bullard had checked his
3 secretary's (Pegi Nadeau's) emails for documents responsive to the August 2010 discovery
4 requests, the defendants produced, on June 24, 2011, a full month after the deposition,
5 Defendants' Eighth Supplement to Initial Disclosures (the "Eighth Supplemental
6 Disclosure").

7 24. In the June 2011 Eighth Supplemental Disclosure,³ the defendants
8 produced (apparently from Ms. Nadeau's computer) some 1404 additional documents that
9 were directly responsive to the Trustee's August 2010 Second Discovery Requests and
10 that contained emails spanning the period from June 2007 through early 2008. A copy of
11 the Eighth Supplemental Disclosure is attached hereto as Exhibit F.

12 25. Thus, the 107 largely irrelevant post-January 2, 2008, emails that
13 Mr. Bullard had produced in the Bullard Initial Production of October 2010 as the full
14 scope of Mr. Bullard's document production has transmogrified over the past year into a
15 production — in the Bullard Second Production and the Eighth Supplemental Disclosure
16 — of more than 1500 documents directly pertinent to the allegations and claims at issue
17 in this litigation.

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25 ³ Defendants' repeated reference to their document productions as
26 "supplements" to their initial disclosures, rather than (extraordinarily late) responses to
27 outstanding discovery requests represents pure semantics. The June 2011 Eighth
28 Supplemental Disclosure consisted of documents directly responsive to the Trustee's
August 2010 discovery requests. Styling them as "supplements" to their initial
disclosures does nothing to alter this reality, or to excuse the defendants' failure timely to
produce the documents (here, some 1500) in response to the Trustee's discovery requests.

1 **The Critical Nature of the Newly Produced Documents**

2 26. As discussed in the Points and Authorities section below, the
3 Trustee does not need to point to smoking gun emails — or even particularly important
4 emails — to render defendants’ conduct here an egregious and sanctionable violation of
5 the discovery rules.

6 27. As it happens, however, the newly produced evidence contains
7 numerous documents that bear directly and critically on the Trustee’s claims here, and
8 thus renders the imposition of sanctions — severe sanctions — uniquely appropriate in
9 this case.

10 **A.. The \$150 Million Purchase Offer**

11 28. For example, unbeknownst to the Trustee until he received the
12 Second Bullard Production in May 2011, Mr. Bullard received on October 3, 2007 (the day
13 before the company-destroying \$12 Zyen loan facility closed) a verbal offer from a third
14 party to purchase Xyience for \$150 million. Exhibit G.

15 29. Mr. Bullard promptly reported this offer to Lorenzo Fertitta. *Id.*

16 30. Mr. Bullard also told Mr. Adam Frank (the Debtor’s co-CEO) about
17 it — but he told Mr. Frank to keep the matter quiet so as not interfere with the closing of
18 the Zyen loan facility. *Id.*

19 31. Mr. Frank, of course, obliged, keeping secret from his own Board of
20 Directors — as they were about to enter into the company-ending Zyen facility — that a
21 potential buyer existed for the Debtor’s assets that could have returned millions of dollars
22 not just to the Debtor’s creditors, but to its equity holders as well. *See* Exhibit S
23 (Deposition Transcript of Adam Frank conducted on May 25, 2011) at 28-30, 67-70.

24 32. Thus, the Trustee did not learn until May 24, 2011, some 16 months
25 into the case, that Zyen had received a potential offer for the Debtor of more than 10 times
26 the value of the loan that Zyen used to take over the company.
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1 **B. The Fertittas' Control over the Debtor**

2 33. Almost as serious, on August 22, 2007, Mr. Bullard exchanged emails
3 with Frank Fertitta and Lorenzo Fertitta in which he discussed, among other things, the
4 absolute control that “we” — the Fertitta-related enterprises — would possess over the
5 Debtor upon the closing of Zyen \$12 million. Exhibit H.

6 34. Although Mr. Bullard softened this statement slightly by noting that
7 the Debtor’s CFO’s had expressed confidence that the Debtor could raise \$7 million in
8 subordinated debt after the closing, and thereby avoid the Fertittas’ takeover of Xyience,
9 this comment was, in a word, nonsense. For in view of the control, default and remedy
10 provisions that Mr. Bullard himself was inserting in the Zyen loan documents even as he
11 drafted the August 22 email, he knew — as would anyone even remotely acquainted with
12 the subordinated debt markets — that no one was going to lend Xyience \$7 million after it
13 had entered into the \$12 million all-encompassing, company-destroying October 2007 loan
14 facility.

15 35. So Mr. Bullard’s failure to produce the August 22, 2007, email to the
16 Fertittas not only deprived the Trustee of critical evidence, but also directly impacted on
17 the nature and qualifications of the financial experts that the Trustee would retain to
18 demonstrate how Mr. Bullard was effecting his plan to obtain complete control over the
19 Debtor and its assets.

20 **C. Mr. Bullard’s New Relationship with Manchester as well as**
21 **The Debtor’s Chief Financial Office, Michael Levy**

22 36. Equally significant, and disturbing, are Mr. Bullard’s efforts to hide
23 from the Trustee (and ultimately this Court) his decision in December 2007 — the month
24 immediately prior to the Petition Date — to “switch horses” from his conspiracy to take
25 over Xyience with co-CEOs Adam Frank and Kirk Sanford to a new alliance with a group
26 comprised of Manchester Consolidated executives (from Canada) and the Debtor’s CFO
27 and director Michael Levy.

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1 37. We already knew from documents (reluctantly) produced by Zyen’s
2 attorneys — Milbank Tweed — that Mr. Bullard had committed perjury during the
3 Bankruptcy Case when, in his Declaration in connection with the Manchester asset sale in
4 March 2008, he testified that he and Zyen had no prior business relationship with the
5 Manchester group. Exhibit I (Bullard 2008 Declaration at 3 ¶ 10). For in fact, on
6 December 14, 2007, Zyen and Manchester had entered into a document styled Consulting
7 Agreement Between Zyen, LLC and Manchester Consolidated Corp. (the “Consulting
8 Agreement”), in which Zyen engaged Manchester to review, analyze (and potentially make
9 an offer for) the Debtor’s assets. Exhibit J (Consulting Agreement).

10 38. Yet, at his deposition on May 24, 2011, when the Trustee’s counsel
11 asked Mr Bullard why he did not disclose the December 2007 Consulting Agreement in his
12 2008 Declaration (or during his subsequent deposition by the Committee’s counsel prior to
13 the asset sale), Mr. Bullard’s answer — an essential admission of perjury — was “I don’t
14 recall specifically. I would be speculating that we never acted on this agreement.” Exhibit
15 T (Bullard 2011 Dep.) at 29.

16 39. Yet, this answer itself was flagrantly false on several fronts.

17 40. For one, the Consulting Agreement authorized and obligated
18 Manchester to work closely with Mr. Levy, the Debtor’s Chief Financial Officer (who, in
19 theory at least, was an officer of the Debtor, not of Zyen or Mr. Bullard) in providing
20 consulting services for Zyen regarding a possible disposition of the Xyience business and
21 assets. Exhibit J (Consulting Agreement) at 1 ¶ 3.

22 41. What’s more, we now know, from documents produced by Mr. Bullard
23 following the May 2011 deposition — and indeed from Manchester’s ultimate role in the
24 purchase of the Xyience assets — that on December 26, 2007, and then again in January
25 2008, Manchester was producing detailed reports for Zyen and Mr. Bullard as to how it
26 planned to take over and restructure the Debtor once Xyience filed for bankruptcy and
27 emerged through a pre-planned asset sale. *See, e.g.*, Exhibit L (Proposed Xyience Re-
28 Finance and Re-Organization Plan 2008); *see also* Exhibit U (email from Reider to

1 Bullard, copied to Bill Smith, attaching a term sheet for a proposed purchase of Xyience's
2 assets seven days before Xyience even filed its Chapter 11 case).⁴

3 42. But even worse, as indicated above, a key player in this new plan, as
4 reflected on page 4 of the December report, was MICHAEL LEVY — the man who, at that
5 very time of Consulting Agreement and Manchester takeover plan, was the CFO of and a
6 director of the Debtor (and soon to be debtor in possession), with fiduciary duties to the
7 Debtor, its creditors and its shareholders, not to Mr. Bullard and Manchester.

8 43. And as this Court is aware from the Trustee's pending motion to
9 compel, the mysterious destruction (or shall we say disappearance) of Mr. Levy's emails
10 during the October 2007 and subsequent time period means that we could not know until
11 we obtained the Gordon Biersch documents — by subpoena — of the close relationship
12 that thereafter developed between Mr. Levy and Mr. Bullard as they planned for the
13 execution of the Manchester plan, and as Mr. Levy (as a fiduciary of the Debtor)
14 corresponded on a regular basis with Mr. Bullard and Zyen (the Debtor's purported
15 lender) regarding, among many other things, (i) the Debtor's daily activities, (ii) its
16 potential preference recipients, and even (iii) the entity that the Debtor, at Zyen's behest,
17 was selecting as the stalking bidder for the Debtor's assets.⁵ *See* Exhibit N (Sattar Dep. at
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19 ⁴ To be clear, Mr Bullard did not even produce these critical documents when
20 required by subpoena to do so. Instead, Mr. Bullard came to the deposition without
21 them, and produced them only after Mr. Backman twice wrote to defendants' counsel —
22 on June 7 and then again on June 18, 2011, of Mr. Bullard's obligation to produce these
23 documents. *See* Group Exhibit M at 1, 2. Only then, and in the weeks that followed, did
24 Mr. Bullard, at long last, produce the most critical documents that are the subject of this
25 motion.

26 ⁵ Adam Frank and Kirk Sanford, among others, had attempted to become
27 part of the bidding process, but they were quickly shot down by Bullard and Zyen, as
28 reflected in this email from Mr. Frank to Mr. Bullard on February 21, 2008: "Kirk and I
submitted a bid and laurel told omer that garmin said that under no circumstances would
you consider a stalking horse bid from kirk or I." Ex. N (emphasis added). So having
once conspired with Frank and Sanford to take over the Debtor, Bullard and Zyen had
now selected the Manchester/Levy team — and nothing that Frank or Sanford might

(continued...)

1 8 and 21-23) (relying on Levy for preference payment information and bidder selection);
2 Group Exhibit O (numerous emails between Bullard and Levy regarding the Debtor's
3 financial condition and contract negotiations); Exhibit P (Bullard inviting Manchester
4 principals to "Q&A Session" with Bullard and Levy regarding funding for the Debtor, and
5 various other aspects of the Debtor's business, more than a week prior to the Debtor's
6 bankruptcy filing); Exhibit Q (Levy, the purported officer of the Debtor, preparing for
7 Bullard, the supposed representative of the lender, the amount of interest owed by the
8 Debtor to Zyen as of April 1, 2008).

9 44. Indeed, the list of relevant, and in some cases critical documents,
10 goes on and on. And although it is true that the Trustee possessed a limited number of
11 these emails from other sources prior to receiving them from the Second Bullard
12 Production and the Eighth Supplemental Production, a critical point here, among many
13 others, is that the Trustee engaged in endless and enormously expensive additional
14 discovery, strategizing, obtaining expert reports, and taking numerous depositions
15 (including of Messrs. Levy and Bullard themselves) during the period between the October
16 2010 Bullard Initial Production and the production of the new 1500 documents — without
17 the benefit of many of those critical documents.

18 45. As set forth below, these facts warrant substantial monetary and
19 more severe sanctions against the defendants (and, unfortunately, their counsel as well).

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26 ⁵(...continued)
27 offer for the Debtor (even if it offered more value to the Debtor than the Manchester bid)
28 was going to persuade Mr. Bullard — whose role supposedly was a mere lender to
Xyience who wanted to be repaid — to allow them interfere with Mr. Bullard's plans to
take over the company with Manchester.

1 **POINTS AND AUTHORITIES**

2 **I. Defendants Indisputably Violated the Discovery Rules**

3 46. Resolution of this motion is, in one sense, stunningly simple:
4 Absolutely no question exists that Mr. Bullard, and his co-defendants and counsel,
5 violated Rule 34, and are subject to sanctions under Rule 37, for failing to produce the
6 1500 pages of documents that were within Mr. Bullard's possession and control in October
7 2010, but that he did not produce until seven to eight months later, in response to the
8 Gordon Biersch subpoena. Rule 34(2); (37)(d)(1)(A)(ii); *Anheuser-Busch, Inc. v. Natural*
9 *Beverage Distributors, Inc.*, 69 F.3d 337, 348 (9th Cir.1995) (“[t]his court has squarely
10 rejected the notion that a failure to comply with the rules of discovery is purged by belated
11 compliance”); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 110 (2d Cir.
12 2002) (“purposeful sluggishness” violates the discovery rules, and can warrant sanctions,
13 every bit as much as the failure to produce at all); *Cache La Poudre Feeds, LLC v. Land*
14 *O'Lakes, Inc.*, 244 F.R.D. 614, 630 (D. Colo. 2007) (defendant's counsel “failed in many
15 respects to discharge their obligations to coordinate and oversee discovery [where] by
16 [their] own admission, [they] took no independent action to verify the completeness of the
17 employees' document production”).

18 47. Nor can defendants' conduct be construed as mere inadvertence, or
19 even simple negligence. Time and again, the Trustee's counsel pleaded with defendants'
20 counsel — verbally and in writing — to review Mr. Bullard's hard files and ESI at Gordon
21 Biersch to locate the relevant 2007 documents. And time and again, defendants' counsel
22 (often mockingly) responded that such documents did not exist. Indeed, not until the day
23 of Mr. Bullard's deposition — i.e., the return date of the subpoena — did counsel
24 acknowledge that neither they nor Mr. Bullard had made any effort whatsoever to locate
25 archived ESI and related documents that would be responsive to the Trustee's August
26 2010 discovery requests.

27 48. Accordingly, no question exists that defendants and their counsel
28 have engaged in reckless ---- bordering on willful — misconduct in their failure to respond

1 to the Trustee's basic initial discovery requests. *E.g.*, *Residential Funding Corp. v.*
2 *DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) ("District courts should not
3 countenance "purposeful sluggishness" in discovery on the part of parties or attorneys and
4 should be prepared to impose sanctions when they encounter it.").

5 49. What's more, the severity of this conduct — together with the
6 sanctions that must attend it — is heightened substantially by the fact that defendants
7 and their counsel knew, during the entire time that the Trustee was attempting to obtain
8 Mr. Bullard's emails and related documents, that the other side of many of those emails
9 were unavailable to the Trustee because Manzen — which possessed the Xyience ESI on
10 its servers — was claiming that the servers had crashed and hence that the data was
11 entirely inaccessible and unavailable.

12 50. Thus, the close question here — if a close one exists at all — is not
13 whether defendants and their counsel have violated the discovery rules — they
14 indisputably have done so — but instead what the appropriate sanctions for such
15 violations should be. We address this regrettable, but unavoidable, issue in the next
16 section below.

17
18 **II. The Appropriate Monetary and Other Sanctions for Defendants'**
Wilful and Egregious Discovery Violations of the Discovery Rules.

19 51. Rule 37(d) empowers this Court to impose a wide variety of sanctions
20 for the discovery violations at issue here. Rule 37(d)(1)(A)(ii); Rule 37(d)(3).

21 52. Most common, and obviously necessary and appropriate here, are
22 monetary sanctions, which here must include the costs to the Trustee of, among other
23 things:

24 (a) Conducting six depositions (including of Mr. Levy and Mr.
25 Bullard) and defendant one without the belatedly produced documents;

26 (b) Engaging in countless correspondence with defendants'
27 counsel in an effort to obtain the documents;

28

1 (c) Obtaining (for more than \$50,000) an expert damages report
2 without the benefit of the critical documents (including, among others, the
3 \$150 million purchase offer for Xyience made in October 2007);

4 (d) Strategizing with his client, interviewing witnesses and
5 preparing analyses of the various claims and issues in this case; and

6 (e) Of course, having to issue, and then take, the Gordon Biersch
7 subpoena and deposition on May 24, 2011.

8 *See* Fed R. Civ. P. Rule 37(d)(3) (in addition to or in lieu of the harsher sanctions provided
9 by Rule 37(d)(2)(A)(i)-(vi), a court imposing sanctions for unjustifiable failures to comply
10 with requests to produce “must require the party failing to act, the attorney advising that
11 party, or both to pay the reasonable expenses, including [but not limited to] attorney's
12 fees”).

13 53. Furthermore, beyond compensating the wronged party, monetary
14 sanctions also are intended to punish and deter; thus, in addition to the aforementioned
15 sanctions — the precise dollar amounts of which the Trustee will provide within 30 days
16 the Court’s granting of this motion — the Trustee asks that the Court impose an
17 additional (and quite reasonable) \$50,000 sanction on defendants for their flagrant
18 discovery violations here. *See, e.g., S.E.C. v. Happ*, 295 F. Supp. 2d 189, 200 (D. Mass.
19 2003) (imposing monetary sanction of \$34,758, in addition to actual fees and expenses, as
20 a civil penalty bad faith conduct in discovery non-compliance), *aff’d* 392 F.3d 12 (1st Cir.
21 2004); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552-553 (D. Minn. 1989) (ordering
22 violating party to pay double the actual expenditures incurred by the moving party
23 because the “Court is not persuaded ... that this amount [the actual fees and costs alone]
24 will fully compensate plaintiffs for the harm done to them. . . . [n]or adequately punish
25 defendant and deter future transgressions”).

26 54. Finally, as the Ninth Circuit, among a multitude of other courts, has
27 held, and as 37(d)(2)(A)(i)-(vi), makes clear, monetary sanctions are only one component —
28 and a frequently inadequate one — of the sort of sanctions that a Court may, and in

1 circumstances such as the instant one should, impose for the sorts of egregious and wilful
2 discovery violations at issue here. *G-K Properties v. Redevelopment Agency of San Jose*,
3 577 F.2d 645, 647-48 (9th Cir.1978); (“Where it is determined that counsel or a party has
4 acted willfully or in bad faith in failing to comply with rules of discovery or with court
5 orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the
6 discretion of the trial court to dismiss the action or to render judgment by default against
7 the party responsible for noncompliance.... We encourage such orders.”) (Emphasis added)

8 55. Indeed, were the Trustee the violating party here, virtually no
9 question whatsoever exists that the defendant would be asking for dismissal of at least
10 some of the Trustee’s claims — and specifically, those claims directly impacted by the
11 Trustee’s failure to comply with the discovery rules. *See, e.g., National Hockey League v.*
12 *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976), *Leon v.*
13 *IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. Wash. 2006) (dismissing plaintiff’s claims for
14 ongoing discovery violations)..

15 56. And what’s good for the goose is good for the gander. Mr. Bullard’s
16 flagrant and willful discovery abuses have directly impacted the Trustee’s pursuit of many
17 of his claims — and most significantly, the breach of fiduciary duty claim again against
18 Mr. Bullard (Count VII) and the insider preference claim against Fertitta Enterprises (of
19 whom Mr. Bullard was a senior officer) (Count X).

20 57. As a result, an appropriate, and indeed extremely reasonable,
21 sanction here would be to grant judgment against defendants (on the issue of liability
22 only) on these two claims as a proper remedy, and punishment, for Mr. Bullard’s egregious
23 violations of the discovery rules in this case. *E.g., Bratka v. Anheuser-Busch Co.*, 164
24 F.R.D. 448, 463-464 (S.D. Ohio 1995) (“a default judgment [against defendant] on the
25 issue of liability would not only serve the purposes of punishment and deterrence but it
26 would also have a direct relationship to the specific evidence which defendant failed to
27 produce”).

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CONCLUSION

WHEREFORE, the Trustee prays that this Court enter an Order awarding monetary sanctions against defendants as set forth above for their multiple and egregious discovery violations delineated here, entering partial judgment against defendants on the issue of liability on Count VII and Count X of plaintiff's Second Amended Complaint, and granting the Trustee such other and further relief as may be just and proper.

Dated: August 9, 2011

Respectfully submitted,

/s/ Jonathan A. Backman

Jonathan A. Backman
Law Office of Jonathan A. Backman
117 N. Center Street
Bloomington, Illinois 61701-5001
(309) 820-7420
FAX: (309) 820-7430
jbackman@backlawoffice.com

*Counsel for David Herzog, as Liquidating Trustee for
The Estate of Xyience, Incorporated*

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CERTIFICATION OF JONATHAN A. BACKMAN

I, JONATHAN A. BACKMAN, declare under penalty of perjury that I am the attorney for the Trustee, that I have personal knowledge of the facts set forth in the above and foregoing motion, that the facts and representations set forth therein are true and correct to the best of my knowledge and belief.

I further certify, as reflected in the five emails attached as Group Exhibits A and M, that I have attempted to confer with defendants in a sincere and good faith effort to obtain the aforementioned discovery, but that such efforts have proved unsuccessful as detailed in the motion, and thus that court action is now required.

Dated: August 9, 2011

/s/ Jonathan A. Backman
Jonathan A. Backman

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CERTIFICATE OF SERVICE

I, Jonathan A. Backman, hereby certify that on August 9, 2011, I electronically filed the foregoing **Liquidating Trustee’s Motion for Discovery Sanctions Against All Remaining Defendants** using the ECF system which will send notification of such filing to the following:

OGONNA M. ATAMOH, ESQ.
on behalf of the Liquidating Trustee
ogatamoh@nevadafirm.com

MATTHEW C. ZIRZOW, ESQ.
on behalf of all Defendants
bankruptcynotices@gordonsilver.com, bknotices@gordonsilver.com

and I hereby certify that I have delivered the document to the following non-CM/ECF participants by United States Priority Mail postage prepaid: NONE.

/s/ Jonathan A. Backman

Group Exhibit A

Jon Backman

From: "Jon Backman" <jbackman@backlawoffice.com>
To: "JZS Joel Z. Schwarz" <JZS@GORDONSILVER.com>
Cc: "Greg Garman" <GEG@GORDONSILVER.com>; "MCZ Matthew C. Zirzow" <MCZ@GORDONSILVER.com>; "Eileen Backman" <ebackman@backlawoffice.com>; "Jon Backman" <jbackman@backlawoffice.com>; "Molly Anthony" <manthony@nevadafirm.com>; "Ogonna Atamoh" <oatamoh@nevadafirm.com>
Sent: Wednesday, December 08, 2010 6:41 AM
Subject: Xyience/Herzog v. Zyen/Discovery Issues
Good morning Joel ---

In view of the recent rescheduling of the discovery deadlines as well as the current status of our efforts to obtain the emails and certain other data from the Xyience servers, I propose that we cancel the deposition of Bill Bullard that we tentatively have scheduled for December 20, 2010. Please let me know whether this poses a problem for you or your clients. Unless I hear otherwise from you, you may advise Bill Bullard that the deposition on that date has been cancelled and that he may make other plans for that day.

On a related note, please accept this email as an effort under Rule 37 to confer regarding Mr. Bullard's 2007 emails. While you had suggested during our last call that it would not have been inappropriate of Mr. Bullard to dispose of all his emails through the end of 2007, you did not actually state that he had done so. And frankly, inasmuch as Mr. Bullard uses a corporate email account (i.e., the Gordon Biersch account), I think it unlikely, bordering on inconceivable, that those emails would have been permanently and irretrievably deleted. In any event, please let me know your position on this matter by no later than the close of business on Friday, December 17, 2010. If you advise me that Mr. Bullard will be producing no further Xyience-related emails, then I will need to proceed with a subpoena to Gordon Biersch and, most likely, with a motion to compel as well.

Finally, please note that, notwithstanding the foregoing cancellation/rescheduling of Mr. Bullard's deposition, we WILL BE PROCEEDING with the deposition of Brent Hucks in Boise, Idaho, next week --- at the rescheduled start time of 11:00 a.m. I sent you the pertinent documents for the deposition a few days ago, but since I have not received a confirmation that you received them, please let me know if you did not do so, in which case I will resend them promptly.

I look forward to seeing you in Idaho next week.

Jon

Law Office of Jonathan A. Backman
www.backlawoffice.com
117 North Center Street
Bloomington, IL 61701
(309) 820-7420
FAX: (309) 820-7430
jbackman@backlawoffice.com

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RE: Xyience/Herzog v. Zyen/Discovery Issues

From: **JZS Joel Z. Schwarz** (JZS@GORDONSILVER.com)
Sent: Mon 12/13/10 1:16 PM
To: 'Jon Backman' (jbackman@backlawoffice.com)
Cc: Greg Garman (GEG@GORDONSILVER.com); MCZ Matthew C. Zirzow (MCZ@GORDONSILVER.com); Eileen Backman (ebackman@backlawoffice.com); Molly Anthony (manthony@nevadafirm.com); Ogonna Atamoh (oatamoh@nevadafirm.com)

Jon,

We are amendable to rescheduling Mr. Bullard's deposition. We are looking into whether there are any additional emails, but I am not sure why you think that it would be "inconceivable" that Gordon Biersch would not have kept emails from 3 years ago.

From: Jon Backman [mailto:jbackman@backlawoffice.com]
Sent: Wednesday, December 08, 2010 4:41 AM
To: JZS Joel Z. Schwarz
Cc: Greg Garman; MCZ Matthew C. Zirzow; Eileen Backman; Jon Backman; Molly Anthony; Ogonna Atamoh
Subject: Xyience/Herzog v. Zyen/Discovery Issues

Good morning Joel ---

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I look forward to seeing you in Idaho next week.

Jon

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Joel Schwarz, Esq.

Gordon Silver

3960 Howard Hughes Pkwy.

Ninth Floor

Las Vegas, NV 89169

Tel: 702.796.5555

Fax: 702.369.2666

E-mail: JZS@GORDONSILVER.com



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Eileen M. Backman

From: Jonathan Backman [jbackman1@hotmail.com]
Sent: Monday, December 13, 2010 1:24 PM
To: jzs@gordonsilver.com; Jon Backman
Cc: geg@gordonsilver.com; mcz@gordonsilver.com; Eileen Backman; Molly Anthony; Ogonna Atamoh
Subject: RE: Xyience/Herzog v. Zyen/Discovery Issues

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Joel ---

Thank you for the note. Perhaps "inconceivable" is too strong of a term. But I would still think it unlikely that a company the size of Gordon Biersch would not retain emails for at least three years. If I am wrong, then I will stand corrected, but please investigate a bit further. Also, please update me at your earliest convenience on the status of Adam Frank's emails and the Xyience servers.

I look forward to seeing you on Friday.

Please note: I am having temporary problems with my outgoing email so I am using my Hotmail address for outgoing emails, but please continue to use my office address for emails to me as I am able to receive them here without a problem at the office email address. I do not check this Hotmail address for incoming emails very often. Thanks.

Jon

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jbackman@backlawoffice.com

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From: JZS@GORDONSILVER.com
To: jbackman@backlawoffice.com
CC: GEG@GORDONSILVER.com; MCZ@GORDONSILVER.com; ebackman@backlawoffice.com; manthony@nevadafirm.com; oatamoh@nevadafirm.com
Date: Mon, 13 Dec 2010 11:14:17 -0800
Subject: RE: Xyience/Herzog v. Zyen/Discovery Issues

Jon,

We are amendable to rescheduling Mr. Bullard's deposition. We are looking into whether there are any additional emails, but I am not sure why you think that it would be "inconceivable" that Gordon Biersch would not have kept emails from 3 years ago.

From: Jon Backman [mailto:jbackman@backlawoffice.com]

Sent: Wednesday, December 08, 2010 4:41 AM

To: JZS Joel Z. Schwarz

Cc: Greg Garman; MCZ Matthew C. Zirzow; Eileen Backman; Jon Backman; Molly Anthony; Ogonna Atamoh

Subject: Xyience/Herzog v. Zyen/Discovery Issues

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I look forward to seeing you in Idaho next week.

Jon

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Joel Schwarz, Esq.
Gordon Silver

3960 Howard Hughes Pkwy.

Ninth Floor

Las Vegas, NV 89169

Tel: 702.796.5555

Fax: 702.369.2666

E-mail: JZS@GORDONSILVER.com



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Eileen M. Backman

From: Jon Backman [jbackman@backlawoffice.com]
Sent: Wednesday, December 15, 2010 7:27 PM
To: JZS Joel Z. Schwarz
Cc: Greg Garman; MCZ Matthew C. Zirzow; Aman Daemi-Rashidi; Anna Dang; Jon Backman; Eileen M. Backman
Subject: Re: Update on Xyeince/Manzen server issues -- Related Rule 37 Issues

Follow Up Flag: Follow up
Flag Status: Completed

Hi Joel ---

I am looking forward to getting the CDs on Friday and reviewing them. It appears that we are well on our way to putting the server issues behind us. Will you have Adam Franks' emails as well?

Regarding the back-up tapes, Eileen spoke at some length with an individual named Scott from the service that Santoro Driggs uses for copying and for electronic discovery issues. I do not believe that he would be the one to obtain the data, but he appeared to have people he used in town who could do so.

In any event, by this email, I am asking Eileen to update me and you simultaneously on where she had left her discussions with Scott, and what he was and/or will be recommending for retrieving the data from the back-up tapes. We do not need to use Scott, but they have impressed me as extremely professional and diligent on the few occasions I have used them in Las Vegas, so they may be a good choice.

A related issue that I hope to address with you on Friday pertains to Bill Bullard. Separate and apart from the issue regarding his 2007 emails, I note that my Interrogatory Nos. 5 and 6 in the Trustee's second set of discovery requests also asked you (i.e., the Fertitta-related defendants) to identify term sheets, analyses, non-email communications, etc., etc., regarding their discussions about, development of, analysis of and interim and final terms of the Fertitta and then the Zyen loan facilities. Your answers to the interrogatories indicated that you would be identifying/producing documents responsive to these interrogatories that are within the remaining defendants' possession and control. To date, however, I do not believe that I have received any (or at least not many) documents from the possession of Fertitta, Zyen or Bill Bullard that are responsive to this request.

I have not to date understood your position that Bill/Gordon Biersch may have disposed of all of Bill's pre-2008 emails as also suggesting that Bill may have disposed of all of his other electronic and hard documents relating to Xyeince during the critical 2007 period. Would you kindly review Interrogatory Nos. 5 and 6, and discuss them with Bill and/or your other clients prior to our meeting on Friday so that I can at least obtain from you your position as to these documents. Needless to say, if your position will be that Fertitta/Zyen/Bill Bullard and Gordon Biersch have disposed of every document and electronic file from 2007 that pertains to their two large loans to Xyeince during this period, then we are going to need some statements under oath to this effect, and probably a discussion with the judge as well. But first let's make sure we clearly understand our and our clients' positions on these matters.

I look forward to seeing you Friday.

Jon

----- Original Message -----

From: JZS Joel Z. Schwarz
To: 'jbackman@backlawoffice.com'
Cc: [Greg Garman](#) ; [MCZ Matthew C. Zirzow](#) ; [Aman Daemi-Rashidi](#) ; [Anna Dang](#)
Sent: Wednesday, December 15, 2010 5:10 PM
Subject: Update on Xyeince/Manzen server issues

Jon,

I received 3 disks today, which I will have copied and deliver to you on Friday:

Disk 1- Labeled Xyience 061120- This disc contains a complete backup of the Xyience QuickBooks file through the bankruptcy filing. The admin password has been reset to "xyience".

Disk 2- Labeled Xyience Inc 2008- This disk contains a complete backup of the Xyience QuickBooks file that was used from the BK filing to the asset acquisition. The admin password has been reset to "xyience".

Disk 3- Labeled Text files of Drive Directories from Orpheus- This Contains 1 text file for each of the 2 installed drives in the "miscellaneous" server. Complete file information is included on each file, including dates modified. These files were created with a program called Karen's Directory printer. You can get more details about the program at <http://www.karenware.com/powertools/ptdirprn.asp>. You can review the text files and determine if there are any files you want copied from that server.

Also, I spoke with Chad, who just got back from his trip, and he says he has the back-up tapes. We need to figure out a place to send them for analysis.

Joel Schwarz, Esq.
Gordon Silver
3960 Howard Hughes Pkwy.
Ninth Floor
Las Vegas, NV 89169
Tel: 702.796.5555
Fax: 702.369.2666
E-mail: JZS@GORDONSILVER.com



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Exhibit B

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re: XYIENCE, INCORPORATED, Debtor.	Case No. 08-10474-MKN Chapter 11
DAVID R. HERZOG, AS LIQUIDATING TRUSTEE, Plaintiff, v. ZYEN, LLC, A NEVADA LIMITED LIABILITY COMPANY, FERTITTA ENTERPRISES, INC., A NEVADA CORPORATION, WILLIAM BULLARD, ADAM FRANK, KIRK SANFORD, AND OMER SATTAR, Defendants.	Adv No. 09-1402-MKN SUBPOENA IN A CASE UNDER THE BANKRUPTCY CODE

TO: Person Most Knowledgeable of Gordon Biersch Brewing Company***
 c/o William Bullard, President and Registered Agent
 10801 W. Charleston Blvd, Suite 600
 Las Vegas, NV 89135

YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

Place:	Courtroom:
	Date and Time:

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

***See Exhibit B hereto for the subject matters on which deponent(s) will be examined pursuant to Rule 30(b)(6).

Place: GORDON SILVER, 3960 Howard Hughes Pkwy., 9th Floor, Las Vegas, Nevada 89169	Date and Time: Tuesday, May 24, 2011, at 10:00 a.m.
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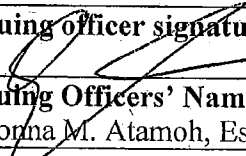
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects): **All Documents and things referenced on Exhibit A hereto that are within the possession and control of you or your Custodian of Records.**

Place: GORDON SILVER, 3960 Howard Hughes Pkwy., 9th Floor, Las Vegas, Nevada 89169	Date and Time: Same as Deposition
--	---

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises:	Date and Time:
------------------	-----------------------

Any subpoenaed organization not a party to this proceeding shall designate one or more officers, directors, or managing agents, or other persons who will testify on its behalf, and shall set forth, for each person designated, the matters on which the person will testify, Fed. R. Civ. P. 30(b)(6) made applicable to this proceeding by Rule 7030, Fed. R. Bankr. P. See Rules 1018 and 9014, Fed. R. Bankr. P.

Issuing officer signature and Title: 	Date: May 9, 2011
Issuing Officers' Name, Address and Phone Number Ogonna M. Atamoh, Esq., 400 S. 4 th St., 3 rd Floor, Las Vegas, NV 89101 (702) 791-0308	

Proof of Service		
Served	Date	Place
Gordon Biersech Brewing Co.	5-9-11 @ 3:27 pm	10801 W. Charleston Blvd #600, Las Vegas, NV 89117
Served on (Print Name) Paul Mischels, Comptroller	Manner of Service Personal	
Served by (Print name) Tim Dillard	Title Process Server	
Declaration of Server		

I declare under penalty of perjury under the law of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 5-9-11
(Date)


Signature of Server

Address of Server **PROFESSIONAL INVESTIGATORS INC.**
123 N. 9TH STREET
LAS VEGAS, NV 89101
NV LIC: 657
WORKCARD # 1509215

Rule 45, Federal Rules of Civil Procedure, Parts c & d:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected material and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specific information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

EXHIBIT A

DEMAND FOR PRODUCTION OF DOCUMENTS AND THINGS

Please produce the following documents electronically stored information¹ and tangible things to the extent that they are in the possession or control of Gordon Biersch Brewing Company ("Gordon Biersch" or the "Company"), or any officer or director thereof, as of the date of this subpoena: Any and all communications, documents, electronic mail and/or other files or data (including hard drives from computers, copiers and the like) evidencing, reflecting or pertaining to Xyience, Incorporated ("Xyience"), Adam Frank and/or Kirk Sanford during the period June 1, 2007, through April 1, 2008. For the sake of clarify, documents and electronically stored information pertaining to Xyience shall be produced even if they do not involve Messrs. Frank or Sanford in any way (such as, by way of illustration and not exclusion, (i) communications among Gordon Biersch officers or employees, and/or between Gordon Biersch officers and any third party, pertaining to possible loans to or the acquisition of Xyience, and/or (ii) internal documents pertaining to any such loans and/or acquisitions).

1. Any and all communications, documents, electronic mail and/or other files or data (including hard drives from computers, copiers and the like) evidencing, reflecting or pertaining to Gordon Biersch's policies, practices or customs regarding the storage of and/or the deletion or destruction of documents and/or electronically stored information, including but not limited to any written or verbal communications between or among anyone at the Company after Mr. William Bullard announced at the November 3, 2007, board meeting that he had concerns that one of the entities with which he was affiliated might become the subject of litigation.
2. Any and all communications, documents, electronic mail and/or other files or data (including hard drives from computers, copiers and the like) containing, evidencing, reflecting or pertaining to Gordon Biersch's storage of and/or deletion or destruction of documents and/or electronically stored information created during or pertaining to the period June 1, 2007, through April 1, 2008 (regardless of when such storage, destruction or deletion actually occurred).

¹ Electronically stored information should be produced in the format in which it was originally stored or saved if such format is compatible with and/or readable by Microsoft Office, Microsoft Word, Microsoft Excel, Microsoft PowerPoint, Microsoft Office Express, or WordPerfect. Otherwise, the electronically stored information should be produced in hard copy or Adobe .pdf with the properties of the document, to the extent available, also printed in hard copy and accompanying the document in the same format.

EXHIBIT B

SUBJECT MATTER OF TESTIMONY

The subject matter as to which the deponent will be examined, and as to which Gordon Biersch Brewing Company ("Gordon Biersch" or the "Company") should identify one or more officers, directors, managers or other persons to testify in accordance with Rule 30(b)(6) of the Federal Rules of Civil Procedures, are as follows:

1. Gordon Biersch's policies, practices or customs regarding the storage of and/or the deletion or destruction of documents and/or electronically stored information to the extent that such policies, practices or custom were utilized, in whole or in part, during the period June 1, 2007, through April 1, 2008.
2. Gordon Biersch's storage of and/or deletion or destruction of documents and/or electronically stored information created during and/or pertaining to the period June 1, 2007, through April 1, 2008 (regardless of when such storage, destruction or deletion actually occurred).

1 Jonathan A. Backman, Esq.
Illinois Bar No. 6196243
2 Law Office of Jonathan A. Backman
117 N. Center Street
3 Bloomington, Illinois 91701-5001
Telephone: 309-820-7420
4

Ogonna M. Atamoh, Esq. (NV Bar No. 7589)
5 Email: oatamoh@nevadafirm.com
SANTORO, DRIGGS, WALCH,
6 KEARNEY, HOLLEY & THOMPSON
400 South Fourth Street, Third Floor
7 Las Vegas, Nevada 89101
Telephone: 702/791-0308
8 Facsimile: 702/791-1912
Attorney for David R. Herzog, Liquidating Trustee
9

10 UNITED STATES BANKRUPTCY COURT
11 DISTRICT OF NEVADA

12 In re:
13 XYIENCE INCORPORATED,
14 Debtor.

Case No. BK-S-08-10474-MKN
Chapter 11

15 DAVID R. HERZOG, as Liquidating Trustee,
16 Plaintiff,

Adv. No. 09-1402-MKN

17 v.

**NOTICE OF TAKING DEPOSITION OF
PERSON MOST KNOWLEDGEABLE OF
GORDON BIRSCH BREWING
COMPANY**

18 ZYEN, LLC, a Nevada limited liability company,
19 FERTITTA ENTERPRISES, INC., a Nevada
corporation, WILLIAM BULLARD, ADAM
FRANK, KIRK SANFORD, and OMER
20 SATTAR,; et al.,

Date of Deposition: May 24, 2011
Time of Deposition: 10:00 a.m.

21 Defendants.

Location: **GORDON SILVER**, 3960
Howard Hughes Pkwy., 9th Floor, Las
Vegas, Nevada 89169

22
23 PLEASE TAKE NOTICE that Plaintiff David R. Herzog, as Liquidating Trustee, by and
24 through its counsel Jonathan A. Backman, Esq., will take the deposition of the designated
25 representative of representatives of Gordon Biersch Brewing Company pursuant to Rule 26 and
26 Rule 30(b)(6) of the Federal Rules of Civil Procedure, as incorporated by Rule 7026 and Rule
27 7030 of the Federal Rules of Bankruptcy Procedure, on May 24, 2011 at 10:00 a.m. at the offices
28 of **GORDON SILVER**, 3960 Howard Hughes Pkwy., 9th Floor, Las Vegas, Nevada 89169.

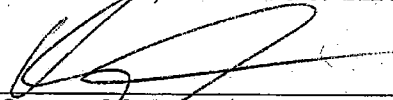
SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON



1 Said deposition will be taken by before a notary public, or before some other officer
2 authorized by law to administer oaths. Testimony shall continue from day to day until
3 completed. You are invited to attend and cross-examine. The topics and documents at issue in
4 the deposition are included in **Exhibits A and B to the subpoena** to the deponent being served
5 substantially concurrently herewith, which subpoena is attached hereto.

6 DATED this 9th day of May 2011.

7 **SANTORO, DRIGGS, WALCH,**
8 **KEARNEY, HOLLEY & THOMPSON**

9 
10 Ogonna M. Atamoh, Esq.
11 Nevada Bar No. 7589
12 400 South Fourth Street, Third Floor
13 Las Vegas, Nevada 89101

14 And

15 Jonathan A. Backman, Esq.
16 Illinois Bar No. 6196243
17 Law Office of Jonathan A. Backman
18 117 N. Center Street
19 Bloomington, Illinois 91701-5001
20 *Attorneys for David R. Herzog, Liquidating*
21 *Trustee*

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON



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Exhibit C

Jonathan A. Backman
Law Office of Jonathan A. Backman
117 N. Center Street
Bloomington, Illinois 61701-5001
(309) 820-7420
jbackman@backlawoffice.com

Ogonna M. Atamoh, Esq. (NV Bar No. 7589)
Email: ootamoh@nevadafirm.com
SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308

Counsel for the Liquidating Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

<p>IN RE:</p> <p>XYIENCE INCORPORATED, a Nevada corporation,</p> <p>Debtor.</p> <hr/> <p>DAVID HERZOG, as Liquidating Trustee,</p> <p>Plaintiff,</p> <p>v.</p> <p>ZYEN, LLC, et al.,</p> <p>Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>No. BK-S-08-10474-MKN</p> <p>Adversary Case No. 09-1402-MKN</p>
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LIQUIDATING TRUSTEE'S SECOND SET OF DISCOVERY REQUESTS

Plaintiff David Herzog, as Liquidating Trustee (the "Trustee") for the estate of Xyience Incorporated ("Xyience," or the "Debtor"), the former debtor and debtor in possession in the above-captioned Chapter 11 case (the "Case"), respectfully propounds the following to defendants Zyen, LLC ("Zyen"), Fertitta Enterprises, Inc. ("Fertitta"), William Bullard, and Adam Frank, to be responded to separately and under oath within 30 days of service hereof: (a) requests to admit (the "Requests to Admit") pursuant to Rule 36 of the Federal Rules of Civil Procedure (the "Rules"), made applicable here by Rule 7036 of the Federal Rules of Bankruptcy Procedures; (b) interrogatories (the "Interrogatories")

1 pursuant to Rule 33, and (c) requests that defendant produce documents and things for
2 plaintiff's inspection at offices of **SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY &**
3 **THOMPSON, 400 South Fourth Street, Third Floor, Las Vegas, Nevada 89101, on**
4 **Tuesday, October 5, 2010, at 10:00 a.m.**, or at such other time and place to which the
5 parties may mutually agree, pursuant to Rule 34 (the "Document Requests," and
6 collectively with the Interrogatories, the "Discovery Requests").

7
8 I. DEFINITIONS AND INSTRUCTIONS

9 A. The following terms shall have the following meanings throughout these
10 Discovery Requests:

11 1. "Adversary Proceeding" means the above-captioned adversary
12 proceeding in the Case.

13 2. "Document" or "document" means the original (or if unavailable, a
14 copy), and all nonidentical copies (whether different from the original because of notes
15 made on such copies or otherwise), of all written, printed, recorded, graphic or
16 electronically stored matter of every kind and description, including all attachments or
17 addenda annexed thereto, whether inscribed by hand or by mechanical, electronic,
18 microfilm, computer, photographic or other means, as well as phonic or visual
19 reproductions, in your possession, custody or control. If any document requested herein
20 has been lost, discarded or destroyed, such shall be identified as completely as possible,
21 including, without limitation, the following information:

- 22 a. date of disposal;
 - 23 b. manner of disposal;
 - 24 c. reason for disposal;
 - 25 d. person authorizing the disposal; and
 - 26 e. person disposing of the document.
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3. "Identify" or "identify" means to provide the following information:
- a. When used with reference to a natural person: state his full name, present or last known business or residence address, and his last known or present business affiliation and position. If such person is or has been your employee, also state the dates of his employment and describe the jobs held or performed by him.
 - b. When used with reference to a business entity: state its full name and the address of its principal place of business.
 - c. When used with reference to a document state:
 - (1) the nature of the document (e.g., letter, contract, chart, memorandum);
 - (2) its date;
 - (3) each author (and, if different, each signer) thereof, and each person to whom the document was distributed; and
 - (4) its subject matter.
4. "Person" or "person" means any natural person or any business entity, such as a proprietorship, partnership, corporation, association, joint venture and any other legally recognized business entity, as well as all divisions, departments, affiliations, subsidiaries or other subunits of the foregoing entities.
5. "You", "you" or "your" refers to defendants Zyen, Fertitta, Bullard and Frank, collectively and individually, unless the context clearly indicated otherwise.

1 B. The singular form shall be interpreted as including the plural; likewise, the
2 plural form shall be interpreted as including the singular, and any reference to the
3 masculine, feminine or neuter gender shall be interpreted as including each gender not
4 specifically included in the reference.

5 C. The word "and" and the word "or" shall be construed disjunctively and
6 conjunctively as and/or.

7 D. Unless a different time period is expressly or implicitly referenced, these
8 Discovery Requests are limited to the period from January 1, 2007, through the present.
9 Documents originating before or after the foregoing period or before or after any other
10 time period specifically indicated in any of the Interrogatories or Requests to Produce
11 which relate or refer to other documents responsive to any of the Interrogatories or
12 Requests to Produce also are to be produced.

13 E. If you object to a Discovery Request, then state the reasons for your
14 objection with specificity.

15 F. Electronically stored information should be produced in the format in which
16 it was originally stored or saved if such format is compatible with and/or readable by
17 Microsoft Office, Microsoft Word, Microsoft Excel, Microsoft PowerPoint, Microsoft Office
18 Express, or WordPerfect. Otherwise, the electronically stored information should be
19 produced in hard copy or Adobe .pdf with the properties of the document, to the extent
20 available, accompanying such copy the same format.* Electronically stored information
21 should be produced in the format in which it was originally stored or saved if such format
22 is compatible with and/or readable by Microsoft Office, Microsoft Word, Microsoft Excel,
23 Microsoft PowerPoint, Microsoft Office Express, or WordPerfect. Otherwise, the
24 electronically stored information should be produced in hard copy or Adobe .pdf with the
25 properties of the document, to the extent available, accompanying such copy the same
26 format.

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1 G. If the answer to any Interrogatory or the response to any Document Request
2 is withheld under a claim that such answer or response would require the disclosure of
3 privileged information, specifically so state and explain in detail the nature of and basis
4 for the claimed privilege. Specifically, in order that the Court and the parties may
5 determine the validity of the claim of privilege, if any statement or the identification of
6 any document is withheld under a claim of privilege, please state the basis for the
7 asserted claim of privilege, and provide (to the extent possible without revealing
8 privileged matter) such document's date, author(s), recipient(s), copy(ies), as well as a
9 description of the document's contents.

10 H. These Discovery Requests shall be deemed to be continuing to the extent
11 permitted by the Rules.

12 **II. DISCOVERY REQUESTS**

13 **A. Request to Admit**

14 1. Please admit that, during December 2007, Zyen informed Xyience
15 that Zyen wanted Xyience to delay a Chapter 11 filing so that the approximately \$1.0
16 million that the Debtor had paid to Fertitta on or about October 5, 2007, would fall outside
17 the 90-day preference period.

18 2. Please admit that, during December 2007, Zyen informed Xyience
19 that Zyen wanted Xyience to delay a Chapter 11 filing so that the \$ 4.5 million that the
20 Debtor had paid to Zuffa Marketing , LLC, on or about October 5, 2007, would fall outside
21 the 90-day preference period.

22 3. Please admit that, on or about October 1, 2007, the Xyience board of
23 directors adopted a resolution appointing Mr. Bullard as a member of the Xyience board of
24 directors, effective upon and contingent upon the closing of the Zyen \$12 million October
25 2007 loan facility.

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1 4. Please admit that, at the time of the closing of the Zyen \$12.0 million
2 loan facility on or about October 4, 2007, Mr. Bullard knew that the Xyience board
3 previously had adopted a resolution appointing him to the Xyience board effective upon
4 the closing of the loan facility.

5 **B. Interrogatories**

6 1. Please identify each person, other than counsel currently
7 representing defendants in this Adversary Proceeding, who (a) prepared or assisted in the
8 preparation of the responses to these Discovery Requests, and/or (b) provided you with
9 information or documents for your responses to these Discovery Requests.

10 2. Please identify and provide contact information for any and all
11 witnesses whom you intend to call to testify at the trial in this cause, and for each such
12 witness, state the subject matter about which you expect the witness to testify and, if the
13 witness will be called to provide opinion or expert testimony, then provide the information
14 and documentation required by Rule 26(a)(2).

15 3. If you denied any of the Requests to Admit, then please explain in
16 detail the reason for your denial.

17 4. Please identify and briefly describe any and all written or oral
18 communications between or among Mr. Bullard and/or Fertitta, on the one hand, and the
19 Debtor and/or any other person or entity on the other hand, evidencing, reflecting or
20 relating to the Fertitta \$1.0 million loan to the Debtor of July 2007, including (without the
21 limitation, (a) the making of such, (b) the extension or amendment of the loan, (c) the
22 default and related events with respect to such loan, (d) the payoff of such loan, and/or
23 (e) the requirement that Messrs. Frank and Sanford lend the Debtor a total of \$500,000
24 concurrently with such loan.
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1 5. Please identify and briefly describe any all documents or
2 electronically stored information (including, without limitation, analyses, term sheets,
3 oral or written communications between or among Mr. Bullard and/or Mr. Frank and/or
4 any other person or entity, and any and all other discussions or references) within the
5 possession or control of Zyen, Fertitta, Mr. Bullard and/or Mr. Frank at any time since
6 April 1, 2007, in which the subject of actual or potential financing for Xyience (from
7 Fertitta, from Zyen or from any other person or entity) is evidenced, discussed or
8 referenced.

9 6. [To defendants Bullard, Zyen and Fertitta only:] Please describe in
10 detail, and identify, any and all documents evidencing, documenting or reflecting, why
11 and how you determined, prior to entering into the October 2007 loan facility with the
12 Debtor, (a) that \$12.0 million was the appropriate amount for the facility, (b) that you
13 would not lend more to the Debtor under this facility, and (c) if applicable, that the Debtor
14 would be able to satisfy the requirements of section 15 of the Convertible Senior Secured
15 Note of October 3, 2007, that the Debtor raise equity capital in an amount sufficient to
16 satisfy outstanding obligations owed from time to time to the existing lenders and
17 creditors listed on Schedule 15 (or sufficient for such lenders and creditors to enter into
18 forbearance agreements satisfactory to the Lender).

19 7. Please identify and briefly describe any and all oral or written
20 communications between Mr. Bullard and/or Mr. Frank and any other person or entity
21 requesting, soliciting, discussing and/or pertaining to the subordination agreements from
22 the Debtor's creditors the were obtained in connection with the Zyen October 2007 loan
23 facility with the Debtor.

24 8. Please identify and briefly describe any and all oral or written
25 communications between Mr. Bullard and/or Mr. Frank and any other person or entity
26 requesting, soliciting, discussing and/or pertaining to the shareholders consents that the
27 Debtor obtained from certain of its shareholders in connection with the Zyen October 2007
28 loan facility with the Debtor.

1 9. Please identify and briefly describe any and all oral or written
2 communications between Mr. Bullard and/or Mr. Frank and any other person or entity
3 pertaining to Xyience's failure to make payments when due under the Zyen October 2007
4 loan facility, from and after October 4, 2007, and/or any other default under such loan
5 facility, and briefly explain the reason for such failure or default, and any and all actions
6 that Mr. Bullard, Zyen and/or Fertitta took as a result.

7 10. Please state and describe the status of the October 2007 Zyen \$12.0
8 loan facility with Xyience as of October 2007 and every three months thereafter through
9 the present in terms of (a) the amount outstanding under the facility, (b) the identity of
10 debtor under the facility, (c) whether the lender had obtained any equity in the debtor in
11 connection with the facility, (d) whether the facility was in default, and (e) whether (and if
12 so to what extent) the lender was pursuing foreclosure of or other remedies under (or had
13 actually foreclosed) its interests in the debtor under the facility.

14 11. Please identify any and all persons and entities that possessed a
15 direct or indirect interest in the Zyen \$12.0 loan facility with Xyience of October 2007, and
16 for each such person or entity, please identify and state the nature and amount of its
17 investment in and/or share of the facility in October 2007 and every three months
18 thereafter through the present.

19 12. Please identify and briefly describe any and all oral or written
20 communications between Mr. Bullard and/or Mr. Frank and any other person or entity
21 pertaining to the possible acquisition of the assets of Xyience, whether through a
22 foreclosure sale, a section 363 sale or otherwise, commencing in or around October 2007 or
23 thereafter, and through April 16, 2008.

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1 13. Please identify and briefly describe any and all oral or written
2 communications between and/or among Mr. Bullard and/or Mr. Frank and/or any other
3 person or entity pertaining to Xyience's consideration of filing for, the timing of and/or its
4 ultimate decision to file for Chapter 11 protection during November 2007 through January
5 2008.

6 14. Please identify and briefly describe any and all documents
7 evidencing, reflecting or relating to the consideration by Fertitta, Zyen and or other
8 related persons or entities of an additional loan to the Debtor during late 2007 and/or into
9 early 2008 to allow the Debtor to delay filing for Chapter 11 relief.

10 15. Please identify and briefly describe any and all written or oral
11 communications, during the period June 1, 2007, through January 31, 2008, between or
12 among Mr. Bullard and/or Fertitta and/or Zyen, on the one hand, and Zuffa, LLC, Zuffa
13 Marketing, LLC, and/or any related person or entity (including Frank Fertitta III and/or
14 Lorenzo Fertitta), on the other hand, evidencing, reflecting or relating to the past, existing
15 or future sponsorship agreements and/or relationship between the Debtor and Zuffa
16 Marketing, LLC.

17 16. Please identify and describe the ownership and management
18 structure of the entity that purchased the Debtor's assets in or around April 2008 as part
19 if this bankruptcy case, and the ownership and management structure of each and every
20 person or entity that subsequently owned a substantial portion of such assets since such
21 purchase, including the person or entity who currently owns such assets.

22 17. Please identify and describe any and all financial interest or
23 interests (whether debt, equity or otherwise) that any defendant has possessed in the
24 entity that purchased the Debtor's assets in or around April 2008 as part if this
25 bankruptcy case, and in any and all persons or entities that acquired a substantial portion
26 of such assets, and for each such financial interest state its nature, terms and current
27 status.

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1 18. Please identify and describe the ownership of, the management of
2 and all office locations of each of the following entities at all times since August 2007:
3 (a) Fertitta Enterprises, Inc.; (b) Zyen, LLC; (c) Zuffa, LLC; (d) Manchester Consolidated,
4 Inc.; (e) Manzen, LLC; and (f) 2164278 Ontario, Inc.; and for the last of these entities (i.e.,
5 2164278 Ontario, Inc.), please state and explain in detail the reason that it no longer is a
6 manager of Manzen, LLC.

7
8 **C. Requests to Produce**

9 1. Please produce each and every document that you identified, or
10 should have identified, in your responses to the Interrogatories — including, without
11 limitation, copies of any and all documents or electronically stored information evidencing,
12 reflecting or relating to the communications and other information and documentation
13 about which the foregoing Interrogatories are directed. For this and all subsequent
14 Requests to Produce below, please note the instructions in Section I above regarding the
15 production of electronically stored information and data.

16 2. Please produce any and all communications, documents, electronic
17 mail and/or other files or data evidencing (other the documents previously produced),
18 reflecting or pertaining to your and/or Xyience’s negotiation of, consummation of, breach
19 of, the termination of, payment of and/or the actual or contemplated extension of, the
20 Sponsorship Agreement between Xyience and Zuffa Marketing dated on or about October
21 3, 2007. (This Document Request and the following two requests were included in the
22 Liquidating Trustee’s Frist Discovery Requests, but they are repeated here because
23 defendants appeared to limit their initial responses to responsive documents within the
24 possession and control of Mr. Sanford whereas the Liquidating Trustee now is seeking
25 responsive documents in the possession of any other defendant.)
26
27
28

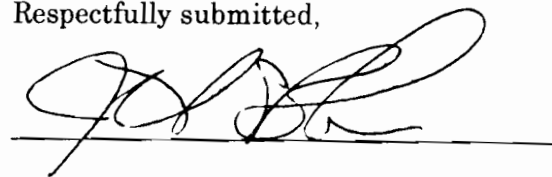
1 3. Please produce a true and accurate copy of the Notification of
2 Material Default and Commencement of Ten Business Day Cure Period, or any similarly
3 titled document, as referenced in Recitals G and H of the Nonexclusive Limited License
4 Agreement entered into between Zuffa Marketing and Xyience in or about January 2008,
5 together with any documents, electronic mail and/or other files or data evidencing,
6 reflecting or pertaining to the manners and means by which and/or the date and time at
7 which said Notification was delivered to Xyience and/or to any officer or director thereof.
8 (Please see the parentheticals in Document Request No. 2 above.)

9 4. Please produce any and all communications, documents, electronic
10 mail and/or other files or data evidencing, reflecting or pertaining to the your and/or
11 Xyience's negotiation of, consummation of, breach of, termination of, payment of and/or
12 actual or contemplated extension of, the Nonexclusive Limited License Agreement entered
13 into between Zuffa Marketing and Xyience in or about January 2008. (Please see the
14 parentheticals in Document Request No. 2 above.)

15 5. Please produce any and all documents and electronically stored of
16 the Debtor within any defendants' possession or control as of the date of these Discovery
17 Requests, including without limitation all of Xyience's computer servers and any and all
18 other electronically stored information and data of Xyience in existence prior to April 16,
19 2008.

20 Dated: August 23, 2010

Respectfully submitted,



23 Jonathan A. Backman
24 Law Office of Jonathan A. Backman
25 117 N. Center Street
26 Bloomington, Illinois 61701-5001
(309) 820-7420
FAX: (309) 820-7430
ibackman@backlawoffice.com

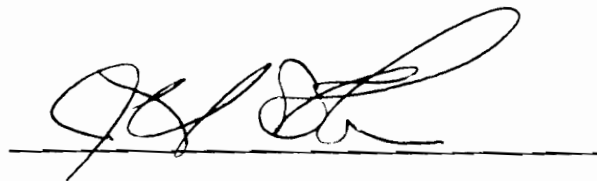
27 *Counsel for David Herzog, as Liquidating Trustee for*
28 *The Estate of Xyience, Incorporated*

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CERTIFICATE OF SERVICE

I, Jonathan A. Backman, an attorney of record in this case, hereby certify that on August 23, 2010, I caused the above and foregoing **Liquidating Trustee's Second Set of Discovery Requests** to be served upon the following counsel of record in this case by United States Priority Mail prior to the hour of 5:00 p.m., CDT:

Gregory E. Garman, Esq.
Matthew C. Zirzow, Esq.
GORDON SILVER
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Telephone (702) 796-5555
Facsimile (702) 369-2666



A handwritten signature in black ink, appearing to read 'Jonathan A. Backman', is written over a horizontal line.

Exhibit D

1 GORDON SILVER
 GREGORY E. GARMAN, ESQ.
 2 Nevada Bar No. 6654
 E-mail: ggarman@gordonsilver.com
 3 MATTHEW C. ZIRZOW, ESQ.
 Nevada Bar No. 7222
 E-mail: mzirzow@gordonsilver.com
 4
 5 JOEL Z. SCHWARZ, ESQ.
 Nevada Bar No. 9181
 E-mail: jschwarz@gordonsilver.com
 6 3960 Howard Hughes Pkwy., 9th Floor
 7 Las Vegas, Nevada 89169
 Telephone (702) 796-5555
 8 Facsimile (702) 369-2666
 9 Attorneys for Defendants

10 **UNITED STATES BANKRUPTCY COURT**
 11 **FOR THE DISTRICT OF NEVADA**

12 In re:

Case No.: BK-S-08-10474-MKN
Chapter 11

13 XYIENCE INCORPORATED,
14 a Nevada corporation,

15 Debtor.

16
17 DAVID HERZOG, as Liquidating Trustee,

Adversary No. 09-1402-MKN

18 Plaintiff,

19 v.

20 ZYEN, LLC, a Nevada limited liability company,
21 FERTITTA ENTERPRISES, INC., a Nevada
22 corporation, WILLIAM BULLARD, ADAM
23 FRANK, KIRK SANFORD, and OMER
SATTAR,

24 Defendants.

25
 26 **DEFENDANTS' RESPONSES TO LIQUIDATING**
TRUSTEE'S SECOND SETS OF INTERROGATORIES AND
 27 **REQUESTS FOR PRODUCTION OF DOCUMENTS**
 28

1 Defendants ZYEN, LLC (“Zyen”), FERTITTA ENTERPRISES, INC. (“Fertitta
2 Enterprises”), and WILLIAM BULLARD (“Bullard”, and collectively with Zyen and Fertitta
3 Enterprises, the “Defendants”), by and through counsel, the law firm of Gordon Silver, hereby
4 respond to: (A) Plaintiff’s Second Set of Interrogatories (the “Interrogatories”) pursuant to Fed.
5 R. Civ. P. 33, made applicable to this proceeding by Fed. R. Bankr. P. 7033; and (B) Plaintiff’s
6 Second Set of Requests for Production (the “Requests for Production”) pursuant to Fed. R. Civ.
7 P. 34, made applicable to this proceeding by Fed. R. Bankr. P. 7034.

8 **PRELIMINARY STATEMENT**

9 These responses are based solely on information presently known to Defendants. Further
10 discovery may lead to additions to, changes in, or modifications of these responses.
11 Accordingly, these responses are being given without prejudice to Defendants’ rights to produce
12 subsequent evidence and to introduce the same at trial.

13 **GENERAL OBJECTIONS**

14 1. Defendants object to Plaintiff’s discovery requests to the extent that they seek the
15 disclosure of information that is protected from disclosure by the attorney-client privilege or
16 work-product exemption in accordance with Fed. R. Civ. P. 26 and applicable case law.

17 2. These responses will be made on the basis of information available to and located
18 by Defendants upon reasonable investigation. There may be other and further information
19 respecting the discovery requests propounded by Plaintiff of which Defendants, despite
20 reasonable investigation and inquiry, are presently unaware. Defendants reserve the right to
21 modify, supplement, or enlarge any response with such pertinent additional information as they
22 may subsequently discover.

23 3. No incidental or implied admissions will be made by these responses. The fact
24 that Defendants may respond or object to a discovery request, or any part thereof, shall not be
25 deemed an admission that Defendants accept or admit the existence of any fact set forth or
26 assumed by such discovery request, or that such response constitutes admissible evidence. The
27 fact that Defendants respond to part of any discovery request is not deemed a waiver by
28 Defendants of their objections, including privilege, to other parts to such discovery request.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1.

Please identify each person other than counsel currently representing defendants in this Adversary Proceeding, who: (a) prepared or assisted in the preparation of the responses to these Discovery Requests, and/or (b) provided you with information or documents for your responses to these Discovery Requests.

Response to Interrogatory No. 1.

(a) William Bullard

(b) Business records of Zyen, Bullard and Fertitta Enterprises are being obtained by William Bullard. Documents obtained from Kirk Sanford which are responsive to these Discovery Requests were previously produced to Plaintiff. In addition, documents responsive to these Discovery Requests were previously produced by Plaintiff and to Plaintiff by Zuffa, LLC, Zuffa Marketing, LLC, and Kirk Hendrick.

Interrogatory No. 2.

Please identify and provide contact information for any and all witnesses whom you intend to call to testify at the trial in this cause, and for each such witness, state the subject matter about which you expect the witness to testify and, if the witness will be called to provide opinion or expert testimony, then provide the information and documentation required by Rule 26(a)(2).

Response to Interrogatory No. 2.

Objection, this Interrogatory exceeds the scope of Defendants' witness disclosure obligations as set forth in Fed. R. Civ. P. 26, and calls for the disclosure of attorney work product. Subject to and without waving said objections, Defendants will comply with their expert disclosure requirements as set forth in Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, the Local Rules of Bankruptcy Practice for the U.S. District Court for the District of Nevada, as well as their pre-trial witness disclosure requirements as set forth in the Order Regarding Pretrial and Trial Matters [Doc. #51].

Interrogatory No. 3.

If you denied any of the Requests to Admit, then please explain in detail the reason for

1 your denial.

2 **Response to Interrogatory No. 3.**

3 Objection, this Interrogatory exceeds the scope of Defendants' obligations pursuant to
4 Fed. R. Civ. P. 36, and calls for the disclosure of attorney work product. This Interrogatory is
5 duplicative and unreasonably cumulative in that it seeks the production of information already
6 disclosed by Defendants to Plaintiff. This Interrogatory seeks the production of information
7 already known to and/or in the possession, custody, or control of Plaintiff. Subject to and
8 without waiving said objections, Defendants answer as follows:

9 Request for Admission No. 1: Defendants have no recollection of such alleged
10 communication, and have seen no documentary evidence indicating that such alleged
11 communication occurred. To the contrary, on December 4, 2007, Kirk Sanford sent an email
12 stating, in pertinent part, "after speaking with numerous BK counsels, we think the best path to
13 pursue will be filing for a Chapter 11 and quickly move towards an asset sale (under a 363 rule)
14 which we think is a 45-60 day process." (See Document Bates No. SAN012534).

15 Request for Admission No. 2: Defendants have no recollection of such alleged
16 communication, and have seen no documentary evidence indicating that such alleged
17 communication occurred. To the contrary, on December 11, 2007, Kirk Sanford sent an email
18 stating, in pertinent part, "after speaking with numerous BK counsels, we think the best path to
19 pursue will be filing for a Chapter 11 and quickly move towards an asset sale (under a 363 rule)
20 which we think is a 45-60 day process." (See Documents Bates Nos. SAN000421-000422,
21 000428-430 already produced herein).

22 Requests for Admissions Nos. 3 and 4: Defendants object to these requests for
23 admissions to the extent that they call for legal conclusions. Furthermore, Defendants deny that
24 by adopting a resolution approving the contingent appointment of Bullard to the board of
25 directors, Bullard thereby became a member of the board of directors. Bullard never accepted
26 any such appointment, nor ever took any actions in such alleged capacity. On October 31, 2007,
27 Bullard sent an email to Adam Frank, Kirk Sanford, Katie Lever, and Patrick Brauckman--the
28 then-members of the board of directors--stating that he was deferring any decision to sit on the

1 board of directors. (See Document Bates No. TRUSTEE-IDIIA-003931). On November 3,
2 2007, Bullard informed the board of directors that he would not accept appointment to the board.
3 (See Document Bates Nos. TRUSTEE-IDIIA-003952-3962).

4 **Interrogatory No. 4.**

5 Please identify and briefly describe any and all written or oral communications between
6 or among Mr. Bullard and/or Fertitta, on the one hand, and the Debtor and/or any other person on
7 the other hand, evidencing, reflecting or relating to the Fertitta \$1.0 million loan to the Debtor of
8 July 2007, including without limitation, (a) the making of such, (b) the extension or amendment
9 of the loan, (c) the default and related events with respect to such loan, (d) the payoff of such
10 loan, and/or (e) the requirement that Messrs. Frank and Sanford lend the Debtor a total of
11 \$500,000 concurrently with such loan.

12 **Response to Interrogatory No. 4.**

13 Objection, this Interrogatory is overly broad and unduly burdensome in asking
14 Defendants to describe “any and all written or oral communications.” This Interrogatory is
15 duplicative and unreasonably cumulative in that it seeks the production of information already
16 disclosed by Defendants to Plaintiff. This Interrogatory seeks the production of information
17 already known to and/or in the possession, custody, or control of Plaintiff and/or seeks the
18 production of information that may be obtained from another source that is more convenient and
19 less burdensome, namely, the records of Xyience.

20 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
21 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
22 responsive to this Interrogatory, said records are being gathered by Defendants and will be
23 produced to Plaintiff.

24 Also see Documents Bates Nos. ZYEN00287-309, TRUSTEE-IDIAA-002209-2231,
25 TRUSTEE-IDIAA-002232-2251, TRUSTEE-IDIAA-002252-2271, SAN001311-313,
26 SAN001486-1496, SAN001497-1499, SAN001500-1514, SAN001991-2000, SAN002349-2353,
27 SAN002374-2385, SAN002415-2416, SAN003283-3285, SAN003476-3479, SAN004392-4393,
28 SAN004475, SAN004478, SAN004487-4488, SAN005275-5277, SAN005403, SAN005497,

1 SAN005595-5601, SAN005771, SAN005853-5855, SAN005866-5870, SAN005888-5900,
2 SAN008027, SAN008487-8495, SAN008767-8770, SAN008810, SAN008854-8856,
3 SAN008866, SAN008899, SAN008948-8960, SAN008997-8998, SAN009063, SAN009150-
4 9152, SAN010580 already produced herein.

5 **Interrogatory No. 5.**

6 Please identify and briefly describe any and all documents or electronically stored
7 information (including, without limitation, analyses, term sheets, oral or written communications
8 between or among Mr. Bullard and/or Mr. Frank and/or any other person or entity, and any and
9 all other discussions or references) within the possession or control of Zyen, Fertitta, Mr. Bullard
10 and/or Mr. Frank at any time since April 1, 2007, in which the subject of actual or potential
11 financing for Xyience (from Fertitta, from Zyen or from any other person or entity) is evidenced,
12 discussed or referenced.

13 **Response to Interrogatory No. 5.**

14 Objection, this Interrogatory is overly broad and unduly burdensome in asking
15 Defendants to identify and describe “any and all documents or electronically stored
16 information.” This Interrogatory exceeds the scope of Defendants’ discovery obligations in
17 asking them to describe documents already produced by Defendants to Plaintiff and/or
18 documents already in the possession, custody, or control of Plaintiff. Defendants are not
19 obligated to and cannot answer this Interrogatory, or produce documents, on behalf of Mr. Frank,
20 whom is a party to a settlement agreement with Plaintiff and whom will be dismissed as a party
21 to this action. This Interrogatory is duplicative and unreasonably cumulative in seeking the
22 production of information already known to and/or in the possession, custody, or control of
23 Plaintiff. This Interrogatory seeks the production of information that may be obtained from
24 another source that is more convenient and less burdensome, namely, the records of Xyience.
25 This Interrogatory seeks information that is not relevant, and is not designed to lead to the
26 discovery of admissible evidence, in requesting information after January 18, 2008.

27 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
28 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are

1 responsive to this Interrogatory, said records are being gathered by Defendants and will be
2 produced to Plaintiff.

3 Also see Documents Bates Nos. TRUSTEE-IDIAA-003881, TRUSTEE-IDIAA-003914-
4 3930, TRUSTEE-IDIAA-003981-3985, TRUSTEE-IDIAA-002356, TRUSTEE-IDIAA-002602,
5 TRUSTEE-IDIAA-002627, TRUSTEE-IDIAA-002639, TRUSTEE-IDIAA-002712,
6 ZYEN000379-625 already produced herein.

7 **Interrogatory No. 6.**

8 [To defendants Bullard, Zyen and Fertitta only:] Please describe in detail, and identify,
9 any and all documents evidencing, documenting or reflecting, why and how you determined,
10 prior to entering into the October 2007 loan facility with the Debtor, (a) that \$12.0 million was
11 the appropriate amount for the facility, (b) that you would not lend more to the Debtor under this
12 facility, and (c) if applicable, that the Debtor would be able to satisfy the requirements of section
13 15 of the Convertible Senior Secured Note of October 3, 2007, that the Debtor raise equity
14 capital in an amount sufficient to satisfy outstanding obligations owed from time to time to the
15 existing lenders and creditors listed on Schedule 15 (or sufficient for such lenders and creditors
16 to enter into forbearance agreements satisfactory to the Lender).

17 **Response to Interrogatory No. 6.**

18 Objection, this Interrogatory is vague and ambiguous, and calls for a legal conclusion,
19 with respect to “the appropriate amount for the facility.” This Interrogatory is overly broad and
20 unduly burdensome in asking Defendants to identify and describe “any and all documents.” This
21 Interrogatory exceeds the scope of Defendants’ discovery obligations in asking them to describe
22 documents already produced by Defendants to Plaintiff and/or documents already in the
23 possession, custody, or control of Plaintiff. This Interrogatory is duplicative and unreasonably
24 cumulative in seeking the production of information already known to and/or in the possession,
25 custody, or control of Plaintiff.

26 Subject to and without waiving said objections:

27 (a) The requested loan amount of \$12.0 million was derived by Xyience and
28 presented to Defendants by Kirk Sanford and Adam Frank as the amount being requested by

1 Xyience. It was Defendants' understanding that Xyience intended to raise additional equity
2 capital which would be sufficient to allow Xyience to meet its loan repayment obligations and
3 which, in combination with the \$12.0 million loan facility, would provide Xyience sufficient
4 capital to satisfy its remaining financial obligations.

5 (b) Zyen loaned the amount requested by Xyience.

6 (c) Defendants were informed and therefore believed that Xyience would be able to
7 raise additional equity capital.

8 Pursuant to Fed. R. Civ. P. 33(d), to the extent that business records maintained by Zyen,
9 Bullard, and/or Fertitta Enterprises are responsive to this Interrogatory, said records are being
10 gathered by Defendants and will be produced to Plaintiff.

11 Also see Documents Bates Nos. TRUSTEE-IDIAA-001971-1974, TRUSTEE-IDIAA-
12 001975-1977, TRUSTEE-IDIAA-001983-1985, TRUSTEE-IDIAA-002094-2095, TRUSTEE-
13 IDIAA-002097-2107 already produced herein.

14 **Interrogatory No. 7.**

15 Please identify and briefly describe any and all oral or written communications between
16 Mr. Bullard and/or Mr. Frank and any other person or entity requesting, soliciting, discussing
17 and/or pertaining to the subordination agreements from the Debtor's creditors that were obtained
18 in connection with the Zyen October 2007 loan facility with the Debtor.

19 **Response to Interrogatory No. 7.**

20 Objection, this Interrogatory calls for the disclosure of attorney-client privileged
21 communications. This Interrogatory is overly broad and unduly burdensome in asking
22 Defendants to identify and describe "any and all oral or written communications." This
23 Interrogatory exceeds the scope of Defendants' discovery obligations in asking them to describe
24 documents already produced by Defendants to Plaintiff and/or documents already in the
25 possession, custody, or control of Plaintiff. Defendants are not obligated to and cannot answer
26 this Interrogatory, or produce documents, on behalf of Mr. Frank, whom is a party to a settlement
27 agreement with Plaintiff and whom will be dismissed as a party to this action. This Interrogatory
28 is duplicative and unreasonably cumulative in seeking the production of information already

1 known to and/or in the possession, custody, or control of Plaintiff. This Interrogatory seeks the
2 production of information that may be obtained from other sources that are more convenient and
3 less burdensome, namely, the records of Xyience and its creditors.

4 Subject to and without waiving said objections, Defendants did not participate in
5 requesting, soliciting, or obtaining subordination agreements from Xyience's creditors in
6 connection with the October 2007 loan facility. The concept of obtaining subordination
7 agreements from Xyience's creditors was presented by Kirk Sanford and Adam Frank to Bullard
8 in discussions regarding the request for a loan, and it was mutually agreed by Zyen and Xyience
9 that obtaining subordination agreements from Xyience's creditors should be incorporated into
10 the provisions of the loan documents.

11 Pursuant to Fed. R. Civ. P. 33(d), to the extent that business records maintained by Zyen,
12 Bullard, and/or Fertitta Enterprises are responsive to this Interrogatory, said records are being
13 gathered by Defendants and will be produced to Plaintiff.

14 Also see Documents Bates Nos. TRUSTEE-IDIAA-002143-2147, TRUSTEE-IDIAA-
15 002148-2155, TRUSTEE-IDIAA-002143-2147, TRUSTEE-IDIAA-002160-2163, TRUSTEE-
16 IDIAA-002321-2325, ZYEN 00229-239, ZYEN 00229-239, ZYEN 00240-250, ZYEN 00251-
17 261, ZYEN 00262-266, ZYEN 00267-271, ZYEN 00272-277, ZYEN 00278-282, ZYEN 00283-
18 286, ZYEN 00774-778, ZYEN 00927-931, ZYEN 00940-943, ZYEN 01050-1058, SAN002280-
19 2294, , SAN002312-2315, , SAN002280-2294, SAN005335-5337, SAN005340, SAN005370-
20 5374, SAN005550-5555, SAN005582-5585, SAN005704-5709, SAN005747-5751,
21 SAN005757-5759, SAN005772-5798, SAN005804-5087, SAN005846, SAN005856-5863,
22 SAN005866-5881, SAN005884-5900, SAN007919-21, SAN008005-8014, SAN008821,
23 SAN008825-8833, SAN008847-8848, SAN008869-8871, SAN008903-8905, SAN008918,
24 SAN008934-8935, SAN008962-8983, SAN008988-8996, SAN009486, SAN009499,
25 SAN009534, SAN010152-0155, SAN010160-0161, SAN010171, SAN010177, SAN010216-
26 0218, SAN010303, SAN010559, SAN010562-0563, SAN010838-0841 already produced herein.

27 **Interrogatory No. 8.**

28 Please identify and briefly describe any and all oral or written communications between

1 Mr. Bullard and/or Mr. Frank and any other person or entity requesting, soliciting, discussing
2 and/or pertaining to the shareholders consents that the Debtor obtained certain of its shareholders
3 in connection with the Zyen October 2007 loan facility with the Debtor.

4 **Response to Interrogatory No. 8.**

5 Objection, this Interrogatory calls for the disclosure of attorney-client privileged
6 communications. This Interrogatory is overly broad and unduly burdensome in asking
7 Defendants to identify and describe “any and all oral or written communications.” This
8 Interrogatory exceeds the scope of Defendants’ discovery obligations in asking them to describe
9 documents already produced by Defendants to Plaintiff and/or documents already in the
10 possession, custody, or control of Plaintiff. Defendants are not obligated to and cannot answer
11 this Interrogatory, or produce documents, on behalf of Mr. Frank, whom is a party to a settlement
12 agreement with Plaintiff and whom will be dismissed as a party to this action. This Interrogatory
13 is duplicative and unreasonably cumulative in seeking the production of information already
14 known to and/or in the possession, custody, or control of Plaintiff. This Interrogatory seeks the
15 production of information that may be obtained from other sources that are more convenient and
16 less burdensome, namely, the records of Xyience and its shareholders.

17 Subject to and without waiving said objections, Defendants did not participate in
18 requesting, soliciting, or obtaining consents from Xyience’s shareholders in connection with the
19 October 2007 loan facility, save and except Bullard was copied on written communications with
20 Russell Pike and had one in-person discussion with Russell Pike regarding the issue of Mr.
21 Pike’s shares in Xyience being designated as non-voting shares. The concept of obtaining
22 consents from Xyience’s creditors was presented by Kirk Sanford and Adam Frank to Bullard in
23 discussions regarding the request for a loan, and it was mutually agreed by Zyen and Xyience
24 that obtaining consents from Xyience’s shareholders should be incorporated into the provisions
25 of the loan documents.

26 Pursuant to Fed. R. Civ. P. 33(d), to the extent that business records maintained by Zyen,
27 Bullard, and/or Fertitta Enterprises are responsive to this Interrogatory, said records are being
28 gathered by Defendants and will be produced to Plaintiff.

1 Also see Documents Bates Nos. ZYEN000774-778, ZYEN 01050-1058, TRUSTEE-
2 IDIAA-002534-2542, SAN003200, SAN004387-4389, SAN004434-4438, SAN005256-5257,
3 SAN005267, SAN005361-5362, SAN005424-5447, SAN005526-5527, SAN005904-5905,
4 SAN007476, SAN007500-7501, SAN008011-8014, SAN008054, SAN009512, SAN009534,
5 SAN009537-9546, SAN009621-9622, SAN009660 already produced herein.

6 **Interrogatory No. 9.**

7 Please identify and briefly describe any and all oral or written communications between
8 Mr. Bullard and/or Mr. Frank and any other person or entity pertaining to Xyience's failure to
9 make payments when due under the Zyen October 2007 loan facility, from and after October 4,
10 2007, and/or any other default under such loan facility, and briefly explain the reason for such
11 failure or default, and any and all actions that Mr. Bullard, Zyen and/or Fertitta took as a result.

12 **Response to Interrogatory No. 9.**

13 Objection, this Interrogatory calls for the disclosure of attorney-client privileged
14 communications. This Interrogatory is overly broad and unduly burdensome in asking
15 Defendants to identify and describe "any and all oral or written communications." This
16 Interrogatory exceeds the scope of Defendants' discovery obligations in asking them to describe
17 documents already produced by Defendants to Plaintiff and/or documents already in the
18 possession, custody, or control of Plaintiff. Defendants are not obligated to and cannot answer
19 this Interrogatory, or produce documents, on behalf of Mr. Frank, whom is a party to a settlement
20 agreement with Plaintiff and whom will be dismissed as a party to this action. This Interrogatory
21 is duplicative and unreasonably cumulative in seeking the production of information already
22 known to and/or in the possession, custody, or control of Plaintiff. This Interrogatory seeks the
23 production of information that may be obtained from another source that is more convenient and
24 less burdensome, namely, the records of Xyience. This Interrogatory seeks information that is
25 not relevant, and is not designed to lead to the discovery of admissible evidence, in requesting
26 information after January 18, 2008.

27 Subject to and without waiving said objections, Defendants are unable to answer on
28 behalf of Xyience why Xyience defaulted under the Zyen October 2007 loan facility, but it is

1 Defendants' understanding that Xyience lacked the necessary capital to make the required loan
2 payments. Furthermore, as Plaintiff is well aware, the Zyen October 2007 loan facility was
3 between Zyen, as lender, and Xyience, as borrower, and as such, neither Bullard nor Fertitta
4 Enterprises took any actions "as a result" of Xyience's default.

5 Pursuant to Fed. R. Civ. P. 33(d), to the extent that business records maintained by Zyen,
6 Bullard, and/or Fertitta Enterprises are responsive to this Interrogatory, said records are being
7 gathered by Defendants and will be produced to Plaintiff.

8 Also see Documents Bates Nos. TRUSTEE-IDIAA-000001-1480, TRUSTEE-IDIAA-
9 004300-4302, TRUSTEE-IDIAA-004307-4308, TRUSTEE-IDIAA-004393-4396, ZYEN01842-
10 1860, ZYEN01885-1888, ZYEN01891-1896, ZYEN01911-1913 already produced herein.

11 **Interrogatory No. 10.**

12 Please state and describe the status of the October 2007 Zyen \$12.0 loan facility with
13 Xyience as of October 2007 and every three months thereafter through the present in terms of (a)
14 the amount outstanding under the facility, (b) the identity of debtor under the facility, (c) whether
15 the lender had obtained any equity in the debtor in connection with the facility, (d) whether the
16 facility was in default, and (e) whether (and if so to what extent) the lender was pursuing
17 foreclosure of or other remedies under (or had actually foreclosed) its interest in the debtor under
18 the facility.

19 **Response to Interrogatory No. 10.**

20 Objection, this Interrogatory is vague and ambiguous with respect to the "status of the
21 October 2007 Zyen \$12.0 loan facility." This Interrogatory seeks information that is not
22 relevant, and is not designed to lead to the discovery of admissible evidence, in requesting
23 information after January 18, 2008. Subparts (b),(c), and (d) of this Interrogatory call for legal
24 conclusions. This Interrogatory is duplicative and unreasonably cumulative in seeking the
25 production of information already known to and/or in the possession, custody, or control of
26 Plaintiff.

27 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
28 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are

1 responsive to this Interrogatory, said records are being gathered by Defendants and will be
2 produced to Plaintiff.

3 **Interrogatory No. 11.**

4 Please identify any and all persons and entities that possessed a direct or indirect interest
5 in the Zyen \$12.0 loan facility with Xyience of October 2007, and for each such person or entity,
6 please identify and state the nature and amount of its investment in and/or share of the facility in
7 October 2007 and every three months thereafter through the present.

8 **Response to Interrogatory No. 11.**

9 Objection, this Interrogatory is vague and ambiguous with respect to “a direct or indirect
10 interest.” This Interrogatory seeks information that is not relevant, and is not designed to lead to
11 the discovery of admissible evidence in requesting in requesting information after January 18,
12 2008 and in requesting information about investments in the Zyen \$12.0 million loan facility.
13 This Interrogatory is duplicative and unreasonably cumulative in seeking the production of
14 information already known to and/or in the possession, custody, or control of Plaintiff.

15 Subject to and without waiving said objections, pursuant to the October 2007 loan
16 facility, \$12.0 million was loaned by Zyen to Xyience.

17 Pursuant to Fed. R. Civ. P. 33(d), to the extent that business records maintained by Zyen,
18 Bullard, and/or Fertitta Enterprises are responsive to this Interrogatory, said records are being
19 gathered by Defendants and will be produced to Plaintiff.

20 **Interrogatory No. 12.**

21 Please identify and briefly describe any and all oral or written communications between
22 Mr. Bullard and/or Mr. Frank and any other person or entity pertaining to the possible
23 acquisition of the assets of Xyience, whether through a foreclosure sale, a section 363 sale or
24 otherwise, commencing in or around October 2007 or thereafter, and through April 16, 2008.

25 **Response to Interrogatory No. 12.**

26 Objection, this Interrogatory is overly broad and unduly burdensome in asking
27 Defendants to identify and describe “any and all oral or written communications.” This
28 Interrogatory exceeds the scope of Defendants’ discovery obligations in asking them to describe

1 documents already produced by Defendants to Plaintiff and/or documents already in the
2 possession, custody, or control of Plaintiff Defendants are not obligated to and cannot answer
3 this Interrogatory, or produce documents, on behalf of Mr. Frank, whom is a party to a settlement
4 agreement with Plaintiff and whom will be dismissed as a party to this action. This Interrogatory
5 is duplicative and unreasonably cumulative in seeking the production of information already
6 known to and/or in the possession, custody, or control of Plaintiff. This Interrogatory seeks the
7 production of information that may be obtained from another source that is more convenient and
8 less burdensome, namely, the records of Xyience. This Interrogatory seeks information that is
9 not relevant, and is not designed to lead to the discovery of admissible evidence, in requesting
10 information after January 18, 2008.

11 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
12 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
13 responsive to this Interrogatory, said records are being gathered by Defendants and will be
14 produced to Plaintiff.

15 Also see Documents Bates Nos. TRUSTEE-IDIAA-004300-4305, TRUSTEE-IDIAA-
16 004307-4308, TRUSTEE-IDIAA-004393-4399, TRUSTEE-IDIAA-004405-4409, SAN000337-
17 339, SAN000421-422, SAN000428-431, SAN002300-2304, SAN002319-2325, SAN004314-
18 4360, SAN00437-4381, SAN004384-4389, SAN004392-4393, SAN010156-0159, SAN010162-
19 0164, SAN010184-0188, SAN010203-0208, SAN010213-0215, SAN010223-0230,
20 SAN010233-0271, SAN010274-0290, SAN010570-0573, SAN010578, SAN010580,
21 SAN011351-1353, SAN011386-1387, SAN011388-1389, SAN011391-1392, SAN011804,
22 SAN011805-1808, SAN011810-1834, SAN011991-1997, SAN012004-2005, SAN012104,
23 SAN012357-2366, SAN012534-2535, SAN012558-2559, SAN012739-2740, SAN014157-4158
24 already produced herein

25 **Interrogatory No. 13.**

26 Please identify and briefly describe any and all oral or written communications between
27 an/or among Mr. Bullard and/or Mr. Frank and/or any other person or entity pertaining to
28 Xyience's consideration of filing for, the timing of and/or its ultimate decision to file Chapter 11

1 protection during November 2007 through January 2008.

2 **Response to Interrogatory No. 13.**

3 Objection, this Interrogatory is vague and ambiguous with respect to “Xyience’s
4 consideration of filing for” and “its ultimate decision.” This Interrogatory is overly broad and
5 unduly burdensome in asking Defendants to identify and describe “any and all oral or written
6 communications.” This Interrogatory exceeds the scope of Defendants’ discovery obligations in
7 asking them to describe documents already produced by Defendants to Plaintiff and/or
8 documents already in the possession, custody, or control of Plaintiff. Defendants are not
9 obligated to and cannot answer this Interrogatory, or produce documents, on behalf of Mr. Frank,
10 whom is a party to a settlement agreement with Plaintiff and whom will be dismissed as a party
11 to this action. This Interrogatory is duplicative and unreasonably cumulative in seeking the
12 production of information already known to and/or in the possession, custody, or control of
13 Plaintiff. This Interrogatory seeks the production of information that may be obtained from
14 another source that is more convenient and less burdensome, namely, the records of Xyience.

15 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
16 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
17 responsive to this Interrogatory, said records are being gathered by Defendants and will be
18 produced to Plaintiff.

19 Also see Documents Bates Nos. TRUSTEE-IDIAA-004111, TRUSTEE-IDIAA-004137-
20 4138, SAN000428, SAN011351-1353, SAN011379-1381, SAN011390-1396, SAN01139-1403,
21 SAN011411-1412, SAN012004-2005, SAN011960-1965, SAN012023-2025, SAN012534-2535,
22 SAN012551-2552, SAN012554-2557, SAN014648-4649 already produced herein.

23 **Interrogatory No. 14.**

24 Please identify and briefly describe any and all documents evidencing, reflecting or
25 relating to the consideration by Fertitta, Zyen and or other related persons or entities of an
26 additional loan to the Debtor during late 2007 and/or into early 2008 to allow the Debtor to delay
27 filing for Chapter 11 relief.

28 . . .

1 **Response to Interrogatory No. 14.**

2 Objection, this Interrogatory is overly broad and unduly burdensome in asking
3 Defendants to identify and describe “any and all documents.” This Interrogatory is vague and
4 ambiguous with respect to “other related persons or entities” and “during late 2007 and/or into
5 early 2008.” This Interrogatory is duplicative and unreasonably cumulative in seeking the
6 production of information already known to and/or in the possession, custody, or control of
7 Plaintiff. This Interrogatory seeks the production of information that may be obtained from
8 another source that is more convenient and less burdensome, namely, the records of Xyience.

9 Subject to and without waiving said objections, Defendants have no recollection of and
10 have not located any communications regarding consideration by Fertitta Enterprises or Zyen for
11 an additional loan during late 2007 and/or into early 2008 to allow the Debtor to delay filing for
12 Chapter 11 relief.

13 To the extent that this Interrogatory is designed to inquire about communications relating
14 to DIP financing, an issue that has already been resolved in a final and non-appealable Order,
15 and which was not financing for the purpose of delaying Chapter 11 bankruptcy filing, but
16 rather, financing to allow Xyience to continue operating during the pendency of bankruptcy
17 proceedings before approval and consummation of the sale of Xyience’s assets, pursuant to Fed.
18 R. Civ. P. 33(d), to the extent that business records maintained by Zyen, Bullard, and/or Fertitta
19 Enterprises are responsive to this Interrogatory, said records are being gathered by Defendants
20 and will be produced to Plaintiff.

21 Also see Documents Bates Nos. SAN000401, SAN000407-408, SAN000418,
22 SAN011279-1284, SAN011334-1338, SAN011374 SAN011391-1392, SAN011399-1403,
23 SAN012004-2005, SAN012023-2027 already produced herein.

24 **Interrogatory No. 15.**

25 Please identify and briefly describe any and all oral or written communications, during
26 the period June 1, 2007, through January 31, 2008, between or among Mr. Bullard and/or Fertitta
27 and/or Zyen, on the one hand, and Zuffa, LLC, Zuffa Marketing, LLC, and/or any related person
28 or entity (including Frank Fertitta III and/or Lorenzo Fertitta), on the other hand, evidencing,

1 reflecting or relating to the past, existing or future sponsorship agreements and/or relationship
2 between the Debtor and Zuffa Marketing, LLC.

3 **Response to Interrogatory No. 15.**

4 Objection, this Interrogatory seeks information that is not relevant, and is not designed to
5 lead to the discovery of admissible evidence in requesting any information after January 18,
6 2008. This Interrogatory is vague and ambiguous with respect to “any related person or entity”
7 and “future sponsorship agreements and/or relationship between the Debtor and Zuffa
8 Marketing, LLC.” This Interrogatory is duplicative and unreasonably cumulative in seeking the
9 production of information already known to and/or in the possession, custody, or control of
10 Plaintiff. This Interrogatory seeks the production of information that may be obtained from
11 another source that is more convenient and less burdensome, namely, Zuffa Marketing, LLC.

12 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
13 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
14 responsive to this Interrogatory, said records are being gathered by Defendants and will be
15 produced to Plaintiff. Also see Defendants’ Responses to Request for Production Nos. 2 and 4,
16 served concurrently herewith.

17 Also see Documents Bates Nos. ZM000001-429, TRUSTEE-IDIAA-002617-2622,
18 SAN005460-5480, SAN007322-7325, SAN007477-7499, SAN007913-7914, SAN009290-9292,
19 SAN009422-9423, SAN010126-0151, SAN010475-0467, SAN010527-0551, SAN011279-1284,
20 SAN011949-1951, SAN013507-3528, SAN014736-4751, SAN015647-5672, SAN015673-5701,
21 SAN016635-6636 already produced herein.

22 **Interrogatory No. 16.**

23 Please identify and describe the ownership and management structure of the entity that
24 purchased the Debtor’s assets in or around April 2008 as part of this bankruptcy case, and the
25 ownership and management structure of each and every person or entity that subsequently owned
26 a substantial portion of such assets since such purchase, including the person or entity who
27 currently owns such assets.

28 . . .

1 **Response to Interrogatory No. 16.**

2 Objection, this Interrogatory is vague and ambiguous with respect to “ownership and
3 management structure” and “a substantial portion of such assets.” This Interrogatory seeks
4 information that is not relevant, and is not designed to lead to the discovery of admissible
5 evidence, in requesting information after January 18, 2008. This Interrogatory is duplicative and
6 unreasonably cumulative in seeking the production of information already known to and/or in the
7 possession, custody, or control of Plaintiff. This Interrogatory seeks the production of
8 information that may be obtained from other sources that are more convenient and less
9 burdensome.

10 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
11 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
12 responsive to this Interrogatory, said records are being gathered by Defendants and will be
13 produced to Plaintiff.

14 **Interrogatory No. 17.**

15 Please identify and describe any and all financial interest or interests (whether debt,
16 equity or otherwise) that any defendant has possessed in the entity that purchased the Debtor’s
17 assets in or around April 2008 as part of this bankruptcy case, and in any and all persons or
18 entities that acquired a substantial portion of such assets, and for each such financial interest state
19 its nature, terms and current status.

20 **Response to Interrogatory No. 17.**

21 Objection, this Interrogatory is vague and ambiguous with respect to “any and all
22 financial interest or interests” and “a substantial portion of such assets.” This Interrogatory seeks
23 information that is not relevant, and is not designed to lead to the discovery of admissible
24 evidence, in requesting information after January 18, 2008. This Interrogatory is duplicative and
25 unreasonably cumulative in seeking the production of information already known to and/or in the
26 possession, custody, or control of Plaintiff. This Interrogatory seeks the production of
27 information that may be obtained from other sources that are more convenient and less
28 burdensome, namely, the entity that purchased the Debtor’s assets in or around April 2008 and/or

1 the person or entity who currently owns such assets.

2 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
3 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
4 responsive to this Interrogatory, said records are being gathered by Defendants and will be
5 produced to Plaintiff.

6 **Interrogatory No. 18.**

7 Please identify and describe the ownership of, the management of and all office locations
8 of each of the following entities at all times since August 2007: (a) Fertitta Enterprises, Inc.; (b)
9 Zyen, LLC; (c) Zuffa, LLC; (d) Manchester Consolidated, Inc.; (e) Manzen, LLC; and (f)
10 2164278 Ontario, Inc.; and for the last of these entities (i.e., 2164278 Ontario, Inc.), please state
11 and explain in detail the reason that it no longer is a manager of Manzen, LLC.

12 **Response to Interrogatory No. 18.**

13 Objection, this Interrogatory seeks information that is not relevant, and is not designed to
14 lead to the discovery of admissible evidence, in requesting information after January 18, 2008.
15 This Interrogatory is duplicative and unreasonably cumulative in seeking the production of
16 information already known to and/or in the possession, custody, or control of Plaintiff. This
17 Interrogatory seeks the production of information that may be obtained from other sources that
18 are more convenient and less burdensome, namely, Zuffa, LLC, Manchester Consolidated, Inc.,
19 Manzen, LLC; 2164278 Ontario, Inc., and/or the public records on file with the Nevada
20 Secretary of State and/or in other jurisdictions.

21 Subject to and without waiving said objections, for the time period of August 18, 2007
22 through January 18, 2008, the manager of Zyen was Fertitta Enterprises, Inc., and the offices of
23 Zyen were located at 2960 W. Sahara Ave., Las Vegas, NV, 89102, and then relocated to 10801
24 W. Charleston Ave., Las Vegas, NV, 89135. For the time period of August 18, 2007 through
25 January 18, 2008, the officers of Fertitta Enterprises, Inc. were: William Bullard, Secretary,
26 Treasurer; Lorenzo Fertitta, President, the director was Lorenzo Fertitta, and the offices of
27 Fertitta Enterprises were located at 2960 W. Sahara Ave., Las Vegas, NV, 89102, and then
28 relocated to 10801 W. Charleston Ave., Las Vegas, NV, 89135.

1 Also see Documents Bates Nos. TRUSTEE-IDIAA-001613-1615, TRUSTEE-IDIAA-
2 001616-1618, TRUSTEE-IDIAA-001621-1622, TRUSTEE-IDIAA-001630-1631, ZYEN00344
3 already produced herein.

4 **RESPONSES TO REQUESTS FOR PRODUCTION**

5 **Request for Production No. 1.**

6 Please produce each and every document that you identified, or should have identified, in
7 your responses to the Interrogatories—including, without limitation, copies of any and all
8 documents or electronically stored information evidencing, reflecting or relating to the
9 communications and other information and documentation about which the foregoing
10 Interrogatories are directed. For this and all subsequent Requests to Produce below, please note
11 the Instructions in Section I above, regarding the production of electronically stored information
12 and data.

13 **Response to Request for Production No. 1.**

14 Objection, this Request is vague and ambiguous, calls for a legal conclusion, and
15 attempts to impose a burden upon Defendants far beyond the scope of Defendants' obligations
16 under Fed. R. Civ. P. 26, 33, and 34 in requesting documents Defendants "should have identified
17 in your responses to Interrogatories." This request is vague and ambiguous in requesting
18 documents "evidencing, reflecting or relating to the communications about which the foregoing
19 Interrogatories are directed." This Request seeks information that is not relevant, and is not
20 designed to lead to the discovery of admissible evidence to the extent that it seeks the production
21 of documents after January 18, 2008. This Request is unreasonably cumulative and duplicative
22 in that it seeks the production of documents already in the possession of Plaintiff and/or already
23 produced by Defendants. This Request seeks the production of information that can be obtained
24 from other sources that are more convenient and less burdensome.

25 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
26 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
27 responsive to this Interrogatory, said records are being gathered by Defendants and will be
28 produced to Plaintiff.

1 Also see Documents Bates Nos. ZYEN 00001-1913, SAN 000015-SAN 016792, and
2 SAT 000001- SAT 000021 already produced to Plaintiff, Documents Bates Nos. TRUSTEE-
3 IDIAA-000001-5707 already produced by Plaintiff, and Documents Bates Nos. ZM00001-429
4 already produced by Zuffa, LLC, Zuffa Marketing, LLC and Kirk Hendrick.

5 **Request for Production No. 2.**

6 Please produce any and all communications, documents, electronic mail and/or other files
7 or data evidencing (other than documents previously produced), reflecting or pertaining to your
8 and/or Xyience's negotiation of, consummation of, breach of, the termination of, payment and/or
9 the actual or contemplated extension of, the Sponsorship Agreement between Xyience and Zuffa
10 Marketing dated on or about October 3, 2007. (This Document Request and the following two
11 requests were included in the Liquidating Trustee's First Discovery Requests, but they are
12 repeated here because defendants appeared to limit their initial responses to responsive
13 documents within possession and control of Mr. Sanford whereas the Liquidating Trustee now is
14 seeking responsive documents in possession of any other defendant.)

15 **Response to Request for Production No. 2.**

16 Objection, this Request is unreasonably cumulative and duplicative in that it seeks the
17 production of documents already in the possession of Plaintiff and/or already produced by
18 Defendants. This Request seeks the production of information that can be obtained from other
19 sources that are more convenient and less burdensome, namely Xyience and Zuffa Marketing.

20 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
21 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
22 responsive to this Interrogatory, said records are being gathered by Defendants and will be
23 produced to Plaintiff.

24 Also see Documents Bates Nos. SAN00069, SAN002329, SAN003168-SAN003173,
25 SAN003191-SAN003199, SAN003218-SAN003222, SAN003261, SAN003318-SAN003321,
26 SAN003326-SAN003327, SAN004000-SAN004001, SAN004307-SAN004308, SAN004426-
27 SAN004426, SAN005460-SAN005480, SAN006369-SAN006370, SAN007322-SAN007323,
28 SAN007324-SAN007325, SAN007477-SAN007499, SAN007522-SAN007524, SAN007913-

1 SAN007914, SAN009290-SAN009292, SAN009422- SAN009423, SAN010126, SAN010151,
2 SAN010298, SAN010416-SAN010417, SAN010461, SAN010464, SAN010465-SAN010467,
3 SAN010527-SAN010551, SAN010558, SAN010560, SAN011587, SAN011588-SAN011589,
4 SAN011590-SAN011591, SAN012391-SAN012417, SAN012656-SAN012657, ZM 000001,
5 ZM 000003-5, ZM 000007-28, ZM 000030-51, ZM 000053-75, ZM 000077-93, ZM 000095-
6 116, ZM 000176-197, ZM 000205, ZM 000242-243, ZM 000249-252, ZM 000254-275, ZM
7 000301-323, ZM 000325-346, ZM 000348, ZM 000350-351, ZM 000353-356, ZM 000358-359,
8 ZM 000361-385, ZM 000387-389, ZM 000391-415, ZM 000422-423, ZM 000425-427, ZM
9 000429, TRUSTEE-IDIAA-002604-2608, TRUSTEE-IDIAA-002617-2622, TRUSTEE-IDIAA-
10 002654-2702, TRUSTEE-IDIAA-002654-2702, TRUSTEE-IDIAA-003678-3700 already
11 produced herein.

12 **Request for Production No. 3.**

13 Please produce a true and accurate copy of the Notification of Material Default and
14 Commencement of Ten Business Day Cure Period, or any similarly titled document, as
15 referenced in Recitals G and H of the Nonexclusive Limited License Agreement entered into
16 between Zuffa Marketing and Xyience in or about January 2008, together with any documents,
17 electronic mail and/or other files or data evidencing, reflecting or pertaining to the manners and
18 means by which and/or the date and time at which said Notification was delivered to Xyience
19 and/or to any officer or director thereof. (Please see the parentheticals in Document Request No.
20 2 above.)

21 **Response to Request for Production No. 3.**

22 Objection, this Request is unreasonably cumulative and duplicative in that it seeks the
23 production of documents already in the possession of Plaintiff and/or already produced by
24 Defendants. This Request seeks the production of information that can be obtained from other
25 sources that are more convenient and less burdensome, namely Xyience and Zuffa Marketing.

26 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
27 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
28 responsive to this Interrogatory, said records are being gathered by Defendants and will be

1 produced to Plaintiff.

2 Also see Documents Bates Nos. SAN007522-SAN007524, SAN009290-SAN009292,
3 SAN009395, SAN014615-SAN014693, SAN01663-SAN016636, ZM 000200-203, TRUSTEE-
4 IDIAA-005034-5055 already produced herein.

5 **Request for Production No. 4.**

6 Please produce any and all communications, documents, electronic mail and/or other files
7 or data evidencing, reflecting or pertaining to the your and/or Xyience's negotiation of,
8 consummation of, breach of, termination of, payment of and/or actual or contemplated extension
9 of, the Nonexclusive Limited License Agreement entered into between Zuffa Marketing and
10 Xyience in or about January 2008. (Please see the parentheticals in Document Request No. 2
11 above.)

12 **Response to Request for Production No. 4.**

13 Objection, this Request is unreasonably cumulative and duplicative in that it seeks the
14 production of documents already in the possession of Plaintiff and/or already produced by
15 Defendants. This Request seeks the production of information that can be obtained from other
16 sources that are more convenient and less burdensome, namely Xyience and Zuffa Marketing.
17 This Request seeks information that is not relevant, and is not designed to lead to the discovery
18 of admissible evidence to the extent that it seeks the production of documents after January 18,
19 2008.

20 Subject to and without waiving said objections, pursuant to Fed. R. Civ. P. 33(d), to the
21 extent that business records maintained by Zyen, Bullard, and/or Fertitta Enterprises are
22 responsive to this Interrogatory, said records are being gathered by Defendants and will be
23 produced to Plaintiff.

24 Also see Documents Bates Nos. SAN000183, SAN000313, SAN000331-SAN000333,
25 SAN000342-SAN000344, SAN000345-SAN000349, SAN000350-SAN000353, SAN000354-
26 SAN000356, SAN000357-SAN000360, SAN000367-SAN000369, SAN000370-SAN000372.
27 SAN002329, SAN003352-SAN003377, SAN010298, SAN011279-SAN011284, SAN011334-
28 SAN011336, SAN011581-SAN011583, SAN011888-SAN011890, SAN011946-SAN011948,

1 SAN011949-SAN011951, SAN014615-SAN014693, SAN016635-SAN016636, SAN012444-
2 SAN012447, SAN012529-SAN012532, ZM 000217-224, ZM 000226-233 already produced
3 herein.

4 **Request for Production No. 5.**

5 Please produce any and all documents and electronically stored [sic] of the Debtor within
6 any defendants' possession or control as of the date of these Discovery Requests, including
7 without limitation all of Xyience's computer servers and any and all other electronically stored
8 information and data of Xyience in existence prior to April 16, 2008.

9 **Response to Request for Production No. 5.**

10 Objection, this Request is unreasonably cumulative and duplicative in that it seeks the
11 production of documents already in the possession of Plaintiff and/or already produced by
12 Defendants. This Request seeks the production of information that can be obtained from another
13 source that is more convenient and less burdensome, namely Xyience. This Request seeks
14 information that is not relevant, and is not designed to lead to the discovery of admissible
15 evidence to the extent that it seeks the production of documents after January 18, 2008.

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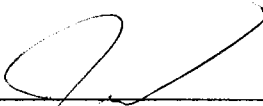
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1 Subject to and without waiving said objections, Defendants are not in possession or
2 control of Xyience's computer servers and any and all other electronically stored information
3 and data of Xyience. Furthermore, Defendants are informed and thereupon believe that the
4 primary computer server of Xyience, comprised of 5 drives and containing electronically stored
5 information and data of Xyience in existence prior to April 16, 2008, crashed due to hardware
6 failure on or shortly before June 15, 2010. Defendants are further informed and thereupon
7 believe there may be recoverable data on some, if not all, of the drives, which are currently being
8 stored in the warehouse of PC 911, 3129 W Tompkins Avenue, Las Vegas, NV, 89103.

9 DATED this 14th day of October, 2010.

10 GORDON SILVER

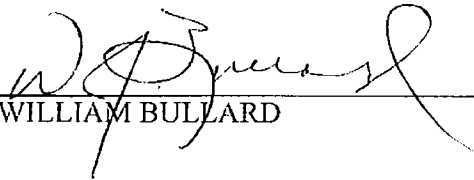
11
12 By: 
13 GREGORY E. GARMAN, ESQ.
14 Nevada Bar No. 6654
15 MATTHEW C. ZIRZOW, ESQ.
16 Nevada Bar No. 7222
17 JOEL Z. SCHWARZ, ESQ.
18 Nevada Bar No. 9181
19 3960 Howard Hughes Pkwy., 9th Floor
20 Las Vegas, Nevada 89169
21 (702) 796-5555
22 Attorneys for Defendants
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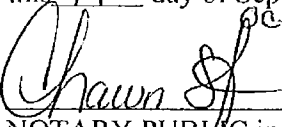
VERIFICATION

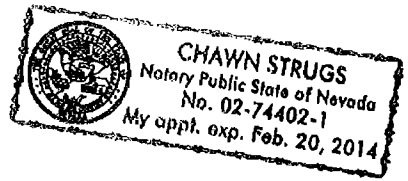
STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

WILLIAM BULLARD, being first duly sworn according to law, deposes and says: That I am a Defendant named in the above entitled matter; that I have read the foregoing Responses to Defendants' Responses to Liquidating Trustee's Second Set of Interrogatories and know the contents thereof; that the same is true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.


WILLIAM BULLARD

SUBSCRIBED AND SWORN to before me
this 19 day of September, 2010.


NOTARY PUBLIC in and for said
County and State



CERTIFICATE OF SERVICE

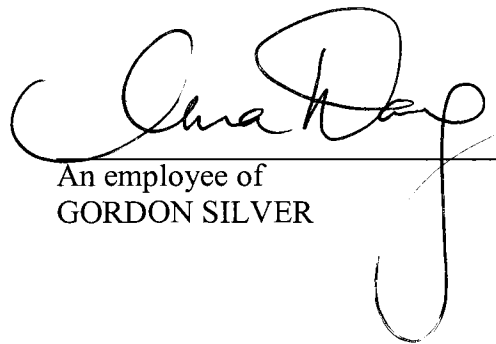
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The undersigned, an employee of Gordon Silver, hereby certifies that on the 14th day of October, 2010, she served a copy of **Defendants' Responses to Liquidating Trustee's Second Discovery Requests**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Jonathan A. Backman, Esq.
Law Office of Jonathan A. Backman
117 N. Center Street
Bloomington, IL 61701-5001
Counsel for David Herzog, as Liquidating Trustee
for the Estate of Xyience, Incorporated
(Via Email and Federal Express - Overnight Mail)

Oganna M. Atamoh, Esq.
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101
Counsel for David Herzog, as Liquidating Trustee
for the Estate of Xyience, Incorporated
(Via Email and U.S. Mail)

Michael N. Feder, Esq.
Lewis and Roca, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
(Via Email and U.S. Mail)



An employee of
GORDON SILVER

Exhibit E

1 GORDON SILVER
 2 GREGORY E. GARMAN, ESQ., NV Bar No. 6654
 E-mail: ggarman@gordonsilver.com
 3 MATTHEW C. ZIRZOW, ESQ., NV Bar No. 7222
 E-mail: mzirzow@gordonsilver.com
 4 JOEL Z. SCHWARZ, ESQ., NV Bar No. 9181
 E-mail: jschwarz@gordonsilver.com
 5 3960 Howard Hughes Pkwy., 9th Floor
 Las Vegas, Nevada 89169
 6 Telephone (702) 796-5555
 7 Facsimile (702) 369-2666
 Attorneys for Defendants

8
 9 **UNITED STATES BANKRUPTCY COURT**
 10 **FOR THE DISTRICT OF NEVADA**

11 In re:

Case No.: BK-S-08-10474-MKN
Chapter 11

12 XYIENCE INCORPORATED,
13 a Nevada corporation.

14 Debtor.

Adversary No. 09-1402-MKN

15 DAVID HERZOG, as Liquidating Trustee,

16 Plaintiff,

17 v

19 ZYEN, LLC, a Nevada limited liability company,
20 FERTITTA ENTERPRISES, INC., a Nevada
21 corporation, WILLIAM BULLARD, ADAM
FRANK, KIRK SANFORD, and OMER
22 SATTAR.

23 Defendants.

24
25 **DEFENDANTS' FOURTH SUPPLEMENT TO RULE 26 DISCLOSURES**

26 Defendants ZYEN, LLC ("Zyen"), Fertitta Enterprises, Inc. ("Fertitta Enterprises"), and
27 William Bullard, ("Bullard", and collectively with Zyen and Fertitta Enterprises, the
28 "Defendants"), by and through counsel, the law firm of Gordon Silver, hereby provide a fourth

1 supplement to Section II of their initial Disclosures pursuant to FRCP 26 as follows:

2 II.

3 **DOCUMENTS, DATA AND OTHER TANGIBLE EVIDENCE**

4 1. Attached herewith is a disk containing Bates Nos. ZYEN 001914 - ZYEN 02000,
5 BUL 00001- BUL 00107, MIL00001- MIL 00267.

6 In addition to those documents identified above, Defendants reserve the right to:

7 A. Use any and all documents identified by any and all other parties herein;

8 B. Use any and all documents or pleadings of any type filed and/or served on any
9 party in connection with the United States Bankruptcy, District of Nevada, Case No: BK-S-08-
10 10474-MKN; and

11 C. Supplement this document list up to and including the time of trial.

12 DATED this 14th day of October ~~14~~ 2010.

13 GORDON SILVER
14)

15 _____
16 GREGORY E. GARMAN
17 Nevada Bar No. 6654
18 MATTHEW C. ZIRZOW
19 Nevada Bar No. 7222
20 JOEL Z. SCHWARZ
21 Nevada Bar No. 9181
22 3960 Howard Hughes Pkwy., 9th Floor
23 Las Vegas, Nevada 89169
24 (702) 796-5555
25 Attorneys for Defendants
26
27
28

RECEIPT OF COPY

A RECEIPT OF COPY of **Defendants' Fourth Supplement to Rule 26 Disclosures**, is hereby acknowledged by the undersigned this ____ day of October, 2010.

Law office of Jonathan A. Backman

Jonathan A. Backman, Esq.
117 N. Center Street
Bloomington, IL 61701-5001
Counsel for David Herzog, as Liquidating Trustee
for the Estate of Xyience, Incorporated

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the ____ day of October, 2010, she served a copy of **Defendants' Fourth Supplement to Rule 26 Disclosures**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Oganna M. Atamoh, Esq.
on behalf of the Trustee
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101

Anna Dang, an employee of
GORDON SILVER

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RECEIPT OF COPY

A RECEIPT OF COPY of **Defendants' Fourth Supplement to Rule 26 Disclosures**, is hereby acknowledged by the undersigned this ____ day of October, 2010.

Law office of Jonathan A. Backman

Jonathan A. Backman, Esq.
117 N. Center Street
Bloomington, IL 61701-5001
Counsel for David Herzog, as Liquidating Trustee
for the Estate of Xyience, Incorporated

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the ____ day of October, 2010, she served a copy of **Defendants' Fourth Supplement to Rule 26 Disclosures**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada. said envelope addressed to:

Oganna M. Atamoh, Esq.
on behalf of the Trustee
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101

Anna Dang, an employee of
GORDON SILVER

Exhibit F

RECEIVED

JUN 27 2011

**LAW OFFICE OF
JONATHAN A. BACKMAN**

1 GORDON SILVER
 2 GREGORY E. GARMAN, ESQ.
 Nevada Bar No. 6654
 E-mail: ggarman@gordonsilver.com
 3 MATTHEW C. ZIRZOW, ESQ.
 Nevada Bar No. 7222
 E-mail: mzirzow@gordonsilver.com
 4 JOEL Z. SCHWARZ, ESQ.
 Nevada Bar No. 9181
 E-mail: jschwarz@gordonsilver.com
 5 3960 Howard Hughes Pkwy., 9th Floor
 6 Las Vegas, Nevada 89169
 7 Telephone (702) 796-5555
 8 Facsimile (702) 369-2666
 9 Attorneys for Defendants

10
 11 **UNITED STATES BANKRUPTCY COURT**
 12 **FOR THE DISTRICT OF NEVADA**

13 In re:
 14
 15 XYIENCE INCORPORATED,
 a Nevada corporation,
 16
 Debtor.
 17
 18 DAVID HERZOG, as Liquidating Trustee,
 19
 Plaintiff,
 20
 v.
 21
 22 ZYEN, LLC, a Nevada limited liability company,
 FERTITTA ENTERPRISES, INC., a Nevada
 23 corporation, WILLIAM BULLARD, ADAM
 FRANK, KIRK SANFORD, and OMER
 24 SATTAR,
 25
 Defendants.

Case No.: BK-S-08-10474-MKN
 Chapter 11

 Adversary No. 09-1402-MKN

DEFENDANTS' EIGHTH SUPPLEMENT TO RULE 26 DISCLOSURES

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DEFENDANTS' EIGHTH SUPPLEMENT TO RULE 26 DISCLOSURES

Defendants ZYEN, LLC ("Zyen"), Fertitta Enterprises, Inc. ("Fertitta Enterprises"), and William Bullard, ("Bullard", and collectively with Zyen and Fertitta Enterprises, the "Defendants"), by and through counsel, the law firm of Gordon Silver, hereby provide an eighth supplement to Section II of their initial Disclosures pursuant to FRCP 26 as follows:

II.

DOCUMENTS, DATA AND OTHER TANGIBLE EVIDENCE

1. Attached herewith is a disk containing Bates Nos. ZYEN02237-ZYEN03810.

In addition to those documents identified above, Defendants reserve the right to:

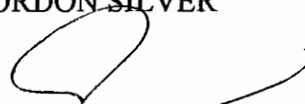
A. Use any and all documents identified by any and all other parties herein;

B. Use any and all documents or pleadings of any type filed and/or served on any party in connection with the United States Bankruptcy, District of Nevada, Case No: BK-S-08-10474-MKN; and

C. Supplement this document list up to and including the time of trial.

DATED this 20th day of June, 2011.

GORDON SILVER



GREGORY E. GORMAN
Nevada Bar No. 6654
MATTHEW C. ZIRZOW
Nevada Bar No. 7222
JOEL Z. SCHWARZ
Nevada Bar No. 9181
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for Defendants

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 24th day of June, 2011, she served a copy of **Defendants' Eighth Supplement to Rule 26 Disclosures**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Jonathan A. Backman, Esq.
Law office of Jonathan A. Backman
117 N. Center Street
Bloomington, IL 61701-5001

Oganna M. Atamoh, Esq.
on behalf of the Trustee
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101


An employee of GORDON SILVER

Privilege Log William Bullard Documents

Date	Description	Author	Recipient	CC's	Privilege	Bates No.
08/20/2007	Email re: Xyience control agreement attached agreement	Wansun Song	William Bullard	Gregory Bray; Thomas Pascall	Attorney Client	ZYEN02001 ZYEN02010
08/17/2007	Email re: Xyience Revised documents attach secured note, security agreement	Wansun Song	William Bullard; Gregory Bray; Thomas Pascall		Attorney Client	ZYEN02011 ZYEN02109
08/21/2007	Email re: Xyience warrant	Thomas Pascall	William Bullard	Gregory Bray; Wansun Song	Attorney Client	ZYEN02110 ZYEN02133
08/17/2007	Email re: Xyience Revised documents attached promissory note and security note	Wansun Song	William Bullard; Gregory Bray; Thomas Pascall		Attorney Client	ZYEN02134 ZYEN02234
09/05/2007	Email re: Xyience Subordination	Thomas Pascall	William Bullard		Attorney Client	ZYEN02235 ZYEN02336
10/01/2007	Email re: Xyience Budget attached Xyience Statement of Operations	Wansun Song	William Bullard	Thomas Pascall	Attorney Client	ZYEN02464 ZYEN02542
09/30/2007	Email re: Xyience Schedule Notes attached schedule of convertible senior secured note	Wansun Song	William Bullard	Gregory Bray; Thomas Pascall	Attorney Client	ZYEN02543 ZYEN02572
10/04/2007	Email re: signature pages	Wansun Song	William Bullard	Thomas Pascall	Attorney Client	ZYEN02648 ZYEN02655
04/15/2008	Email re: Term Sheet Xyience attach General Terms for Mazen	Bill Smith	William Bullard		Not Relevant	ZYEN02785 ZYEN02789
04/16/2008	Email re; Legal documents	Bill Smith	William Smith		Not Relevant	ZYEN02790
04/16/2008	Email re: legal documents	Bill Smith	William Bullard		Not Relevant	ZYEN02791 ZYEN02792

*Not Relevant - not reasonably calculated to lead to the discovery of admissible evidence

Privilege Log William Bullard Documents

Date	Description	Author	Recipient	C.C.S.	Privilege	Bates No.
04/17/2008	Email re: revised terms outlined attach general terms for Mazen	Bill Smith	William Bullard		Not Relevant	ZYEN02793 ZYEN02799
04/18/2008	Email re: Update on legal documents	Bill Smith	William Bullard		Not Relevant	ZYEN02800
04/22/2008	Email re: revised terms outlin attach general terms for Mazen	Bill Smith	William Bullard		Not Relevant	ZYEN02801 ZYEN02808
04/23/2008	Email re: legal documents	Bill Smith	William Bullard		Not Relevant	ZYEN02809
04/24/2008	Email re: legal documents	Bill Smith	William Bullard		Not Relevant	ZYEN02910
04/24/2008	Email re: Mazen Employer ID	Bill Smith	Kristin Genc; Michael Levy	Greg Garman; William Bullard	Attorney Client	ZYEN02811 ZYEN02812
04/25/2008	Email re: Application for EN Mazen Holding	Bill Smith	Kristin Genc; Michael Levy	Greg Garman; William Bullard	Attorney Client	ZYEN02813 ZYEN02816
04/25/2008	Email re: EINS for Mazen	Bill Smith	Kristen Genc	William Bullard	Attorney Client	ZYEN02818 ZYEN02819
04/29/2008	Email re: Legal documents	Bill Smith	William Bullard		Not Relevant	ZYEN02820
04/22/2008	Email re: Xyience	Lawrence Epstein	William Bullard		Not Relevant	ZYEN02821
04/23/2008	Email re: Xyience	Lawrence Epstein	William Bullard		Not Relevant	ZYEN02822 ZYEN02823
02/27/2008	Email re: Bergeron v. Fertitta Enterprises	Lawrence Epstein	William Bullard		Not Relevant	ZYEN02824 ZYEN02825
03/31/2008	Email re: Michael Passalacqua here	Adam Frank	William Bullard		Not Relevant	ZYEN02998 ZYEN03006

*Not Relevant - not reasonably calculated to lead to the discovery of admissible evidence

Privilege Log William Bullard Documents

Date	Description	Author	Recipient	C.C.'s	Privilege	Bates No.
03/13/2008	Email re: Michael Passalacqua	Adam Frank	William Bullard		Not Relevant	ZYEN03007 ZYEN03015
03/14/2008	Email re: Candidate for Chief Marketing Officer - Nevin Grinnell	Adam Frank	Kirk Sanford; William Bullard		Not Relevant	ZYEN03016 ZYEN03018
03/26/2008	Email re: Articles of Incorporation	Bill Smith	William Bullard		Not Relevant	ZYEN03050 ZYEN03061
03/26/2008	Email re: Docs	Anthony Pallante	William Bullard		Not Relevant	ZYEN03071
04/28/2008	Email re: Another bitter quarter at Cott Corp.	Anthony Pallante	William Bullard		Not Relevant	ZYEN03072
04/10/2008	Email re: UFC Tickets	Csaba Reider	William Bullard	Michael Levy; Bill Smith, Anthony Pallante	Not Relevant	ZYEN03196
04/10/2008	Email re: treal Tickets attach UFC teral Ticket Allocation	Michael Levy	William Bullard		Not Relevant	ZYEN03811 ZYEN03814
04/11/2008	Email re: UFC Tickets	Michael Levy	William Bullard		Not Relevant	ZYEN03815
04/11/2008	Email re: UFC tickets	Michael Levy	William Bullard		Not Relevant	ZYEN03816
04/11/2008	Email re: Donna Spaulding	Michael Levy	William Bullard		Not Relevant	ZYEN03817
04/11/2008	Email re: Xyience tickets	Michael Levy	William Bullard; Donna Marcolini		Not Relevant	ZYEN03818 ZYEN03819
04/17/2008	Email re: Xyience UFC tickets for treal fight	Michael Levy	William Bullard		Not Relevant	ZYEN03820

*Not Relevant - not reasonably calculated to lead to the discovery of admissible evidence

Privilege Log William Bullard Documents

Date	Description	Author	Recipient	C.C.'s	Privilege	Bates No.
04/17/2008	Email re: Donna cell number	Michael Levy	William Bullard		Not Relevant	ZYEN03821
04/22/2008	Email re: Happy haven't gotten call did u...	Michael Levy	William Bullard		Not Relevant	ZYEN03822
04/22/2008	Email re: Setting up new bank accounts	Michael Levy	William Bullard		Not Relevant	ZYEN03823 ZYEN03824
04/22/2008	Email re: Manzen Formation Documents	Michael Levy	William Bullard		Not Relevant	ZYEN03825 ZYEN03826
04/22/2008	Email re: Manzen Formation Documents	Michael Levy	William Bullard		Not Relevant	ZYEN03827 ZYEN03828
04/22/2008	Email re: Manzen Formation Documents	Michael Levy	William Bullard		Not Relevant	ZYEN03829 ZYEN03831
04/23/2008	Email re: Federal Tax number	Michael Levy	William Bullard		Not Relevant	ZYEN03832
04/25/2008	Email re: Manzen Employee-Identification Number Applications	Michael Levy	Bill Smith		Not Relevant	ZYEN03833

*Not Relevant - not reasonably calculated to lead to the discovery of admissible evidence

Exhibit G

/O=MICROSOFTONLINE/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=I

From: Bill Bullard
Sent: Thursday, October 04, 2007 7:32 PM
To: 'lorenzo.fertitta@stationcasinos.com'
Subject: Xyience

We got a verbal offer from Kott (the co-packer) last nite to buy the company for 150 million. Not sure how real it is just yet but will be meeting w them as early as next week to discuss this as well as ongoing manufacturing. Given that we just locked up Pike via voting agreement, I told Adam to keep this low key until we got something in writing with details.

Have no idea yet if this is legit yet.

We funded today and vested our warrant.

Sent from my BlackBerry Wireless Handheld

Exhibit H

Re: Xyience

Page 1 of 2

**/O=MICROSOFTONLINE/OU=EXCHANGE ADMINISTRATIVE GROUP
(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C5B17149-2390-4956-84C3-
E4E35DC8C0BA**

From: Bill Bullard
Sent: Wednesday, August 22, 2007 5:25 PM
To: Fertitta, Lorenzo; Frank.Fertitta@StationCasinos.com
Subject: RE: Xyience

What does this mean? What does "commitment" mean – personal, financial, Zuffa or what? He indicated to me today he just wants Zuffa to get paid which they should if we fund this deal. How do we reach conclusion as I need to tell Xyience whether we will fish or cut bait.

I just want to update status of operations and structure for you and Frank so we go in with eyes open. I like the play from the debt deal side. It has some risk, but commensurate returns. But it won't work if Zuffa won't keep alliance and support Xyience as sponsor. I just need to get some feedback and get you guys updated on size and structure. Can we discuss for 15 – 20 minutes?

From: Fertitta, Lorenzo [mailto:Lorenzo.Fertitta@StationCasinos.com]
Sent: Wednesday, August 22, 2007 5:02 PM
To: Bill Bullard; Frank.Fertitta@StationCasinos.com
Subject: Re: Xyience

If dana is in we are in. It won't work without danas commitment

-----Original Message-----

From: Bill Bullard <billb@gordonbiersch.com>
To: Fertitta, Lorenzo; Frank.Fertitta@StationCasinos.com <Frank.Fertitta@StationCasinos.com>
Sent: Wed Aug 22 12:40:30 2007
Subject: Xyience

We have almost finalized all of the deal documents for a capitalization of Xyience and could be in a position to fund as soon as a week to 10 days. I believe the structure of this deal provides us the most flexibility for maximizing upside value while providing new management with the incentive to create value, raise capital and monetize our investment and warrants.

Xyience looks to be on track for \$4 million in sales for August, their highest month yet and they appear to be making some significant traction. They have been approached by the Gallo distributor to begin sales for the entire state of Texas and a couple of other adjacent states which would be a significant new market and sales. They picked up a 4500 unit chain in the midwest and now have Cadbury Schwepps requesting to bid against Cott for their production which will further increase margin and improve logistics for them.

They have a lot of positive traction working for them now but remained hampered by capital. I have reviewed their forecast and budgets for the next 24 months in detail and believe they are fair and achievable. They still have execution issues to work out but issues that need capital only. The company is beginning talks with investment banking groups for long term capital. With all the potential, without a Zuffa alliance, I don't believe they will get there in the short-term as they cannot afford the marketing lift they get from this exposure and branding. If they don't raise about \$7 million in subordinated capital over the next 90-120 days, which they are quite confident they can do, under this structure - **we would control them.**

5/24/2011

GB00103

Re: Xyience

Page 2 of 2

However, if there is no interest in going forward on this deal, we should let them know now. While I think there is some opportunity here, it will only exist with a favorable alliance with Zuffa. I also believe there is a way to muzzle Russell Pike if that remains a concern.

I would like to discuss this ASAP to give you an update on structure and events and let them know whether we are going forward.

Bill

The information contained in this electronic transmission (email) is confidential information and may be subject to attorney/client privilege. It is intended only for the use of the individual or entity named above. ANY DISTRIBUTION OR COPYING OF THIS MESSAGE IS PROHIBITED, except by the intended recipient. Attempts to intercept this message are in violation of 18 U.S.C. 2511(1) of the Electronic Communications Privacy Act (ECPA), which subjects the interceptor to fines, imprisonment and/or civil damages.

5/24/2011

GB00104

Exhibit I

E-FILED ON: March 5, 2008

1 GORDON & SILVER, LTD.
 2 GERALD M. GORDON, ESQ.
 Nevada Bar No. 229
 E-mail: gmg@gordonsilver.com
 3 GREGORY E. GARMAN, ESQ.
 Nevada Bar No. 6654
 E-mail: geg@gordonsilver.com
 5 MATTHEW C. ZIRZOW, ESQ.
 Nevada Bar No. 7222
 E-mail: mcz@gordonsilver.com
 6 3960 Howard Hughes Pkwy., 9th Floor
 7 Las Vegas, Nevada 89169
 8 Telephone (702) 796-5555
 Facsimile (702) 369-2666
 9 Attorneys for Zyen, LLC

10 UNITED STATES BANKRUPTCY COURT
 11 FOR THE DISTRICT OF NEVADA

12 In re: 13 XYIENCE INCORPORATED, 14 a Nevada corporation, 15 Debtor.	Case No.: BK-S-08-10474-MKN Chapter 11 Date: March 6, 2008 Time: 9:30 a.m.
---	---

16
 17 **DECLARATION OF WILLIAM J. BULLARD IN SUPPORT OF**
 18 **REPLY TO OPPOSITION FILED BY THE OFFICIAL COMMITTEE OF UNSECURED**
 19 **CREDITORS TO DEBTOR'S MOTION FOR ORDER (1) APPROVING SALES**
 20 **PROTECTIONS TO MANCHESTER CONSOLIDATED CORP., (2) APPROVING**
 21 **PROCEDURES FOR SOLICITING HIGHER AND BETTER OFFERS, AND**
 22 **DETERMINING HIGHEST AND BEST OFFER; (3) SETTING HEARING TO SELECT**
 23 **HIGHEST AND BEST OFFER, AND TO APPROVE SALES OF ASSETS; AND (4)**
 24 **GRANTING OTHER RELIEF**

25 I, William J. Bullard, declares as follows:

- 26 1. I am over the age of 18, am mentally competent, have personal knowledge of the
 27 facts in this matter, and if called up to testify, could and would do so.
- 28 2. I am the manager of Zyen, LLC, a Nevada limited liability company ("Zyen"),
 and Chief Financial Officer of Fertitta Enterprises, Inc., a Nevada corporation ("Fertitta
 Enterprises").
3. I make this declaration in support of Zyen's Reply to the Initial Objection of

1 Official Committee of Unsecured Creditors to Debtor's Motion for Order (1) Approving Sales
2 Protections to Manchester Consolidated Corp.; (2) Approving Procedures for Soliciting Higher
3 and Best Offers, and Determining Highest and Best Offer; (3) Setting Hearing to Select Highest
4 and Best Offer, and to Approve Sale of Assets; and (4) Granting Other Relief in the above-
5 captioned bankruptcy case.

6 4. By way of its Objection, the Unsecured Creditors' Committee (the "Committee")
7 makes the unsubstantiated allegation that "the Committee has been informed that there is a
8 relationship between the Fertitta family (the ultimate owners of Fertitta Enterprises, which
9 created Zyen and is a 90% owner of Zuffa, LLC) ("Zuffa") - the parent company of the Ultimate
10 Fighting Championship, of which the Debtor is as major sponsor), and Manchester the proposed,
11 purchaser of the Debtors assets. Objection See page 4, lines 1-4. The Committee uses this
12 inflammatory statement to support their conspiracy theory that "Zyen may be seeking a short
13 marketing period in order to improperly consummate a 'Lend to Own' strategy." See Objection
14 page 4, lines 8-9. The Committee later reinstates this unfounded allegation in its Objection. See
15 Objection pp 8-10. As set forth herein, there is not, nor has there ever been, a relationship
16 between Zyen, Fertitta Enterprises or their affiliates and the Manchester Group other than in their
17 capacity as a proposed investor in, manufacturer to or buyer of the Debtor.

18 5. In October 2007, in my capacity of manager of secured creditor Zyen, I was
19 introduced to representatives of the Manchester Group by representatives of the Debtor. At
20 that meeting, the Manchester Group indicated an interest in either making a strategic investment
21 in the Debtor's operations or providing manufacturing services to the Debtor.

22 6. In late December in connection with a meeting with the Debtor, the Manchester
23 Group resurfaced as a potential Buyer or investor. At that time I again engaged in discussions
24 with the Manchester Group in my capacity as a secured lender.

25 7. Again, rose discussions centered on the Manchester Group's interest in buying or
26 investing in the Debtor. Pursuant to the terms of the Letter of Intent submitted to this Court for
27 approval with the Sales Procedures Motion, the Manchester Group has indicated an interest in
28 purchasing substantially all the assets of the Debtor, provided that, Zyen is willing to convert a

1 portion of its secured note into equity in Newco (the yet to be formed entity in which the
2 Manchester Group intends to acquire Debtors assets).

3 8. My discussions with the Manchester Group remain ongoing and the parties have
4 not reached an agreement concerning what, if any portion of the secured debt Zyen would be
5 willing to convert into equity of Newco.

6 9. Prior to the filing of the Committee's Opposition, I caused my counsel, Gregory
7 E. Garman, Esq. of Gordon & Silver, Ltd., to disclose the ongoing discussion with the
8 Manchester Group to the Debtor, the Office of the United States of the Trustee, and Counsel to
9 the Unsecured Creditors Committee.

10 10. Other than discussions with the Manchester Group set forth and herein, there is no
11 relationship between the Manchester Group and Zyen, Fertitta Enterprises, or their affiliates.

12 I declare under penalty of perjury of the laws of the United States that these facts are true
13 to the best of my knowledge and belief.

14 DATED this 5th day of March, 2008.

15
16 /s/ Willaim J. Bullard
17 WILLIAM J. BULLARD
18
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Exhibit J

**CONSULTING AGREEMENT BETWEEN ZYEN, LLC AND MANCHESTER
CONSOLIDATED CORP.**

This Consulting Agreement (the "Agreement") is made as of the 14th day of December, 2007 by and between Zyen, LLC, a Nevada limited liability company, (the "Company") and Manchester Consolidated Corp., with an address at 1591 Jalna Ave., Mississauga Ontario, L5J 1B8 (the "Consultant").

WHEREAS, the Company wishes to engage Consultant to advise the Company and Consultant wishes to accept such engagement, all upon the terms and subject to the conditions contained in this Agreement; **NOW, THEREFORE**, the parties hereto, in consideration of the mutual consideration and promises contained herein and intending to be bound, hereby agree as follows:

1. Appointment. The Company hereby appoints Consultant, and Consultant agrees to serve as, consultant to the Company, all upon the terms, and subject to the conditions of this Agreement.

2. Term. The term of this Agreement shall begin on the date first set forth above and shall continue until January 31, 2007.

3. Duties of Consultant. Consultant shall assist the Company in assessing the alternatives related to a secured loan currently outstanding between the Company and Xyience Inc. which is in default. The duties will require the assessment of all forecast and operating plans generated by Xyience and working with the CFO of Xyience, Michael Levy. Consultant shall render such advice and assistance as the Company may reasonably request pursuant to such duties. Consultants work will be completed by William Smith with the assistance of others as and when needed.

4. Compensation. The Company shall pay Consultant a monthly fee equal to \$5,000.00. The monthly fee will be prorated where necessary.

5. Status as Independent Contractor. The parties intend and acknowledge that Consultant is acting as an independent contractor and not as an employee of the Company. Consultant shall have full discretion in determining the amount of time and activity to be devoted to rendering the services contemplated under this Agreement and the level of compensation to Consultant is not dependent upon any preordained time commitment or level of activity. The Company acknowledges that Consultant shall remain free to accept other consulting engagements of a like nature to the engagement under this Agreement. Consultant, however, hereby undertakes to notify the Company in writing of any engagement undertaken by Consultant that could reasonably be determined to create a conflict of interest with the Company's engagement of Consultant. Nothing in this Agreement shall be construed to create any partnership, joint venture or similar arrangement between the Company and Consultant or to render either party responsible for any debts or liabilities of the other.

6. Confidentiality.

(a) Consultant acknowledges that in connection with the services to be rendered under this Agreement, Consultant may be provided with confidential business information of the

Company. Consultant agrees to keep any information or materials specifically designated in writing by a responsible officer of the Company as confidential (the "Confidential Information") in the strictest confidence and not to disclose or disseminate any such Confidential Information to any person, firm or other business entity except to those employees, consultants or other independent contractors of the Company or Consultant as shall be necessary or advisable for the carrying out of the purposes of this Agreement and who are under a similar obligation of confidentiality.

(b) The Company acknowledges that Consultant may, in rendering the services to be rendered hereunder, be utilizing materials that are proprietary to Consultant. The Company acknowledges that any such materials that are specifically designated in writing to the Company to be proprietary to Consultant will remain the property of Consultant and the Company will treat such materials as confidential information of Consultant and will not disclose or disseminate any such confidential information to any person, firm or other business entity except to those employees, consultants or other independent contractors of the Company or Consultant as shall be necessary or advisable for the carrying out of the purposes of this Agreement and who are under a similar obligation of confidentiality.

7. Indemnification. The Company shall indemnify Consultant for any loss, damage, expenses, claims or other liabilities (including, without limitation, attorneys' fees) resulting from a breach or alleged breach of any of the representations and warranties of the Company, or the failure of the Company to perform any of its obligations, contained in this Agreement.

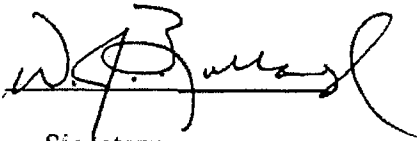
8. Amendments, Modifications, Waivers, Etc. No amendment or modification to this Agreement, nor any waiver of any term or provision hereof, shall be effective unless it shall be in a writing signed by the party against whom such amendment, modification or waiver shall be sought to be enforced. No waiver of any term or provision shall be construed as a waiver of any other term or condition of this Agreement, nor shall it be effective as to any other instance unless specifically stated in a writing conforming with the provisions of this Paragraph 8.

9. Successors and Assigns. This Agreement shall be enforceable against any successors in interest, if any, to the Company and Consultant. Neither the Company nor Consultant shall assign any of their respective rights or obligations hereunder without the written consent of the other in each instance.

IN WITNESS WHEREOF, the parties hereto have set their respective hands as of the date first above written.

12-17-07

MANCHESTER CONSOLIDATED CORP.

By: 
Signatory
ZYEM LLC

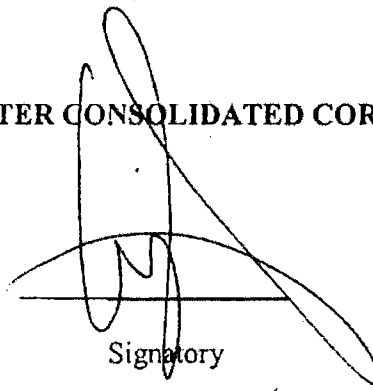

Signatory
WILLIAM SIMON
EVP.

Exhibit K

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE: Chapter 11
XYIENCE INCORPORATED,
No. BK-S-08-10474-MKN
Debtor.

DAVID HERZOG,
as Liquidating Trustee,

Plaintiff,

v.
Adversary Case No. 09-1402-MKN
ZYEN, LLC, et al.,

Defendants.

DEPOSITION OF WILLIAM BULLARD, PERSON MOST
KNOWLEDGEABLE OF GORDON BIRSCH BREWING COMPANY
Las Vegas, Nevada
Tuesday, May 24, 2011

Reported by:
Maria C. Wooley
CCR No. 488
Job No. 159848B

1 APPEARANCES:

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For David Herzog, as Liquidating Trustee
for the Estate of Xyience Incorporated:

LAW OFFICE OF JONATHAN A. BACKMAN
BY: JONATHAN A. BACKMAN, ESQ.
117 N. Center Street
Bloomington, Illinois 61701-5001
309.820.7420
email: jbackman@backlawoffice.com

For the Defendants:

GORDON & SILVER
BY: GREGORY E. GARMAN, ESQ.
3960 Howard Hughes Parkway
Ninth Floor
Las Vegas, Nevada 89169
702.796.5555
email: ggarman@gordonsilver.com

Also Present:

EILEEN M. BACKMAN

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 IN RE: Chapter 11
5 XYIENCE INCORPORATED,
6 No. BK-S-08-10474-MKN
7 Debtor.

8 DAVID HERZOG,
9 as Liquidating Trustee,

10 Plaintiff,

11 v.
12 Adversary Case No. 09-1402-MKN
13 ZYEN, LLC, et al.,

14 Defendants.

15
16 Deposition of WILLIAM BULLARD, taken on
17 behalf of David Herzog, as Liquidating Trustee for the
18 Estate of Xyience Incorporated, at Gordon & Silver,
19 3960 Howard Hughes Parkway, 9th Floor, Las Vegas,
20 Nevada, beginning at 3:29 p.m. and ending at 4:10 p.m.
21 on Tuesday, May 24, 2011, before Maria C. Wooley,
22 Certified Court Reporter No. 488.
23
24
25

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2 WITNESS EXAMINATION
3 WILLIAM BULLARD
4 BY MR. BACKMAN 5

6
7 EXHIBITS
8 DEPOSITION PAGE
9 Exhibit 497 Subpoena in a Case Under the 5
Bankruptcy Code
10 Exhibit 498 Notice of taking Deposition of 6
11 Person Most Knowledgeable of
Gordon Biersch Brewing Company
12 Exhibit 499 Defendant's Fourth Supplement 15
13 to Rule 26 Disclosures
14 Exhibit 500 Documents Produced at 22
Deposition by William Bullard
15
16
17
18
19
20
21
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25

1 it.
2 Q And would it have been the individual
3 employees who made the decision to delete e-mails as
4 of a certain date or was it the third-party vendor?

5 A It would have been the individual employees.

6 Q Okay. Was there a reason you had chosen to
7 delete everything prior to December 31st, 2007?

8 A I don't know when that would have been
9 happening. All I can tell you is at some point in
10 time when the server gets big, I go in and try to get
11 rid of things.

12 We also delete them daily, so there is no
13 rhyme or reason. We don't delete them by date, we can
14 delete them individually as they come in.

15 Q Okay. Was a litigation hold ever placed to
16 your knowledge, that is, stop any deletion of any
17 e-mails related to Xyience going through the
18 Gordon Biersch?

19 A I'm not aware of any.

20 Q All right. So tell me a little bit about
21 what happened in the past couple of days. You brought
22 in End 2 End, that third-party server?

23 A I just -- yeah. I called them up and said
24 could you do a search -- because I don't know how to
25 do it. I said can you do a search on these exchanges

Page 13

1 just to make sure there is no Xyience documents out
2 there.

3 We had a discussion and I said, okay, can
4 you go back and get any e-mails?

5 And he says, no, but you would have history
6 on an archive file, which I didn't know I had.

7 So he showed me how to get into it and
8 that's what happened over the weekend, so that's when
9 I got into it and said, okay, there is some more
10 e-mails I didn't know existed.

11 Q So if I'm clear, when you say there was an
12 archive file, was this a Bill Bullard archive file?

13 A I believe it's on my -- only on my computer.
14 As I understand, when Microsoft asks for an automatic
15 archive, you either say "yes" or "no." And if you say
16 "yes," then it goes down there. And when you're on it
17 and you say "no," it doesn't go on there.

18 So whatever was on there, I don't know how
19 it got on there but we did find it.

20 Q All right. And that's what you produced?

21 A Yes.

22 Q Okay. So when you got the request for the
23 documents back in September or whatever it was, the
24 ones that were produced -- in fact, we have those.
25 Why don't we just mark them.

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1 I'll mark this as Exhibit 499, which is
2 Defendant's Fourth Supplement to its initial
3 disclosures.

4 And if you will look through it, you will
5 see -- and we only attached to that the billable
6 documents.

7 A Right.

8 Q And those started with on or about January
9 1st, 2008.

10 A Yeah.

11 Q So to locate those documents, you had just
12 gone to the computer on your desk, the one you were
13 using at the time?

14 A Right.

15 Q And pulled up anything Xyience related?

16 A Yeah, exactly.

17 Q Okay. And you didn't know about this
18 archive file?

19 A I didn't.

20 Q Okay. And that was located over the
21 weekend?

22 A Yes.

23 Q All right. Okay.

24 MR. GARMAN: And just to supplement,
25 End 2 End wasn't just brought in to do a search. End

Page 15

1 2 End was brought in to assist with making him
2 knowledgeable under 30(b)(6) so he was a competent
3 witness.

4 MR. BACKMAN: Right.

5 MR. GARMAN: And that was sort of the result
6 of what happened, was in doing that process I wanted
7 to make sure everything was caught and found the
8 archive file. And then it wasn't brought in over the
9 weekend to do a search. It was to make him a
10 competent witness under 30(b)(6) to answer your
11 questions and to do a search. Right?

12 THE WITNESS: Right.

13 BY MR. BACKMAN:

14 Q All right. Let me ask, beyond an ESI, ESI
15 meaning short for electronically stored information,
16 it's kind of a new term in the bankruptcy, in the
17 Federal Rules of Civil Procedure, but that's for us
18 lawyers to argue about, but I also asked for and
19 expressed some surprise with Joel Schwartz,
20 Mr. Garman's partner, that there weren't like, you
21 know, documents like spreadsheets, things like that,
22 that would have maybe been around.

23 Do you have a folder or a file where you
24 keep stuff that you print if you get an e-mail that's
25 interesting that you would set aside?

Page 16

1 A Well, typically if I do -- we have what we
2 call original documentation file, which could be a
3 closing binder from attorneys, so all the original
4 documentations are in there.
5 If there is a supplemental file, you know,
6 then I will usually keep that with it or anything that
7 I think is worth keeping, you know, whether it was
8 projections. You know, I don't typically print out
9 e-mails to store them unless there is a spreadsheet on
10 there or document that I think is worthy of continuing
11 to have in the future.
12 Q And is there such a file for the period of
13 June 1st, 2007 through December 31st, 2007 relating to
14 the Xyience loan?
15 A Well, we would have a file, but it wouldn't
16 be a file for any specific period. It would be a file
17 with anything to do with Xyience that I thought was
18 necessary to keep of interest.
19 Q Have you been through that file?
20 A Yes.
21 Q And have you produced everything that
22 responds to the document request?
23 A Yes.
24 Q Okay. Go ahead.
25 A It's not a lot. There is not a lot of

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1 reason to keep old Xyience information.
2 Q Right. We have the file binder, obviously,
3 and those are thousands of pages. So I'm really
4 asking for anything beyond that, any supplements, as
5 you put it, or other interesting information that
6 didn't find its way into the closing binder.
7 A Most of that stuff, yeah, whatever I had you
8 got.
9 Q Okay. A question relating to finding this
10 archive file.
11 Did you find it on your computer, your
12 actual computer?
13 A Yes.
14 Q And is it a PST file, a Microsoft?
15 A PST.
16 Q Like what type of software is it?
17 A It's in the Outlook file.
18 Q The Outlook, okay.
19 A It's a little file that I didn't know about
20 that says archive.
21 Q Okay. Got it.
22 And what did it do? Did it make a copy of
23 that archive file? Did it just print out every
24 document from it?
25 A It just has e-mails on there as archived

Page 18

1 e-mails on there, just like it would be in your inbox
2 or outbox.
3 Q Okay.
4 A So it has the original e-mail of whatever I
5 sent. If it was archived, it was on there.
6 Q And so you just had to print it out and give
7 to us?
8 A Yeah. I printed it out for all of the
9 things that were applicable to Xyience.
10 Q Okay. So there was stuff in that archive
11 folder that had nothing to do with Xyience?
12 A Yeah, most of it had nothing to do with
13 Xyience.
14 Q It must have been quite a job then because
15 you were using Gordon Biersch.
16 If I understood you correctly, you were
17 using that e-mail address for all of your different
18 businesses?
19 A Yes.
20 Q So that archived file was probably quite
21 large?
22 A I don't know. I don't know how large, but
23 it was -- it had a lot of e-mails in it.
24 Q Are you comfortable that you caught all the
25 Xyience related?

Page 19

1 A I spent a great deal of time going through
2 looking for e-mails to Xyience related people that
3 would have been, you know, in an exchange of Xyience.
4 Q Do you know what period the archive --
5 A I don't know.
6 Q In searching, did you do -- in looking for
7 applicable responsive e-mails, did you do like a word
8 search or did you just look one e-mail at a time?
9 A I looked by e-mail address, okay, so I
10 sorted who it went to. So I would scroll down and
11 said, okay, were they related to Xyience, were they
12 related to Xyience.
13 Q And that would be both to and from?
14 A The only archive file it had was ones I
15 sent.
16 Q Okay. Very good.
17 A There was no archive file for things I
18 received.
19 Q Got it.
20 Now, would those archived files have been
21 kept on the Gordon Biersch servers?
22 A Well, that's the server that it was on. It
23 was on the GB exchange server.
24 Q So even though you got it off your computer,
25 you were really pulling it from the server?

Page 20

1 A Well, no. I'm saying that's where they
2 originally went to, they went to the GB server. And
3 then when they're archived, they're archived on my
4 hard drive.

5 Q I'm a little confused. I am a novice when
6 it comes to --

7 A Me, too.

8 Q Yes, we're definitely in the same business
9 there.

10 Just so I'm clear, it's your understanding
11 then that this archive file was actually located on
12 your hard drive or on the servers that serve
13 Gordon Biersch generally?

14 A I believe it was explained that it was
15 located on my hard drive.

16 Q Did anybody take a look at the servers
17 themselves to see if there was additional Xyience
18 related material?

19 A Yes. I asked them to do -- for documents, I
20 asked them to do any search for documents related to
21 Xyience.

22 Q Okay.

23 A And that's what -- I think we had a couple
24 of other documents that were on a different exchange,
25 a different server, because they were on my

Page 21

1 secretary's server and she doesn't go through
2 documents for e-mails. We just looked in what I had
3 on my computer for an archive file.

4 Q Do you remember that in October of 2004
5 there was a discussion that Cott might be interested
6 in buying Xyience?

7 A Yes, there was several discussions that Cott
8 had an interest before and after.

9 Q You went out to see Cott shortly after the
10 loan closed in October 2007; right?

11 A Yes, we went up to Toronto and I'm not sure
12 of the dates, but I think there is some e-mail
13 exchanges that I've seen that says, you know, what the
14 dates were, I don't remember them offhand, but yes, we
15 did go to Toronto and meet with Cott.

16 Q Did you hear Mr. Frank introduce you in
17 addition to being a lender of Xyience as also being a
18 member of the Board?

19 A No.

20 Q You don't recall that?

21 A No.

22 Q We're going to mark this as Exhibit 500, if
23 you would take a look at that.

24 A What is this?

25 Q That should be all the documents that you

Page 22

1 produced from your --

2 MR. GARMAN: You have an extra set. This is
3 what you gave us today and late yesterday as the
4 supplement. We bound it together and put our
5 responsive cover page on it and produced it.

6 THE WITNESS: Okay.

7 BY MR. BACKMAN:

8 Q And all of those e-mails that you found in
9 your archive as you were going through those, those
10 were e-mails that were created during the course of
11 your business, the Xyience business related to
12 Xyience, the Zyen loan related to Xyience?

13 A There may be others that I've deleted.

14 Q Sure, but I mean the ones you produced?

15 A Right.

16 Q Okay.

17 MR. GARMAN: Just so the record's clear, we
18 produced these in response to the Subpoena for
19 Gordon Biersch today. We're going to supplement them,
20 simply incorporate them in the production by other
21 parties to clean it up at some point.

22 MR. BACKMAN: Okay.

23 BY MR. BACKMAN:

24 Q So it's possible -- if I understand your
25 answers correctly, it's possible that there were other

Page 23

1 e-mails that were deleted, but what you've given us
2 are the ones that are currently there, currently
3 there, that is, on the archive related to Xyience?

4 A Make sure I understand. If you're asking me
5 whether I received or sent, do I have all the e-mails
6 that ever existed with Xyience, I can assure you that
7 I don't because my policy is that, you know, I delete
8 some, some I don't.

9 If it got archived, that's what caught my
10 eyes that these existed, so that's what we gave.

11 There may have been others that over the past four
12 years have been deleted.

13 Q Okay. Did you ever delete any e-mails from
14 either the archive folder or your regular e-mail
15 exchange because you felt that they were adverse or
16 would reflect negatively on you or on Zyen or the
17 other defendants in this litigation?

18 A Not knowing we ever deleted, if things got
19 deleted, you know, they've been deleted over time, but
20 it was not as a result of whether I felt they were
21 right or wrong.

22 Q Did you have -- back in the period June --
23 we're going to use the period June 1st, 2007 to
24 December 31st, 2007, did you have any backup systems
25 for Gordon Biersch e-mail servers?

Page 24

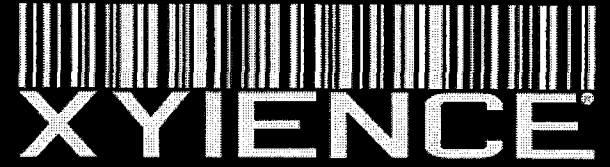
Exhibit L



Proposed Xyience Re-Finance and Re-Organization Plan 2008

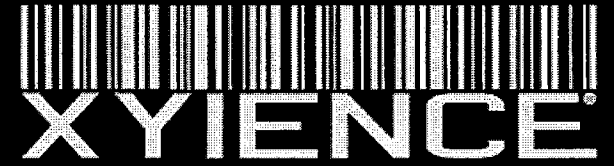
Strictly Private and Confidential – Manchester, December 26th 2007

Table of Contents



- I. Executive Summary
- II. Strategic Structure
- III. Financial Forecast

Executive Summary



• **Key Financial Drivers of Assumptions**

- Legal and Bankruptcy Timelines
- Xyience put into Chapter 11 by January 11th 2008
- 90 day timeline for 363 process anticipated
- Fertitta Enterprises and or 3rd party Finance through D.I.P. period.

• **Management through Chapter 11**

- January 14th Manchester Consolidated engaged as management consultants for senior secured debtor
- Csaba Reider Senior manager, Bill Smith, Finance and other members of team on as needed basis

• **Mandate through 90 days** – *with view of Bevco/Pubco Investments out of Chapter 11, 363 process*

- Preserve cash, and secure assets
- Shore up supply relationship with key suppliers, Cott, Allen etc.
- Ensure supply of products to key distributors, key location regions of UFC penetration
- Quantify D.I.P. financing needs, aprox \$2- \$5 million
- Restructure organization, reduce non essential personnel ie; HR Manager, COO, reduce sales group by aprox. 50% etc.
- Evaluate key personnel
- Restructure sales structure by region, Distributers and retailers

Executive Summary



- **Coming out of Chapter 11, 363 process in 90 days**

- Structure proposal on page 6
- Bevco / Pubco injects \$7 - \$15 million for < 50% ownership, either directly or through wholly owned subsidiary
- New 3 year UFC agreement in place, similar terms to present
- Secured lender converts outstanding debt into Equity
- D.I.P financing is converted into equity (a portion could be paid to D.I.P. lender, thereby reducing equity stake)
- Fresh 3rd party financing (if previous shareholders want to participate or new investors) can enter through Bevco

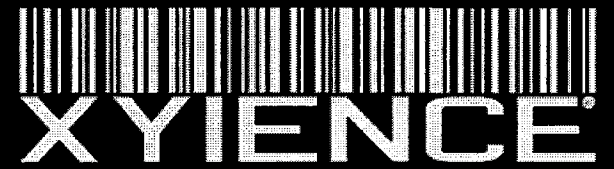
- **Bevco/Pubco Management**

- Tony Pallante, Chairman
- Csaba Reider, President, CEO
- Bill Smith, CFO
- VP sales/marketing Canada, TBD

- **Xyience Management (*New Private, US Operations*)**

- Csaba Reider, President, CEO, Chairman
- Mike Levy, VP Finance, Candidate
- VP Sales/Marketing Candidate U.S.A. TBD

Executive Summary



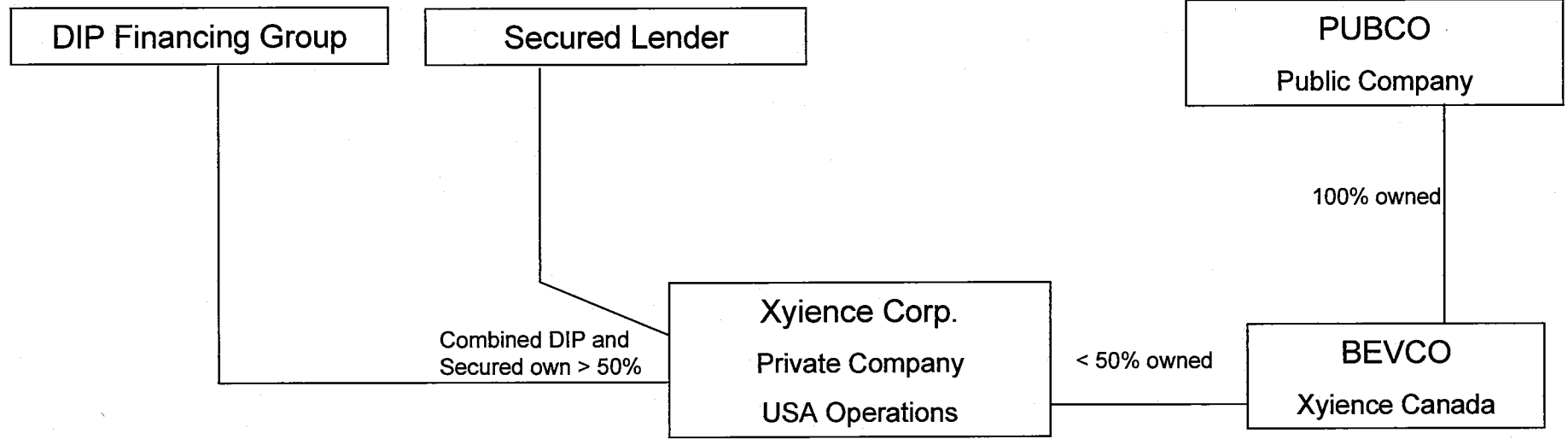
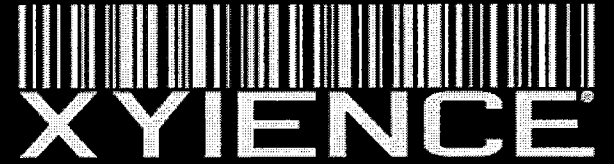
• **Bevco – Considerations for Investment**

- Xyience comes out cleanly out of Chapter 11, 363 process
- 3 year UFC agreement in place before investment
- Manage all worldwide manufacturing for Xyience @ 50 cents / case
- First right of refusal for all worldwide manufacturing @ \$1.50/case, plus open book costs.
- Full Canadian Franchise ownership of Xyience and all related Xyience, products, trademarks etc.
- Xyience Management Team in Place as outlined above
- First right of refusal to purchase remaining shares of Xyience
- Bevco to pay \$4.00 /case to Xyience for every case sold and paid for in Canada
- Bevco has first right of refusal for future geographic franchise areas developed by Xyience Worldwide.

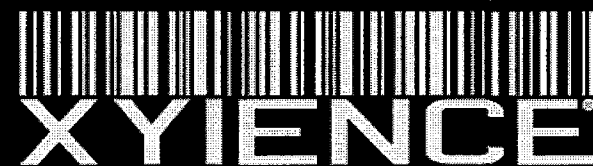
•**Financial Forecast Model – page 7**

- 3 years
- Assuming 90 days from January 14th 2008
- Management consulting in place January 14th
- Bevco Investment made and Xyience management in place coming out of Chapter 11, 363 process

Strategic Structure



Financial Forecast



Xyience Corp. (Private Company)

	Total 2008 Estimate	Total 2009 Estimate	Total 2010 Estimate
Revenue (Gross)			
USA	25,318,339	42,279,287	48,894,287
Canada	1,000,089	1,886,573	2,075,231
Total Revenue	26,318,429	44,165,861	50,969,518
COGS			
USA	11,367,418	18,982,537	21,952,537
	11,367,418	18,982,537	21,952,537
Gross Profit	14,951,011	25,183,324	29,016,981
SGA			
Marketing	11,941,394	13,385,996	14,608,496
Personnel	4,082,283	4,123,669	4,504,294
Canada Case fee	574,112	958,714	1,108,714
Office & Consulting	2,089,765	2,244,371	2,345,621
Total SGA	18,687,554	20,712,750	22,567,125
Operating Income	(3,736,543)	4,470,573	6,449,855
Operating Income Percent	-14.2%	10.1%	12.7%

Group Exhibit M

Jon Backman

From: "Jon Backman" <jbackman@backlawoffice.com>
To: "Joel Schwarz" <jschwarz@gordonsilver.com>
Cc: "Eileen Backman" <ebackman@backlawoffice.com>; "Jon Backman" <jbackman@backlawoffice.com>; "Greg Garman" <GEG@GORDONSILVER.com>; "MCZ Matthew C. Zirzow" <MCZ@GORDONSILVER.com>; "Ogonna Atamoh" <oatamoh@nevadafirm.com>
Sent: Tuesday, June 07, 2011 4:30 PM
Subject: Xyience/Bullard Deposition and Related ESI Follow-up
Hi Joel ---

A few issues:

1. Please provide me with the status of the "clean room" effort to rebuild the damaged server and the person whom I may contact to discuss such status and related issues.
2. At Mr. Bullard's deposition, you indicated that you would get us the attachments to the following emails:

GB00015 - 6/28/07 (Xyience Secured Debt Term Sheet)
GB00030 - 6/28/07 (Xyience Secured Debt Term Sheet)
GB00101 - 6/15/07 (6 Financial spreadsheets)
GB00126 - 6/28/07 (Xyience Cash Plan)
GB00128 - 12/26/07 (Need attachments to C. Reider; see email in middle of page)
3. At the deposition, you also indicated that you had located Ms. Nadeau's server and archives and would be providing ESI from those sources. In particular, we would want any emails or related ESI from Ms. Nadeau's server between May 1, 2007, and August 1, 2008, referencing or including: (i) Adam Frank, (ii) Kirk Sanford, (iii) Frank and/or Lorenzo Fertitta (inclusive of juniors and thirds), (iii) John Mulkey, (iv) Michael Levy, (v) Dana White, (vi) Russell Pike, and/or Bill Underhill. Anything relevant to the Fertitta-Zyen-Xyience loan would, of course, be required as well.
4. The formal name of the Gordon Biersch IT service provider (we cannot locate any provider named "End to End" in Las Vegas or surrounding areas).
5. The time period covered by the archived .pst file from which the ESI provided at Mr. Bullard's deposition was located.
6. Confirmation that there are no readily accessible back-ups of Mr. Bullard's smart phone for the period in question.

Please let me know your thoughts and responses to the foregoing as soon as possible.

Thanks.

Jon

Law Office of Jonathan A. Backman
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117 North Center Street
Bloomington, IL 61701
(309) 820-7420
FAX: (309) 820-7430
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Jon Backman

From: "Jon Backman" <jbackman@backlawoffice.com>
To: "JZS Joel Z. Schwarz" <JZS@GORDONSILVER.com>
Cc: "Eileen" <ebackman@backlawoffice.com>; "Jon Backman" <jbackman@backlawoffice.com>; "Greg Garman" <GEG@GORDONSILVER.com>; "MCZ Matthew C. Zirzow" <MCZ@GORDONSILVER.com>; "Ogonna Atamoh" <oatamoh@nevadafirm.com>; "Shannon Liberio" <sliberio@nevadafirm.com>
Sent: Friday, June 17, 2011 8:30 AM
Attach: Email to Joel re GB and server follow-up 06-07-11.pdf; Expert.Disc.FINAL.06.17.11wpd.pdf; Signed Expert.Disc.FINAL.06.17.11wpd.pdf
Subject: Xyience/Herzog v. Zyen at al
Good morning Joel ---

Thank you for your call yesterday. I am delivering here, as a single discovery document, a supplemental initial disclosure together with our disclosures under Rule 26(a)(2)(C). Consistent with your local practice, Ogonna's office may deliver a hard copy and original receipt next week, but especially in view of our discussion yesterday about extending the fact discovery cut-off date, I wanted to get these disclosures to you as soon as possible.

The portion of the attached regarding Mr. Underhill should come as no surprise. As for Mr. Burr, since we did not initially name him as a fact witness, please note that we doing so now (as well as in his capacity as a non-reporting expert witness) and stand ready to present him for a deposition at a mutually convenient time and location. Mr. Burr --- albeit located out of state --- travels to Las Vegas sufficiently frequently that we should be able to arrange for his deposition as your offices if we can select a few mutually convenient dates and times.

I await your report an and further discovery based on yesterday's discussion regarding your plans for:

1. The seemingly repaired, but apparently horrendously organized, Xyience servers;
2. Ms. Nadeau's documents and any additional production; and
3. The attachments to certain of Mr. Bullard's emails, as produced at his deposition, which we specifically identified in our June 7, 2011, email;
4. The formal name of the Gordon Biersch IT service provider "End to End" in Las Vegas or surrounding areas; and
5. The other rather limited information requested in our email to you of June 7, 2011 (attached hereto for your convenience).

Finally, please let me know at your earliest convenience whether your client is amenable to a settlement conference/mediation with a private mediator. The Trustee is unwilling to engage in another mediation of the sort we experienced last year, but we would be very interested in a settlement conference/mediation with a non-judicial mediator in the coming weeks/months.

As always, I sincerely appreciate your cooperation in these matters.

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Exhibit N

<p style="text-align: center;">IN THE UNITED STATES BANKRUPTCY COURT DISTRICT OF NEVADA</p> <p>IN RE: XYIENCE INCORPORATED, Debtor.</p> <p style="text-align: right;">Chapter 11 No. BK-S-08 10474-MKN</p> <hr/> <p>DAVID HERZOG, as Liquidating Trustee, Plaintiff, vs. ZYEN, LLC, et al. Defendants.</p> <hr/> <p style="text-align: center;">DEPOSITION OF OMER SATTAR Taken at the Law Offices of: Gordon Silver 3960 Howard Hughes Parkway, Ninth Floor Las Vegas, Nevada 89169</p> <p style="text-align: center;">Friday, August 6, 2010 2:38 p.m.</p> <p>Reported By: Gale Salerno RMR, CCR No. 542 Job No. 138664B</p> <p style="text-align: right;">Page 1</p>	<p style="text-align: center;">INDEX</p> <p style="text-align: right;">Page</p> <p>Examination by Mr. Backman 5</p> <p style="text-align: center;">EXHIBITS (Previously Marked in Prior Depositions)</p> <p>Sattar Identified</p> <p>Exhibit 212 Minutes of Special Meeting of the Board of Directors, November 3, 2007 32</p> <p>Exhibit 258 Minutes of Special Meeting of Board of Directors, December 3, 2007 37</p> <p>Exhibit 261 Minutes of Special Meeting of Board of Directors, December 7, 2007 38</p> <p>Exhibit 284 E-Mail dated December 20, 2007, with Attached Notification of Objection 41</p> <p>Exhibit 310A Omnibus Declaration of Omer Sattar 53</p> <p>Exhibit 315 Motion for Final Approval of Nonexclusive License Agreement with Zuffa Marketing, LLC 15</p> <p>Exhibit 328 Declaration of Omer Sattar in Support of Reply Points and Authorities 55</p> <p>Exhibit 335 Letter of Intent to Mr. Sattar, dated February 21, 2008 24</p> <p style="text-align: right;">Page 3</p>
<p>1 APPEARANCES:</p> <p>2 For the Plaintiff:</p> <p>3 JONATHAN A. BACKMAN, ESQUIRE</p> <p>4 Law Office of Jonathan A. Backman</p> <p>5 117 North Center Street</p> <p>6 Bloomington, Illinois 61701</p> <p>7 (309) 820-7420</p> <p>8 For the Defendants:</p> <p>9 MATTHEW C. ZIRZOW, ESQUIRE</p> <p>10 Gordon Silver</p> <p>11 3960 Howard Hughes Parkway, Ninth Floor</p> <p>12 Las Vegas, Nevada 89169</p> <p>13 (702) 796-5555</p> <p>14 For Zuffa Marketing, LLC:</p> <p>15 FRANCHESCA V. VAN BUREN, ESQUIRE</p> <p>16 Lewis and Roca, LLP</p> <p>17 3993 Howard Hughes Parkway, Suite 600</p> <p>18 Las Vegas, Nevada 89169</p> <p>19 (702) 474-2672</p> <p>20 Also Present:</p> <p>21 MS. EILEEN BACKMAN</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 2</p>	<p>1 Exhibit 337A 341 Meeting CD Transcription, February 27, 2008 20</p> <p>2</p> <p>3 Exhibit 343 U.S. Bankruptcy Court, Amendment Cover Sheet and Supplement to Debtor's Response to Sofa Question 3(b) 7</p> <p>4</p> <p>5 Exhibit 344 E-Mail String, September 2009 7</p> <p>6 Exhibit 345 E-Mail String, October 2009 10</p> <p>7 Exhibit 358 E-Mail String, February 2008 24</p> <p>8 Exhibit 359 E-Mail String, February 2008 27</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 4</p>

1 OMER SATTAR,
 2 having been first duly sworn by
 3 GALE SALERNO, a Notary Public within
 4 and for the State of Nevada, was
 5 examined and testified as follows:
 6 - - -
 7
 8 EXAMINATION
 9 BY MR. BACKMAN:
 10 Q. Can you state your name and spell it for
 11 the record.
 12 A. Omer Sattar, S-a-t-t-a-r.
 13 Q. Mr. Sattar, as you know, I'm John Backman,
 14 and I'm the attorney for the Liquidating Trustee in
 15 the Xyience bankruptcy case.
 16 A. Yes.
 17 Q. Have you been deposed before?
 18 A. Once before.
 19 Q. So you know generally you need to give oral
 20 answers as opposed to head shakes, that kind of
 21 thing?
 22 A. Yes.
 23 Q. We'll try not to step over each other's
 24 words, although it always happens. And we'll just
 25 remind each other if we do it.

Page 5

1 A. Sure.
 2 Q. If you will, like I told Kirk in the prior
 3 deposition, I'm very informal in the deposition. So
 4 if you want to take a break or talk to your attorney
 5 or a combination thereof, let me know.
 6 This one won't go nearly as long as his, so
 7 there won't be too many breaks. But if you want,
 8 that's fine, okay?
 9 MR. ZIRZOW: And just so you know, you
 10 cannot talk to me while there's a question pending.
 11 So if he asks a question, you can't look to me and
 12 want to discuss something with me. You have to
 13 answer his question. Okay?
 14 THE WITNESS: Okay.
 15 BY MR. BACKMAN:
 16 Q. But if you do want to take a break, that's
 17 okay. I'm not going to be asking you anything that's
 18 going to cause you to sweat. But if you want to take
 19 a break, that's okay.
 20 A. I appreciate it.
 21 Q. Did you review any documents for today's
 22 deposition?
 23 A. I went through some old E-mails that I was
 24 able to find. But I didn't have a lot, so, no, not
 25 too much.

Page 6

1 Q. Let me kind of start near the end. I'm
 2 going to show you a document you've seen before.
 3 It's been previously marked as Exhibit 343.
 4 (Exhibit No. 343 was marked for
 5 identification.)
 6 BY MR. BACKMAN:
 7 Q. Let me ask if you recall having seen this.
 8 A. Probably something like this, yes.
 9 Q. Do you recall when -- let me pull out
 10 Exhibit 344 too.
 11 (Exhibit No. 344 was marked for
 12 identification.)
 13 BY MR. BACKMAN:
 14 Q. I'm going to show you another document
 15 that's Exhibit 344. Take a look at it and let me
 16 know if you recognize this document.
 17 A. I sent it.
 18 Can I take a second to read through it?
 19 Q. Of course.
 20 A. Okay.
 21 Q. This is an E-mail exchange between you and
 22 Laurel Davis, right?
 23 A. Yes.
 24 Q. From September 2nd, 2009?
 25 A. Yes.

Page 7

1 Q. Laurel -- well, let me ask, did you have
 2 concerns when you got the amended Exhibit 343 or
 3 something like it about the identification of the
 4 multimillion-dollar payments to the Fertitta
 5 entities?
 6 A. I was pretty much entirely reliant on Mike
 7 Levy, our CFO at that time, to help pull this
 8 together and get this information to Laurel.
 9 So, you know, when I saw something for
 10 Mike, my assumption was that it was correct.
 11 I don't recall now what my specific concern
 12 was from this E-mail exchange in regards to this. I
 13 knew there were a lot of payments to be made, but
 14 like I said, as far as I was concerned, if Mike
 15 pulled it together, it should have been accurate.
 16 Q. Not too long after this, within a month or
 17 so, you resigned as designated representative. How
 18 come?
 19 A. That's right, October 2009. I didn't -- I
 20 didn't want to be there anymore. There was -- I felt
 21 that I was being placed in a position to accept a
 22 deal which I thought could have been better, and I
 23 communicated that to Laurel. And then I told her
 24 that I didn't feel comfortable being there anymore
 25 and decided that I wanted to resign.

Page 8

1 Q. And I just want to -- we're kind of off the
 2 topic of the Fertitas now, although they will always
 3 be part of the discussion. But I'm really focusing
 4 on the bidding that took place for the assets.
 5 A. Uh-huh.
 6 Q. Do you remember that Adam Frank and Kirk
 7 Sanford made a bid for, or were trying to make a
 8 bid -- I think they actually made a bid -- to buy the
 9 assets out of the bankruptcy estate?
 10 A. Yes.
 11 Q. And I think you had indicated -- well, you
 12 ended up not going with their bid. You went with the
 13 Manchester bid, right?
 14 A. Yes.
 15 Q. Do you remember why?
 16 A. I don't. I was trying to think about this.
 17 And I remember being in Mike Levy's office and
 18 discussing with him late in the evening. And I was
 19 trying to recollect what the reason for that was.
 20 But there was a definite reason we felt
 21 that Mike and I agreed on that, that we preferred the
 22 Manchester bid. I don't recall if it was pricing or
 23 the structure of the deal, whether it was what the
 24 debt was. And, you know, maybe it was the Manchester
 25 guys. At least as I understood the background of

Page 21

1 some of those folks, had been with some beverage
 2 people in the past. You know, particularly from our
 3 manufacturer at that point was Cott, based out of
 4 Canada. And I think they had some prior affiliations
 5 with Cott and with some other beverage brands.
 6 So we thought maybe that had some strategic
 7 importance to it, but maybe they can do a better job.
 8 So that might have been one reason.
 9 Q. I mean, during this time when you were
 10 reviewing the bids, what was the -- were you having
 11 discussions with Bill Bullard from Zyen, the lender?
 12 A. I don't remember really having too many
 13 discussions with Bill. You know, in all honesty, the
 14 discussions that I remember with Bill were, you know,
 15 which slotting fees do you want to pay to what
 16 convenience store? It was -- you know, maybe that
 17 kind of -- but never -- or, you know, or me telling
 18 him, hey, we're going to do this.
 19 But, I don't think there were any -- I
 20 don't really recall any specific discussions.
 21 Q. I mean, did they have any role -- "they"
 22 meaning Fertitta entities -- did they have any role
 23 in how you selected who to go with?
 24 A. Not that I recall. Mike and I were
 25 pretty -- in that regards, we felt pretty comfortable

Page 22


1 on our own. It was basically Mike and I talking to
 2 Laurel through that process from what I recall.
 3 Q. Were you aware of Bill Bullard having
 4 discussions with the potential buyers, particularly
 5 the Manchester people, separate and apart from your
 6 analysis of the opening bids?
 7 A. I knew that there were some discussions
 8 that were taking place. I was never a party to any
 9 of them. But I knew that they were maybe some
 10 meetings or discussions, yes.
 11 Q. Was it conveyed to you what Bullard's view
 12 was of the Manchester people?
 13 A. Not so much. Mike dealt mostly with Bill.
 14 So anything that I would generally hear where Mike
 15 would walk in and say, you know, Bill had spoken to
 16 the Manchester people. So it was that kind of
 17 conversation. It wasn't, you know -- I think how he
 18 felt about the Manchester people? I really don't
 19 know.
 20 Q. Well, let me ask you, because I'm not
 21 trying to trick you. I'm just trying to understand.
 22 The Manchester deal, you understand,
 23 involved basically Manchester, the buyer, assuming
 24 the substantial, like roughly 15 million dollars at
 25 that point Zyen debt, right?

Page 23


1 A. Right.
 2 Q. Do you know whether Zyen would have been
 3 willing to allow the Sanford Frank team that was
 4 putting together a bid for them to assume that debt?
 5 Would that have been okay with that deal, do you
 6 know?
 7 A. Maybe, I don't know. I don't know.
 8 Q. Because I'm trying to understand when you
 9 were choosing between the bids, did you understand
 10 how -- was one going to be cash, but one going to be
 11 credit? I mean, how did the bids line up?
 12 A. From what I understood of the process, it
 13 was -- well, I mean, now that I'm trying to think
 14 about it, because I don't remember the specifics of
 15 the bid, and between Kirk and Adam whether they
 16 actually submitted a formal bid or were intending to
 17 submit a formal bid.
 18 Q. Let me just show you what we have so maybe
 19 that will refresh your recollection. Because I'm not
 20 looking to trick you. I just want to make sure...
 21 (Exhibits Nos. 335 and 358 were
 22 marked for identification.)
 23 BY MR. BACKMAN:
 24 Q. We'll give you an exhibit marked 358, and
 25 we'll also give you at the same time an exhibit


Page 24

Group Exhibit O



 You forwarded this message on 1/6/2008 1:10 PM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Sat 1/5/2008 4:45 PM
To: Bill Bullard
Cc:
Subject: New Zuffa agreement
Attachments:  [Zuffa Sponsorship Agreement 10-3-07.pdf\(196KB\)](#)

 You forwarded this message on 2/5/2008 11:44 AM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Sat 1/5/2008 4:41 PM
To: Bill Bullard
Cc:
Subject: Breakdown of cash uses from funding
Attachments:  Cash use on funding Rev 2.xls(407KB)  Cash use on funding \$2.5M request.xls(50KB)

Xyience Inc.

Cash Plan on Funding by Vendor

	Pay per Cash Plan On Funding	Check Date	Check Number	Check Amount	Notes
Allen Flavors, Inc.	119,586	10/5/2007	Wire	103,018.30	
Allcan West, Inc.	0				
Ball Corporation	255,922	10/5/2007	Wire	255,921.72	
Cadbury Schweppes Bottling	55,542	10/5/2007	3652	20,000.00	\$20k sent on 10/1/07, ck # 3498
Cott Corporation	443,982	10/5/2007	Wire	438,956.82	
Trucking					
C.H. Robinson Worldwide, Inc.	63,288	10/4/2007	3505	63,115.00	
JAMCO Logistics	35,525	10/4/2007	3506	35,125.00	
Old Dominion Freight Line	27,450	10/4/2007	3507	27,751.48	
Roadway	11,845	10/4/2007	3508	11,845.11	
Transportation Solutions Group	28,300	10/4/2007	3509	28,050.00	
Crown Cork & Seal USA, Inc.	10,000	10/4/2007	3510	10,000.00	
Dymatize	102,824	10/5/2007	Wire	102,823.98	
Misc Suppliers					
BioNeutra, Inc.	56,997	10/4/2007	3511	56,581.75	
Birchwood Manufacturing Co	27,481	10/4/2007	3512	27,480.89	
Command Nutritionals	63,705	10/4/2007	3513	61,116.16	
Flavor Systems International	27,740	10/4/2007	3514	27,740.00	
Glanbia	28,370	10/4/2007	3515	28,370.22	
In The Paint	18,265	10/4/2007	3516	14,986.58	
NVE Pharmaceuticals	18,656	10/4/2007	3517	18,656.48	
Komplete Packaging	17,536	10/4/2007	3518	17,475.30	
Venture Packaging	0				
Warehousing					
AM-C Warehouses	55,297	10/4/2007	3519	55,291.12	
Case Stack	10,615	10/4/2007	3520	10,691.89	
Payroll Production	27,000	1,505,928		27,000.00	Cashier checks from Wells Fargo
Payroll Sales plus commissions	230,000			184,317.68	Cashier checks from Wells Fargo Plus ck # 3644 and 3645 (38,968.1)
Expense Reports					
Bill Coffey - Reimb.	753	10/4/2007	3521	753.26	
Bryan Fortier	54	10/4/2007	3522	54.20	
Carlos Zuluaga	240	10/4/2007	3523	239.67	
Chad Lushin	709	10/4/2007	3524	709.48	
Chris Theodorakis	2,246	10/4/2007	3525	2,246.11	
David Hauser-reimb.	314	10/4/2007	3526	313.78	
Dennis Werner- reimb.	324	10/4/2007	3527	323.84	
Devin Keays-Reimb.	373	10/4/2007	3528	372.96	
Dolce Vita Marketing and Promotions	6,250	10/4/2007	3529	6,250.00	
Duane Tanner- reimb.	1,988	10/4/2007	3530	1,987.69	
Herman Zuluaga - Reimb.	1,405	10/4/2007	3531	1,404.75	
Jana Stewart	243	10/4/2007	3532	243.04	
Jason Dunbar- reimb.	508				Paid on 10/2 ck # 3502
Jay Cwiek- reimb.	228	10/4/2007	3533	227.85	
Jeffrey Rivera- reimb.	467				Paid on 10/2 ck # 3504
Jenna Carplo	147	10/4/2007	3534	146.75	
Jessica Lautman	220	10/4/2007	3535	219.77	
Jill Benedict	2,191	10/4/2007	3536	2,190.60	
Jill Pollard-reimb.	44	10/4/2007	3537	43.97	
Joseph Huntowski	502	10/4/2007	3538	502.39	
Keith Hickman- reimb.	475	10/4/2007	3539	475.38	
Kenny Sanders	50	10/4/2007	3540	49.55	
Laura Hayden	545	10/4/2007	3541	545.30	
Lee Berzman- reimb.	568	10/4/2007	3542	567.89	
Lindsey Jabs-Reimb.	681	10/4/2007	3543	680.55	
Paul Guyot-Reimb.	1,804	10/4/2007	3544	1,804.09	
Paul Sidorlak- reimb.	1,110	10/4/2007	3545	1,110.39	
Randy Sagon	331	10/4/2007	3546	331.17	
Ray Marquez-Reimb.	313	10/4/2007	3547	312.92	
Ray Wetzel	2,549	10/4/2007	3548	2,549.10	
Relevant Group, LLC	19,119				Reviewing documentation before p
Reuben Rios-Reimb.	1,931	10/4/2007	3549	1,931.02	
Rick Briley- reimb.	315	10/4/2007	3550	314.91	
Robert Fortler	218	10/4/2007	3551	217.76	
Robert Park- reimb.	511	10/4/2007	3552	510.73	
Sammy Rodriguez- reimb.	238	10/4/2007	3553	238.43	

Xyience Inc.

Cash Plan on Funding by Vendor

	Pay per Cash Plan On Funding	Check Date	Check Number	Check Amount	Notes
Siobhan Oldham	155	10/4/2007	3554	155.29	
Stephen Carpenter- reimb.	594	10/4/2007	3555	594.32	
Thomas Samaha	368	10/4/2007	3556	367.78	
Vicki DiBernardo-Reimb.	1,119	10/4/2007	3557	1,118.77	
Willie Marshall-Reimb.	283	10/4/2007	3558	282.77	
Wilson Chueire	3,643	10/4/2007	3559	3,642.75	
Broker Fees					
Berg Marketing Group (Broker Fees)	1,026	10/4/2007	3561	1,025.77	
Dan Feldkamp	11,239	10/4/2007	3562	11,239.18	
Evolution Brands, Inc.	25,459	10/4/2007	3563	25,459.01	
Omega	200	10/4/2007	3564	200.15	
S & K Sales Co.	4,137	10/4/2007	3565	4,136.92	
Other Sales Costs					
7-Eleven Inc.	8,151	10/4/2007	3566	7,979.26	
Albertson's (Intermountain Northwest)	20,000	10/4/2007	3567	20,000.00	
Baton Rouge Beer Agency-	11,165	10/4/2007	3568	11,164.88	
Central Coast Distributing	3,672				Customer deducting from next inv
JJ Taylor Distributing	31,104	10/4/2007	3569	31,426.12	Actually owed to General Wholesale
Joseph Mullarkey Dist., Inc.	4,585				Customer deducting from next inv
Save Mart Supermarkets	0	406,863			
Payroll Marketing	16,000			16,000.00	Cashier checks from Wells Fargo
Zuffa Marketing	4,500,000	10/5/2007 Wire		4,500,000.00	
Nielsen	42,749	10/4/2007	3572	42,749.44	
TABS	12,000	10/4/2007	3573	12,000.00	
Melanie Klos		10/4/2007	3570	500.00	
Monica McGrew	5,048	10/4/2007	3571	5,000.00	
Fighters					
Anderson Silva Enterprises, Inc.	5,833	10/4/2007	3574	5,833.33	
Jacob Duran/"Stitch" (Stitch Productions)	33,000	10/4/2007	3575	33,000.00	
Michael Blisping	347				
R-MANagement LLC	30,000	10/12/2007	3685	5,000.00	
Rich Franklin, Inc.	21,000	10/4/2007	3577	21,000.00	
Seafoam Blue Productions, Inc.-	50,000	10/4/2007	3578	50,000.00	
Sean Sherk	7,500	10/4/2007	3579	7,500.00	
Team Hughes Inc.	50,000	10/4/2007	3580	49,999.98	
Zinkin Entertainment	305,747	10/4/2007	3643	112,083.34	Mgmt discussions before balance
POP					
Communikay Graphics	50,362	10/4/2007	3582	43,714.17	
Elite Marketing Solutions	13,995	10/4/2007	3583	13,995.36	
Holden Marketing Group	2,513	10/4/2007	3584	2,513.12	
Las Vegas Color Graphics	31,685	10/4/2007	3585	31,684.64	
Las Vegas Printing Press	1,527	10/4/2007	3586	1,526.88	
Levy Production Group	967	10/4/2007	3587	264.86	
Merchandising Services LLC	1,093	10/4/2007	3588	1,092.50	
NYSCO Products, LLC	10,000	10/4/2007	3589	10,000.00	
Presence From Innovation	20,900	10/4/2007	3590	20,900.00	
Printing Partners	3,090	10/4/2007	3591	3,090.16	
Fight Network	67,091	10/4/2007	3592	38,124.00	
GNC Franchise show	7,325				
Magnetic Public Relations	33,647	5,323,418	10/4/2007	3593	6,545.96
Payroll G&A	59,000			59,000.00	Cashier checks from Wells Fargo
AJ Robbins PC	25,000	10/9/2007 Wire		25,000.00	Wire sent 10/1 for \$25k also
Pickard & Green CPA'S					
Citlcorp Vendor Finance, Inc.	20,375	10/4/2007	3594	20,375.00	
Legal					
Abraham Harrison LLC	10,000	10/4/2007	3595	10,000.00	
AXIS Patent International	727	10/4/2007	3596	727.03	
Brownstein Hyatt Farber Schreck, P.C.	10,000	10/4/2007	3597	10,000.00	
Clarke, Modet & Co.	865	10/4/2007	3598	865.00	
Debra Holstein and Associates	0				
Duane Morris LLP	740	10/4/2007	3599	740.00	
Eisner & Frank	71,795	10/5/2007 Wire		46,795.06	Waiting on addl inv to pay more
Finalyson & Singlehurst	1,033	10/4/2007	3600	1,032.74	
Foley & Lardner LLP	12,779	10/4/2007	3601	12,779.47	

Xyience Inc.

Cash Plan on Funding by Vendor

	Pay per Cash Plan On Funding	Check Date	Check Number	Check Amount	Notes
Jackson Walker LLP	3,960	10/4/2007	3602	3,959.90	
Jones Day	41,007	10/4/2007	3603	45,258.23	
Luce Forward	2,517	10/4/2007	3604	2,517.45	
McConnell Valdes	10,000	10/4/2007	3605	10,000.00	
Santoro, Driggs, Walch Attorneys	50,000	10/4/2007	3606	36,606.71	
Santoro, Driggs, Walch, et al/trademarks	430	10/4/2007	3607	430.00	
Snell & Wilmer LLP	10,000	10/4/2007	3608	10,000.00	
Millbank	75,000	10/5/2007	Wire	75,000.00	
Howard Hughes Properties, LLC	78,972	10/5/2007	3646	78,971.80	Cashiers check issued
Other					
3D Janitorial	2,353	10/4/2007	3609	2,353.34	
AEL Financial, LLC	2,216	10/4/2007	3610	2,215.62	
Anthony Johnson	1,000	10/4/2007	3611	1,000.00	
Arrow	597	10/4/2007	3612	597.00	
Ceutical Labs	1,680	10/4/2007	3613	1,680.00	
ChromaDex	250	10/4/2007	3614	250.00	
Cintas Document Management	35	10/4/2007	3615	35.00	
Connecting Point	360	10/4/2007	3616	359.61	
Data Masons Software, LLC	68	10/4/2007	3617	68.40	
Dell Business Credit	937	10/4/2007	3618	1,000.00	
Edict Systems	90	10/4/2007	3619	45.26	
Erin Michelle Vanta	90	10/4/2007	3620	90.00	
Fedex	2,131	10/4/2007	3621	2,131.47	
Imperial A.I. Credit Companies	3,317	10/4/2007	3622	3,317.09	
Innovative Business Solutions	300	10/10/2007	3671	300.00	
Kimberlee Chapman	90	10/4/2007	3623	90.00	
Kowabunga Technologies	2,495	10/4/2007	3624	2,495.00	
Maine Department of Agriculture	524	10/4/2007	3625	524.00	
MCCS/MCRD	30				
McLane Company-	3,661	10/4/2007	3626	3,660.53	
Missouri Dept of Revenue	1,507	10/4/2007	3627	1,507.39	
Office Depot	5,772	10/4/2007	3628	1,261.75	
Pitney Bowes	736	10/4/2007	3629	736.08	
Protection One	120	10/4/2007	3630	119.80	
Rackspace Managed Hosting	2,975	10/4/2007	3631	2,975.00	
Sparklets	333	10/4/2007	3632	332.76	
Stephen Bock	3,500				
T-Mobile	8,459	10/10/2007	3678	8,459.46	
Tangerine Office Systems	437	10/4/2007	3633	436.88	
TelePacific Communications	5,242	10/4/2007	3634	5,242.38	
TESORO	1,995	10/4/2007	3635	1,995.00	
UPS (Xyience)	4,170	10/4/2007	3636	4,170.07	
UPS Supply Chain Solutions, Inc.	998	10/4/2007	3637	894.57	
UPS Freight	9,578	10/4/2007	3638	1,816.75	
Verizon California	143	10/4/2007	3639	142.93	
Verizon Wireless	2,921	10/4/2007	3640	2,920.87	
VoicePlus	220	10/4/2007	3641	220.00	
Washington State Dept of Revenue	1,296	10/4/2007	3642	884.00	
Debt Principal and Interest					
Fertitta	1,027,083	10/5/2007	Wire	1,029,166.67	
Frank	256,771	10/9/2007	Wire	257,187.50	
Sanford	256,771	10/5/2007	Wire	257,187.50	
Bardo Equities	206,836	10/5/2007	3647/3648	206,835.86	
Joseph Hopkins	20,000	10/5/2007	3649	20,000.00	
Brent Hucks	16,931	10/8/2007	3655/3656/3657	18,267.20	
Sharon Milligan or KCET	20,000	10/5/2007	3650	20,000.00	
Other Interest	5,110	2,366,331			
Total	9,602,540			9,124,127	
World Poker Tour	250,000	10/5/2007	Wire	250,000.00	
Travel Channel	20,000	10/5/2007	Wire	20,000.00	
Seed Backyard					
R & R Partners	15,000				
Prime Point Media					

Xyience Inc.

Cash Plan on Funding by Vendor

	Pay per Cash Plan On Funding	Check Date	Check Number	Check Amount	Notes
PBR	50,000	10/5/2007	Wire	50,000.00	
MTV/Spike					
MDK Motorsports	20,000	10/5/2007	Wire	20,000.00	
L.A. Stars					
Fairfax Publications	50,000	10/5/2007	3653	50,000.00	
Dave Networks	4,473				
Data Intensity					
Arctic Star	30,000	10/5/2007	3651	30,000.00	
	439,473				
	10,042,013			9,544,127	
Intial Funding				9,500,000.00	

Xyience Inc.

New funding request by Vendor


	New Funding Cash Request	Check Date	Check Number	Check Amount	Notes
Allen Flavors, Inc.	212,192		Wire	141,568.00	
Allcan West, Inc.	50,000				
Cadbury Schweppes Bottling	55,542	10/26/2007	3761	35,541.94	\$20k paid earlier in the week
Cott Corporation	617,060	10/26/2007	Wire	214,060.00	
Trucking					
C.H. Robinson Worldwide, Inc.	61,395	10/26/2007	3760	61,395.00	
JAMCO Logistics	14,750	10/26/2007	3769	14,750.00	
Old Dominion Freight Line	13,658	10/26/2007	3772	12,531.30	
Roadway	22,287	10/26/2007	3776	24,896.98	
Transportation Solutions Group	10,250	10/26/2007	3779	10,250.00	
Crown Cork & Seal USA, Inc.	20,699	10/26/2007	3762	20,699.34	
Dymatize	150,000	10/29/2007	Wire	138,448.23	
Misc Suppliers					
BioNeutra, Inc.	25,415				
Command Nutritionals	18,481				
In The Paint	3,278				
McDowell Label	13,993	10/30/2007	3844	13,992.76	
Warehousing					
AM-C Warehouses	32,072	10/26/2007	3759	32,071.68	
Payroll Production	27,000	11/2/2007	Wire	27,000.00	
Payroll Production		11/16/2007	Wire	27,000.00	
Payroll Sales plus commissions	150,000	11/2/2007	Wire	161,592.31	
Payroll Sales plus commissions		11/16/2007	Wire	131,410.05	
Expense Reports					
Relevant Group, LLC	44,766	10/26/2007	3774	44,766.21	
Other Sales Costs					
7-Eleven Inc.	952	10/26/2007	3758	951.97	
Finley Distributing	7,028	10/26/2007	3768	7,028.50	
RLB Food Distributors	7,260	10/26/2007	3775	7,260.40	
Save Mart Supermarkets	5,000	10/26/2007	3777	5,000.00	
Stein Dist	1,658	10/26/2007	3778	1,657.50	
Payroll Marketing	16,000	11/2/2007	Wire	16,000.00	
TABS	6,000	10/30/2007	3847	6,000.00	
Lamar	16,000				
Monica McGrew	5,000	11/26/2007	3991	5,150.00	
Fighters					
Anderson Silva Enterprises, Inc.	5,833	10/29/2007	3826	5,833.33	
Denaro Sports	4,000	11/1/2007	3871	7,500.00	
Dennis Kung	4,600	10/26/2007	3764	4,600.00	
Jorge Gurgel	4,581	10/26/2007	3770	4,580.78	
Matt Serra		11/9/2007	3951	64,000.00	
Michael Bisping	4,000	10/30/2007	3845	4,000.00	
R-MANagement LLC	50,000				
Travis Lutters		11/7/2007	3917	64,000.00	
Zinkin Entertainment	100,000	10/29/2007	3707	203,664.04	Paid off entire balance instead of partial payment
POP					
Kommunikay Graphics	32,541	10/30/2007	3841	32,541.10	
Elite Marketing Solutions	7,865	10/26/2007	3766	7,864.89	
NYSCO Products, LLC	18,196	10/26/2007	3771	18,196.02	
Fight Network	51,000	10/26/2007	3767/3936	59,202.00	
Payroll G&A	59,000	11/2/2007	Wire	59,000.00	
Payroll G&A		11/16/2007	Wire	59,000.00	
AJ Robbins PC	25,000	10/31/2007	Wire	25,000.00	
Arc Investments	25,000	11/9/2007	Wire	25,000.00	
Pickard & Green CPA'S	5,378	10/30/2007	3846	5,378.49	
Legal					
Brownstein Hyatt Farber Schreck, P.C.	15,441				
Debra Holstein and Associates	25,000				
DLA Piper	9,109				
Elsner & Frank	25,000	10/31/2007	Wire	25,000.00	
McConnell Valdes	15,564				

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Xyience Inc.

New funding request by Vendor

	New Funding Cash Request	Check Date	Check Number	Check Amount	Notes
Santoro, Driggs, Walch Attorneys/Hunterton	50,000	11/13/2007	Wire	75,000.00	
Snell & Wilmer LLP	10,173	11/1/2007	3895	10,173.57	
Millbank	75,000				
Howard Hughes Properties, LLC	42,000	11/14/2007	3970	44,187.65	
Other					
AEL Financial, LLC	2,462	11/1/2007	3861	2,683.36	
Dell Business Credit	610	10/26/2007	3763	609.58	
Edict Systems	50	10/26/2007	3765	45.00	
Health Plan of Nevada	31,467	10/30/2007	3843	31,467.04	
Illumnis	16,000	10/26/2007	3793	16,000.00	
Imperial A.I. Credit Companies	3,317	11/1/2007	3879	3,317.09	
MCCS/MCRD	1,000	11/1/2007	3885	1,000.00	
Office Depot	5,904	10/26/2007	3805	4,653.76	
Rackspace Managed Hosting	5,950	10/26/2007	3773	2,975.00	
The Hartford	10,913	10/30/2007	3848	10,913.00	
UPS (Xyience)	6,483	10/26/2007	3818	6,483.19	
UPS Freight	6,756	10/26/2007	3820/3838	6,530.86	
Verizon California	139	10/26/2007	3821	138.90	
Debt Principal and Interest					
Jim Pardee	25,000	11/1/2007	3851	25,000.00	
Janis Grady	20,000	11/1/2007	3854	20,000.00	
Jeff Dash	20,000	11/1/2007	3852	20,000.00	
Joseph Hopkins	20,000	11/1/2007	Wire	20,000.00	
Brent Hucks	16,931	10/25/2007	3708/3709/3710	16,931.25	
KCET	25,000	10/31/2007	3840	25,000.00	
Larry Aberle	10,000	11/1/2007	3856	10,000.00	
Total	2,500,000			2,188,492	

 You forwarded this message on 1/7/2008 9:53 AM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@xyience.com] **Sent:** Mon 1/7/2008 7:41 AM
To: Bill Bullard
Cc:
Subject: RE: Financials
Attachments:  XyienceFinancialsDec2007soft dose.xls(117KB)

-----Original Message-----

From: Bill Bullard [<mailto:billb@gordonbiersch.com>]
Sent: Sunday, January 06, 2008 2:17 PM
To: Michael Levy
Subject: Financials

Can you send me latest financial statements w detail on creditors and note holders? Thx

Sent from my BlackBerry Wireless Handheld

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Sun 1/13/2008 1:25 PM
To: Bill Bullard
Cc:
Subject: RE: Meeting
Attachments:

I was supposed to receive the analysis yesterday morning; I still haven't received the slotting fee plan. I am still waiting on a response from Omer.

-----Original Message-----

From: Bill Bullard [mailto:billb@gordonbiersch.com]
Sent: Sunday, January 13, 2008 12:24 PM
To: Michael Levy
Subject: Re: Meeting

Mike,

Any update on the slotting fee analysis/execution plan?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Michael Levy <mlevy@Xyience.com>
To: Bill Bullard <billb@gordonbiersch.com>
Sent: Fri Jan 11 20:11:35 2008
Subject: FW: Meeting

Bill,

Giving approval and letting Gus and Mike know you may be contacting them with questions. Their numbers are below.


From: Gus Prokos [mailto:GProkos@cott.com]
Sent: Friday, January 11, 2008 1:07 PM
To: Michael Levy
Subject: RE: Meeting

No problem Mike!

Bill or yourself can get in touch with myself or Mike Gibbons at any time via cell if necessary:

Gus: 416-902-0862

Mike: 416-716-5714

 You replied on 1/9/2008 3:33 PM.


Bill Bullard

From: Michael Levy [mlevy@Xyience.com]
To: Bill Bullard
Cc:
Subject: Do you have Mark Dunkeson's address?
Attachments:

Sent: Wed 1/9/2008 2:51 PM

 You forwarded this message on 1/9/2008 5:58 PM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Wed 1/9/2008 5:50 PM
To: Bill Bullard
Cc:
Subject: Latest Plan with cash requirements
Attachments:  Xyience Forecast 2008 through 2010 with full UFC payment and \$30M 08 projection Rev 3.xls(1MB)

Please confirm receipt.

	Q1 2007 Actual	Q2 2007 Actual	Q3 2007 Actual	Q4 2007 Estimate	Q1 2008 Estimate	Q2 2008 Estimate	Q3 2008 Estimate	Q4 2008 Estimate	Q1 2009 Estimate	Q2 2009 Estimate	Q3 2009 Estimate	Q4 2009 Estimate
Revenue (Gross)												
Beverages	2,868,428	5,585,045	4,993,397	2,722,809	4,035,600	7,904,250	9,291,150	9,579,225	11,076,900	12,347,775	13,755,525	14,983,425
Supplements	3,085,569	2,158,123	1,108,742	744,444	0	0	0	0	0	0	0	0
Total Revenue	5,953,996	7,743,168	6,102,139	3,467,253	4,035,600	7,904,250	9,291,150	9,579,225	11,076,900	12,347,775	13,755,525	14,983,425
Gross Profit												
Beverages	1,504,138	2,027,718	2,770,737	880,752	2,271,864	4,383,930	5,178,846	5,353,569	6,181,476	6,886,911	7,685,421	8,425,137
Supplements	965,515	(71,217)	(240,949)	(261,610)	0	0	0	0	0	0	0	0
Total Gross Profit	2,469,653	1,956,502	2,529,788	619,142	2,271,864	4,383,930	5,178,846	5,353,569	6,181,476	6,886,911	7,685,421	8,425,137
Gross Profit Percent												
Beverages	52.4%	36.3%	55.5%	32.3%	56.3%	55.5%	55.7%	55.9%	55.8%	55.8%	55.9%	56.2%
Supplements	31.3%	-3.3%	-21.7%	-35.1%	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
Total Gross Profit Percent	41.5%	25.3%	41.5%	17.9%	56.3%	55.5%	55.7%	55.9%	55.8%	55.8%	55.9%	56.2%
SGA												
Marketing	6,839,118	10,130,387	(5,001,807)	4,427,805	2,848,247	3,012,887	3,059,927	3,066,647	3,239,627	3,290,027	3,340,427	3,370,667
	114.9%	130.8%	-82.0%	127.7%	70.6%	38.1%	32.9%	32.0%	29.2%	26.6%	24.3%	22.5%
Sponsorship	4,290,500	5,542,500	3,042,548	3,750,750	2,250,000	2,250,000	2,250,000	2,250,000	2,362,500	2,362,500	2,362,500	2,362,500
Non Sponsorship	2,548,618	4,587,887	-8,044,356	677,055	598,247	762,887	809,927	816,647	877,127	927,527	977,927	1,008,167
Corporate/G&A	2,381,317	3,010,253	1,702,747	2,906,296	1,359,941	906,678	912,503	915,494	916,132	917,211	921,575	933,392
	40.0%	38.9%	27.9%	83.8%	33.7%	11.5%	9.8%	9.6%	8.3%	7.4%	6.7%	6.2%
Sales	816,167	1,130,625	1,093,553	1,037,837	775,451	1,021,744	1,116,047	1,137,165	1,386,646	1,469,402	1,563,793	1,653,004
	13.7%	14.6%	17.9%	29.9%	19.2%	12.9%	12.0%	11.9%	12.5%	11.9%	11.4%	11.0%
Operations	501,671	610,292	246,869	1,741,768	168,084	226,113	246,917	251,238	273,703	292,766	313,882	332,301
	8.4%	7.9%	4.0%	50.2%	4.2%	2.9%	2.7%	2.6%	2.5%	2.4%	2.3%	2.2%
Supplements	498,840	511,627	285,181	171,253	140,427	305,067	352,107	358,827	419,307	469,707	520,107	550,347
	8.4%	6.6%	4.7%	4.9%	3.5%	3.9%	3.8%	3.7%	3.8%	3.8%	3.8%	3.7%
Total SGA	11,037,113	15,393,184	(1,673,457)	10,284,959	5,292,149	5,472,489	5,687,501	5,729,370	6,235,415	6,439,113	6,659,785	6,839,711
	185.4%	198.8%	-27.4%	296.6%	131.1%	69.2%	61.2%	59.8%	56.3%	52.1%	48.4%	45.6%
Operating Income	(8,567,460)	(13,436,683)	4,203,245	(9,665,817)	(3,020,285)	(1,088,559)	(508,655)	(375,801)	(53,939)	447,798	1,025,636	1,585,426
Operating Income Percent	-143.9%	-173.5%	68.9%	-278.8%	-74.8%	-13.8%	-5.5%	-3.9%	-0.5%	3.6%	7.5%	10.6%
Net Income	(10,341,958)	(14,522,902)	3,246,612	(11,367,619)	(3,058,332)	(1,126,605)	(390,701)	(173,848)	148,015	649,751	1,227,590	1,787,380
Net Income Percent	-173.7%	-187.6%	53.2%	-327.9%	-75.8%	-14.3%	-4.2%	-1.8%	1.3%	5.3%	8.9%	11.9%
Ending Headcount of Quarter												
Marketing	5	3	4	3	3	3	3	3	3	3	3	3
Corporate/G&A	28	9	10	8	8	8	8	8	8	8	8	8
Sales	40	37	61	36	30	46	51	51	57	62	67	70
Operations	7	5	5	7	4	4	4	4	4	4	4	4
Supplements	3	2	0	1	0	0	0	0	0	0	0	0
	83	56	80	55	45	61	66	66	72	77	82	85

	Q1 2010 Estimate	Q2 2010 Estimate	Q3 2010 Estimate	Q4 2010 Estimate	Q1 2011 Estimate	Q2 2011 Estimate	Q3 2011 Estimate	Q4 2011 Estimate	Q1 2012 Estimate	Q2 2012 Estimate	Q3 2012 Estimate	Q4 2012 Estimate
Revenue (Gross)												
Beverages	17,572,125	19,887,075	21,068,025	22,022,175	24,837,675	27,199,575	28,654,275	30,108,975	32,017,275	33,471,975	34,926,675	36,381,375
Supplements	0	0	0	0	0	0	0	0	0	0	0	0
Total Revenue	17,572,125	19,887,075	21,068,025	22,022,175	24,837,675	27,199,575	28,654,275	30,108,975	32,017,275	33,471,975	34,926,675	36,381,375
Gross Profit												
Beverages	9,899,685	11,188,083	11,864,121	12,417,687	14,014,707	15,366,783	16,228,971	17,091,159	18,198,291	19,060,479	19,922,667	20,784,855
Supplements	0	0	0	0	0	0	0	0	0	0	0	0
Total Gross Profit	9,899,685	11,188,083	11,864,121	12,417,687	14,014,707	15,366,783	16,228,971	17,091,159	18,198,291	19,060,479	19,922,667	20,784,855
Gross Profit Percent												
Beverages	56.3%	56.3%	56.3%	56.4%	56.4%	56.5%	56.6%	56.8%	56.8%	56.9%	57.0%	57.1%
Supplements	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
Total Gross Profit Percent	56.3%	56.3%	56.3%	56.4%	56.4%	56.5%	56.6%	56.8%	56.8%	56.9%	57.0%	57.1%
SGA												
Marketing	3,579,512	3,670,232	3,710,552	3,740,792	3,885,967	3,966,607	4,006,927	4,047,247	4,132,727	4,173,047	4,213,367	4,253,687
	20.4%	18.5%	17.6%	17.0%	15.6%	14.6%	14.0%	13.4%	12.9%	12.5%	12.1%	11.7%
Sponsorship	2,480,625	2,480,625	2,480,625	2,480,625	2,525,000	2,525,000	2,525,000	2,525,000	2,550,000	2,550,000	2,550,000	2,550,000
Non Sponsorship	1,098,887	1,189,607	1,229,927	1,260,167	1,360,967	1,441,607	1,481,927	1,522,247	1,582,727	1,623,047	1,663,367	1,703,687
Corporate/G&A	942,561	945,161	949,966	955,213	1,081,643	1,110,149	1,133,162	1,156,175	1,181,934	1,204,947	1,227,960	1,250,973
	5.4%	4.8%	4.5%	4.3%	4.4%	4.1%	4.0%	3.8%	3.7%	3.6%	3.5%	3.4%
Sales	1,977,561	2,128,850	2,209,016	2,274,958	2,613,740	2,774,073	2,877,508	2,980,943	3,262,827	3,366,263	3,469,698	3,573,133
	11.3%	10.7%	10.5%	10.3%	10.5%	10.2%	10.0%	9.9%	10.2%	10.1%	9.9%	9.8%
Operations	371,131	405,856	423,570	437,882	480,115	515,543	537,364	559,184	587,809	609,629	631,450	653,270
	2.1%	2.0%	2.0%	2.0%	1.9%	1.9%	1.9%	1.9%	1.8%	1.8%	1.8%	1.8%
Supplements	641,067	731,787	772,107	802,347	903,147	983,787	1,024,107	1,064,427	1,124,907	1,165,227	1,205,547	1,245,867
	3.6%	3.7%	3.7%	3.6%	3.6%	3.6%	3.6%	3.5%	3.5%	3.5%	3.5%	3.4%
Total SGA	7,511,833	7,881,885	8,065,211	8,211,192	8,964,611	9,350,159	9,579,067	9,807,976	10,290,204	10,519,113	10,748,021	10,976,930
	42.7%	39.6%	38.3%	37.3%	36.1%	34.4%	33.4%	32.6%	32.1%	31.4%	30.8%	30.2%
Operating Income	2,387,852	3,306,198	3,798,910	4,206,495	5,050,096	6,016,624	6,649,904	7,283,183	7,908,087	8,541,366	9,174,646	9,807,925
Operating Income Percent	13.6%	16.6%	18.0%	19.1%	20.3%	22.1%	23.2%	24.2%	24.7%	25.5%	26.3%	27.0%
Net Income	2,709,806	3,628,152	4,158,910	4,566,495	5,410,096	6,376,624	7,009,904	7,643,183	8,268,087	8,901,366	9,534,646	10,167,925
Net Income Percent	15.4%	18.2%	19.7%	20.7%	21.8%	23.4%	24.5%	25.4%	25.8%	26.6%	27.3%	27.9%
Ending Headcount of Quarter												
Marketing	3	3	3	3	3	3	3	3	3	3	3	3
Corporate/G&A	8	8	8	8	8	8	8	8	8	8	8	8
Sales	79	88	92	95	105	113	117	121	127	131	135	139
Operations	4	4	4	4	4	4	4	4	4	4	4	4
Supplements	0	0	0	0	0	0	0	0	0	0	0	0
	94	103	107	110	120	128	132	136	142	146	150	154

	Total 2007 Estimate	Total 2008 Estimate	Total 2009 Estimate	Total 2010 Estimate	Total 2011 Estimate	Total 2012 Estimate
Revenue (Gross)						
Beverages	16,169,678	30,810,225	52,163,625	80,549,400	110,800,500	136,797,300
Supplements	7,096,877	0	0	0	0	0
Total Revenue	23,266,555	30,810,225	52,163,625	80,549,400	110,800,500	136,797,300
Gross Profit						
Beverages	7,183,345	17,188,209	29,178,945	45,369,576	62,701,620	77,966,292
Supplements	391,739	0	0	0	0	0
Total Gross Profit	7,575,084	17,188,209	29,178,945	45,369,576	62,701,620	77,966,292
Gross Profit Percent						
Beverages	44.4%	55.8%	55.9%	56.3%	56.6%	57.0%
Supplements	5.5%	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
Total Gross Profit Percent	32.6%	55.8%	55.9%	56.3%	56.6%	57.0%
SGA						
Marketing	16,395,502	11,987,709	13,240,749	14,701,089	15,906,749	16,772,829
	70.5%	38.9%	25.4%	18.3%	14.4%	12.3%
Sponsorship	16,626,298	9,000,000	9,450,000	9,922,500	10,100,000	10,200,000
Non Sponsorship	-230,796	2,987,709	3,790,749	4,778,589	5,806,749	6,572,829
Corporate/G&A	10,000,614	4,094,616	3,688,310	3,792,902	4,481,128	4,865,814
	43.0%	13.3%	7.1%	4.7%	4.0%	3.6%
Sales	4,078,181	4,050,407	6,072,845	8,590,385	11,246,264	13,671,920
	17.5%	13.1%	11.6%	10.7%	10.2%	10.0%
Operations	3,100,601	892,352	1,212,653	1,638,439	2,092,206	2,482,158
	13.3%	2.9%	2.3%	2.0%	1.9%	1.8%
Supplements	1,466,901	1,156,427	1,959,467	2,947,307	3,975,467	4,741,547
	6.3%	3.8%	3.8%	3.7%	3.6%	3.5%
Total SGA	35,041,799	22,181,510	26,174,023	31,670,122	37,701,813	42,534,268
	150.6%	72.0%	50.2%	39.3%	34.0%	31.1%
Operating Income	(27,466,715)	(4,993,301)	3,004,922	13,699,454	24,999,807	35,432,024
Operating Income Percent	-118.1%	-16.2%	5.8%	17.0%	22.6%	25.9%
Net Income	(32,985,867)	(4,749,486)	3,812,737	15,063,362	26,439,807	36,872,024
Net Income Percent	-141.8%	-15.4%	7.3%	18.7%	23.9%	27.0%
Ending Headcount of Quarter						
Marketing						
Corporate/G&A						
Sales						
Operations						
Supplements						

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Ordinary Income/Expense													
Income													
Gross Sales Revenue													
Beverage Sales, Discontinued	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beverage Sales, Hydration Drk	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sales, Protein Drinks (RTD)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Other Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Apparel Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Bar Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beverage Sales, Energy Drinks	1,028,000.00	1,028,000.00	1,103,600.00	2,237,600.00	2,313,200.00	2,313,200.00	2,615,600.00	2,615,600.00	2,691,200.00	2,691,200.00	2,691,200.00	2,691,200.00	26,019,600.00
Supplements Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Internet Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Shipping and Handling Revenue	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sales Canada	292,000.00	292,000.00	292,000.00	346,750.00	346,750.00	346,750.00	456,250.00	456,250.00	456,250.00	501,875.00	501,875.00	501,875.00	4,790,625.00
Total Gross Sales Revenue	1,320,000.00	1,320,000.00	1,395,600.00	2,584,350.00	2,659,950.00	2,659,950.00	3,071,850.00	3,071,850.00	3,147,450.00	3,193,075.00	3,193,075.00	3,193,075.00	30,810,225.00
Discounts, Credits and Rebates													
Credit Card Chargebacks	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Tagging Discounts	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Depletion Discount on GNC POS	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sampling discounts	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sales Disc (2% time of sale)	-13,200.00	-13,200.00	-13,956.00	-25,843.50	-26,599.50	-26,599.50	-30,718.50	-30,718.50	-31,474.50	-31,930.75	-31,930.75	-31,930.75	-308,102.25
Discounts (bogus)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Chargebacks	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
In Store Mark Downs (discount)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Returns and Allowances	-13,200.00	-13,200.00	-13,956.00	-25,843.50	-26,599.50	-26,599.50	-30,718.50	-30,718.50	-31,474.50	-31,930.75	-31,930.75	-31,930.75	-308,102.25
Allowance for Damaged Goods	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Discounts, Credits and Rebates - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Discounts, Credits and Rebates	-26,400.00	-26,400.00	-27,912.00	-51,687.00	-53,199.00	-53,199.00	-61,437.00	-61,437.00	-62,949.00	-63,861.50	-63,861.50	-63,861.50	-616,204.50
Total Income	1,293,600.00	1,293,600.00	1,367,688.00	2,532,663.00	2,606,751.00	2,606,751.00	3,010,413.00	3,010,413.00	3,084,501.00	3,129,213.50	3,129,213.50	3,129,213.50	30,194,020.50
Cost of Goods Sold													
Cost of Goods Sold													
COGS Beverage, Discontinued	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
COGS Beverage, Hydration Drk	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
COGS, Protein Drinks (RTD)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Gross Profit Protein Drinks(excludes discounts and credits)	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	#DIV/0!
COGS, Freight In	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
COGS, Apparel	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Gross Profit Apparel (excludes discounts and credits)	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	#DIV/0!
COGS, Bars	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Gross Profit Bars (excludes discounts and credits)	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	#DIV/0!
COGS Beverages, Energy Drinks	411,200.00	411,200.00	441,440.00	895,040.00	925,280.00	925,280.00	1,046,240.00	1,046,240.00	1,076,480.00	1,076,480.00	1,076,480.00	1,076,480.00	10,407,840.00
Gross Profit Energy drinks (excludes discounts and credits)	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%	60.0%
COGS, Supplements	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Gross Profit Supplements (excludes discounts and credits)	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
COGS, Internet Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Gross Profit Internet Sales (excludes discounts and credits)	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
COGS, Other	87,600.00	87,600.00	87,600.00	104,025.00	104,025.00	104,025.00	136,875.00	136,875.00	136,875.00	150,562.50	150,562.50	150,562.50	1,437,187.50
COGS, Freight Out													
Freight Out, AAFES	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Freight Out, BB.com	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Freight Out - DSD	41,120.00	41,120.00	44,144.00	89,504.00	92,528.00	92,528.00	104,624.00	104,624.00	107,648.00	107,648.00	107,648.00	107,648.00	1,040,784.00
Freight Out, Europa	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Freight Out, Other	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Freight Out, GNC	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
COGS, Freight Out - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total COGS, Freight Out	51,120.00	51,120.00	54,144.00	99,504.00	102,528.00	102,528.00	114,624.00	114,624.00	117,648.00	117,648.00	117,648.00	117,648.00	1,160,784.00
Total Cost of Goods Sold	549,920.00	549,920.00	583,184.00	1,098,569.00	1,131,833.00	1,131,833.00	1,297,739.00	1,297,739.00	1,331,003.00	1,344,690.50	1,344,690.50	1,344,690.50	13,005,811.50
Total COGS	549,920.00	549,920.00	583,184.00	1,098,569.00	1,131,833.00	1,131,833.00	1,297,739.00	1,297,739.00	1,331,003.00	1,344,690.50	1,344,690.50	1,344,690.50	13,005,811.50
Gross Profit	743,680.00	743,680.00	784,504.00	1,434,094.00	1,474,918.00	1,474,918.00	1,712,674.00	1,712,674.00	1,753,498.00	1,784,523.00	1,784,523.00	1,784,523.00	17,188,209.00
Gross Profit Percentage of Total Gross sales	56.3%	56.3%	56.2%	55.5%	55.4%	55.4%	55.8%	55.8%	55.7%	55.9%	55.9%	55.9%	55.8%

ZYEN03360

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Expense													
Compensation Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Origination Fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Contemporary Mktng	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- MGR & Associates	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Dan Feldkamp	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Omega	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Team Direct	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Berg Marketing	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- S&K Sales	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Broker Fees- Upper 49th	21,900.00	21,900.00	21,900.00	26,006.25	26,006.25	26,006.25	34,218.75	34,218.75	34,218.75	37,640.63	37,640.63	37,640.63	359,296.88
Slotting Fees	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	49,166.67	590,000.00
Customer Placement Incentives	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	180,000.00
Sales Leads	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Working Capital Line	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Loan Receivable Writeoff	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Loan Initiation Fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Software license fees and supp	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sales Tax Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sales Use tax	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Producing Testing	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Marketing													
Coolers	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	240,000.00
DSD- Advertising at Events	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Marketing Data	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Models	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Fighters	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Tagging Discounts	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
POP materials	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	240,000.00
Kiosk/Billboard Advertising	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beverage Samples	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	300,000.00
Business Development	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Call Center	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Video and Photo Production	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Sponsorship - UFC/License to put UFC on can	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	750,000.00	9,000,000.00
TV Advertising (Comm. & Inegr.)	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	240,000.00
Radio Advertising	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Online Marketing	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Print Ads	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Catalog costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Commercial costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Graphics	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Production costs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Promotional Giveaway, Apparel	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Promotional - DVD Prod. Cost	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Promotional, Event Ticket Purch	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Promotional Giveaway, Product	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Promotional Giveaways, TV DVD	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Promotional - Other/Coolers	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Public Relations	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Sponsorship (non UFC)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Trade Shows and Events													
Trade Shows and Events, Other	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Trade Shows and Events, Fees	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Trade Shows and Events, Talent	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Trade Shows and Events - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Trade Shows and Events	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00	240,000.00
Web site server	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Website Dev. and Maintenance	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
In Store Marketing													
PMS \$1.00 per case to DSD)	45,688.89	45,688.89	49,048.89	99,448.89	102,808.89	102,808.89	116,248.89	116,248.89	119,608.89	119,608.89	119,608.89	119,608.89	1,156,426.67
In Store Marketing, Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
In Store Marketing, GNC	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
In Store Marketing, Europa	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
In Store Marketing - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total In Store Marketing	45,688.89	45,688.89	49,048.89	99,448.89	102,808.89	102,808.89	116,248.89	116,248.89	119,608.89	119,608.89	119,608.89	119,608.89	1,156,426.67
Product Development													
Lab Sample Testing	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Product Development - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Product Development	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Marketing - Other	606.85	606.85	606.85	606.85	606.85	606.85	606.85	606.85	606.85	606.85	606.85	606.85	7,282.20
Total Marketing	948,295.74	948,295.74	951,655.74	1,002,055.74	1,005,415.74	1,005,415.74	1,018,855.74	1,018,855.74	1,022,215.74	1,022,215.74	1,022,215.74	1,022,215.74	11,987,708.87

ZYEN03362

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Personnel Costs													
Compensation, Stock Option Plan	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Salaries and Wages-Corporate	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	87,630.85	1,051,570.16
Salaries and Wages-Marketing	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	19,955.27	239,463.22
Salaries and Wages-Operations	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	28,099.87	337,198.46
Salaries and Wages-Sales	154,636.43	154,636.43	158,621.91	218,404.03	222,389.51	222,389.51	238,331.41	238,331.41	242,316.88	242,316.88	242,316.88	242,316.88	2,577,008.14
Salaries and Wages-Supplements	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Payroll Tax Expense	29,032.24	29,032.24	29,430.79	35,409.00	35,807.55	35,807.55	37,401.74	37,401.74	37,800.29	37,800.29	37,800.29	37,800.29	420,524.00
Personnel Related Insurance	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Commission													
Collections	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Sales	13,200.00	13,200.00	13,956.00	25,843.50	26,599.50	26,599.50	30,718.50	30,718.50	31,474.50	31,930.75	31,930.75	31,930.75	308,102.25
Sales & Marketing	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Commission - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Commission	15,700.00	15,700.00	16,456.00	28,343.50	29,099.50	29,099.50	33,218.50	33,218.50	33,974.50	34,430.75	34,430.75	34,430.75	338,102.25
Bonus													
Disability Insurance	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Health insurance expense	17,600.00	17,600.00	18,000.00	24,000.00	24,400.00	24,400.00	26,000.00	26,000.00	26,400.00	26,400.00	26,400.00	26,400.00	283,600.00
Workers Comp	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	4,000.00	48,000.00
Bonus - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Bonus	21,600.00	21,600.00	22,000.00	28,000.00	28,400.00	28,400.00	30,000.00	30,000.00	30,400.00	30,400.00	30,400.00	30,400.00	331,600.00
Recruiting	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Relocation Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Payroll Processing Fee	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Temporary Labor	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Personnel Costs	358,654.66	358,654.66	364,194.68	447,842.52	453,382.54	453,382.54	476,637.63	476,637.63	482,177.65	482,633.90	482,633.90	482,633.90	5,319,466.23
Office and Facilities Expense													
Repairs													
Equipment Repairs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Repairs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Building Maintenance													
Building Repairs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Janitorial	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Building Maintenance - Other	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
Total Building Maintenance	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	2,800.00	33,600.00
Equipment lease													
Copy machine	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Dumpster	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Office Furniture	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Equipment lease - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Equipment lease	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Equipment Maintenance													
Computer Repairs	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
Copy machine maintenance	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
Equipment Maintenance - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Equipment Maintenance	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00	7,200.00
Equipment Rental													
Miscellaneous Office Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Bottled Water	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
Miscellaneous Office Expense - Other	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00	3,000.00
Total Miscellaneous Office Expense	550.00	550.00	550.00	550.00	550.00	550.00	550.00	550.00	550.00	550.00	550.00	550.00	6,600.00
Financial System Hosting													
Office Equipment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Rent													
Association fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
CAM charges	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Parking	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Rent - Other	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	84,000.00
Total Rent	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	9,500.00	114,000.00

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Services													
alarm security	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Services - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Services	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Supplies													
Computer Supplies	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Cleaning supplies	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Event supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Office Supplies	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
Warehouse supplies	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Supplies - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Supplies	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	7,500.00	90,000.00
Utilities													
Telephone													
Cell Phones	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	36,000.00
System service	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Telephone - Other	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	1,600.00	19,200.00
Total Telephone	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	4,600.00	55,200.00
Gas and Electric													
Gas and Electric	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	2,903.29	34,839.48
Trash pick-up	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Water	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Utilities - Other	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	6,000.00
Total Utilities	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	8,003.29	96,039.48
Warehousing Services													
Inventory Management	19,800.00	19,800.00	20,934.00	38,765.25	39,899.25	39,899.25	46,077.75	46,077.75	47,211.75	47,896.13	47,896.13	47,896.13	462,153.38
Warehousing Services - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Warehousing Services	19,800.00	19,800.00	20,934.00	38,765.25	39,899.25	39,899.25	46,077.75	46,077.75	47,211.75	47,896.13	47,896.13	47,896.13	462,153.38
Office and Facilities Expense - Other	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	18,000.00
Total Office and Facilities Expense	50,753.29	50,753.29	51,887.29	69,718.54	70,852.54	70,852.54	77,031.04	77,031.04	78,165.04	78,849.42	78,849.42	78,849.42	833,592.86
Other Administrative Costs													
Currency adjustments	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	12,000.00
Bad Debt Write-Offs	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Shipping & Handling	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Bad Debt Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Bank Service Charges	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Certificates of Manufacturing	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Credit Card Fees	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	2,500.00	30,000.00
Dues and Subscriptions	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Finance charges													
Late Fees	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Finance charges - Other	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	3,600.00
Total Finance charges	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	2,300.00	27,600.00
Insurance													
Liability Insurance	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	27,000.00	324,000.00
Insurance - Other	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	7,000.00	84,000.00
Total Insurance	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	34,000.00	408,000.00
Inventory Shrinkage & Disposal													
Inventory Disposal	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Inventory Shrinkage & Disposal	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Licenses and Permits													
Meetings	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	1,200.00
Shipping & Handling													
Packaging	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Postage	750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00	9,000.00
Shipping	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Shipping & Handling - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Shipping & Handling	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	7,750.00	93,000.00

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Storage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Travel & Ent													
Airfare	9,240.00	9,240.00	9,769.20	18,090.45	18,619.65	18,619.65	21,502.95	21,502.95	22,032.15	22,351.53	22,351.53	22,351.53	215,671.58
Cab Fare	264.00	264.00	279.12	516.87	531.99	531.99	614.37	614.37	629.49	638.62	638.62	638.62	6,162.05
Car rental	1,980.00	1,980.00	2,093.40	3,876.53	3,989.93	3,989.93	4,607.78	4,607.78	4,721.18	4,789.61	4,789.61	4,789.61	46,215.34
Entertainment	396.00	396.00	418.68	775.31	797.99	797.99	921.56	921.56	944.24	957.92	957.92	957.92	9,243.07
Gas expense	3,960.00	3,960.00	4,186.80	7,753.05	7,979.85	7,979.85	9,215.55	9,215.55	9,442.35	9,579.23	9,579.23	9,579.23	92,430.68
Hotel	7,920.00	7,920.00	8,373.60	15,506.10	15,959.70	15,959.70	18,431.10	18,431.10	18,884.70	19,158.45	19,158.45	19,158.45	184,861.35
Meals	5,280.00	5,280.00	5,582.40	10,337.40	10,639.80	10,639.80	12,287.40	12,287.40	12,589.80	12,772.30	12,772.30	12,772.30	123,240.90
miscellaneous	132.00	132.00	139.56	258.44	266.00	266.00	307.19	307.19	314.75	319.31	319.31	319.31	3,081.02
Parking	528.00	528.00	558.24	1,033.74	1,063.98	1,063.98	1,228.74	1,228.74	1,258.98	1,277.23	1,277.23	1,277.23	12,324.09
Travel	1,980.00	1,980.00	2,093.40	3,876.53	3,989.93	3,989.93	4,607.78	4,607.78	4,721.18	4,789.61	4,789.61	4,789.61	46,215.34
Travel & Ent - Vehicle Allowance	16,800.00	16,800.00	17,400.00	26,400.00	27,000.00	27,000.00	29,400.00	29,400.00	30,000.00	30,000.00	30,000.00	30,000.00	310,200.00
Total Travel & Ent	48,480.00	48,480.00	50,894.40	88,424.40	90,838.80	90,838.80	103,124.40	103,124.40	105,538.80	106,633.80	106,633.80	106,633.80	1,049,645.40
Total Other Administrative Costs	98,630.00	98,630.00	101,044.40	138,574.40	140,988.80	140,988.80	153,274.40	153,274.40	155,688.80	156,783.80	156,783.80	156,783.80	1,651,445.40
Legal, Accounting & Consulting													
Litigation Settlement	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Accounting	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	120,000.00
Consulting Fees													
Management Fee	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Consulting Fees, Product Dev.	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Consulting Fees, Brokers	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Consulting Fees - Other	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Total Consulting Fees	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	60,000.00
Legal Fees													
Filing Fees	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	24,000.00
Legal Fees - Other	200,000.00	200,000.00	200,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	1,050,000.00
Total Legal Fees	202,000.00	202,000.00	202,000.00	52,000.00	52,000.00	52,000.00	52,000.00	52,000.00	52,000.00	52,000.00	52,000.00	52,000.00	1,074,000.00
Inactive Accounts													
Donations	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Inactive Accounts	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Legal, Accounting & Consulting - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Legal, Accounting & Consulting	217,000.00	217,000.00	217,000.00	67,000.00	67,000.00	67,000.00	67,000.00	67,000.00	67,000.00	67,000.00	67,000.00	67,000.00	1,254,000.00
Total Expense	1,759,900.35	1,759,900.35	1,772,348.78	1,815,864.11	1,828,312.54	1,828,312.54	1,891,684.23	1,891,684.23	1,904,132.65	1,909,790.15	1,909,790.15	1,909,790.15	22,181,510.23
Net Ordinary Income	-1,016,220.35	-1,016,220.35	-987,844.78	-381,770.11	-353,394.54	-353,394.54	-179,010.23	-179,010.23	-150,634.65	-125,267.15	-125,267.15	-125,267.15	-4,993,301.23

	Estimate Jan 08	Estimate Feb 08	Estimate Mar 08	Estimate Apr 08	Estimate May 08	Estimate Jun 08	Estimate Jul 08	Estimate Aug 08	Estimate Sep 08	Estimate Oct 08	Estimate Nov 08	Estimate Dec 08	Estimate Total 08
Other Income/Expense													
Other Income													
Interest Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Other Income	0.00	0.00	0.00	0.00	0.00	0.00	52,000.00	52,000.00	52,000.00	80,000.00	80,000.00	80,000.00	396,000.00
Total Other Income	0.00	0.00	0.00	0.00	0.00	0.00	52,000.00	52,000.00	52,000.00	80,000.00	80,000.00	80,000.00	396,000.00
Other Expense													
Restructuring Fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Depreciation & Ammortization													
Amortization Expense	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	3,815.29	45,783.48
Depreciation Expense	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	8,866.76	106,401.12
Total Depreciation & Ammortization	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	152,184.60
Interest Expense													
Interest Expense, Non Loan	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Interest Expense, Loans Payable	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Interest Expense, Finders Fees	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Interest Expense - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Interest Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Taxes													
Canadian GST Taxes	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
State	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Federal	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Taxes - Other	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Taxes	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Other Expense	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	12,682.05	152,184.60
Net Other Income	-12,682.05	-12,682.05	-12,682.05	-12,682.05	-12,682.05	-12,682.05	39,317.95	39,317.95	39,317.95	67,317.95	67,317.95	67,317.95	243,815.40
Net Income	-1,028,902.40	-1,028,902.40	-1,000,526.83	-394,452.16	-366,076.59	-366,076.59	-139,692.28	-139,692.28	-111,316.70	-57,949.20	-57,949.20	-57,949.20	-4,749,485.83


Xyience Inc.
Payroll and Headcount for FY July 07 through December 08

				Oct-07	Nov-07	Dec-07
Corporate						
DiBernardo	Vicki	4/3/2006	\$120,000.00 Corporate	\$10,000.00	\$10,000.00	\$10,000.00
Echols	Tiffany	4/17/2007	\$40,000.00 Corporate	\$3,333.33	\$3,333.33	\$3,333.33
Keays	Devin	2/6/2006	\$75,000.00 Corporate	\$6,250.00		
Levy	Michael	7/21/2006	\$150,000.00 Corporate	\$12,500.00	\$12,500.00	\$12,500.00
Marshall	Willie	5/26/2006	\$41,000.00 Corporate	\$3,416.67	\$3,416.67	\$3,416.67
New	Staff acct	1/2/2008	\$45,000.00 Corporate			
Mersino	Jeanette	9/4/2007	\$65,000.00 Corporate	\$5,416.67	\$5,416.67	\$5,416.67
New	Attorney		\$125,000.00 Corporate			
Satar	Omer	COO	\$125,000.00 Corporate			
Miller	Kurt	IT	\$96,000.00 Corporate			
Rodriguez	Nina	4/23/2007	\$28,080.00 Corporate	\$2,340.00	\$2,340.00	\$2,340.00
Yoshimura	Heather	10/23/2006	\$70,000.00 Corporate	\$5,833.33	\$5,833.33	\$5,833.33
Rusnak	Michael	3/12/2007	\$55,000.00 Corporate	\$4,583.33	\$4,583.33	\$4,583.33
Total Subtotal Corporate				\$53,673.33	\$47,423.33	\$47,423.33
Employer Taxes				10.0%	\$5,367.33	\$4,742.33
Modified Business Tax				0.6%	\$338.14	\$298.77
Vacation accrual				3.0%	\$1,610.20	\$1,422.70
Bonus				25.0%		
Payroll Increase				4.0%	\$2,375.15	\$2,098.58
Total Corporate Payroll				\$63,364.16	\$55,985.71	\$55,985.71
Marketing						
Asuncion	Dara	7/11/2006	\$42,000.00 Marketing	\$3,500.00	\$3,500.00	\$3,500.00
Lautman	Jessica	5/9/2007	\$60,000.00 Marketing	\$5,000.00	\$5,000.00	\$5,000.00
New	CMO	1/1/2008	\$150,000.00 Marketing			
Oldham	Siobhan	5/14/2007	\$85,000.00 Marketing	\$7,083.33	\$7,083.33	\$7,083.33
New		1/1/2008	\$60,000.00 Marketing			
New		1/1/2008	\$60,000.00 Marketing			
Total Subtotal Marketing				\$15,583.33	\$15,583.33	\$15,583.33
Employer Taxes				10.0%	\$1,558.33	\$1,558.33
Modified Business Tax				0.6%	\$98.18	\$98.18
Vacation accrual				3.0%	\$467.50	\$467.50
Bonus				10.0%		
Payroll Increase				4.0%	\$689.59	\$689.59
Total Marketing Payroll				\$18,396.94	\$18,396.94	\$18,396.94
Operations						
Curry	Susan	5/8/2006	\$120,000.00 Operations	\$10,000.00	\$10,000.00	\$10,000.00
Hunter	Angela	3/13/2006	\$55,000.00 Operations	\$4,583.33	\$4,583.33	\$4,583.33
Lamotte	Peejay	9/18/2006	\$50,000.00 Operations	\$4,166.67	\$4,166.67	\$4,166.67
Lamotte	Jerrold	12/4/2006	\$44,200.00 Operations	\$3,683.33	\$3,683.33	\$3,683.33
Smith	Stephen	9/25/2006	\$50,000.00 Operations	\$4,166.67	\$4,166.67	\$4,166.67
Toadvine	Tera	10/5/2006	\$31,200.00 Operations	\$2,600.00	\$2,600.00	\$2,600.00
Wierzbicki	Susan	6/5/2006	\$60,000.00 Operations	\$5,000.00	\$5,000.00	\$5,000.00
Total Subtotal Operations				\$34,200.00	\$34,200.00	\$34,200.00
Employer Taxes				10.0%	\$3,420.00	\$3,420.00
Modified Business Tax				0.6%	\$215.46	\$215.46
Vacation accrual				3.0%	\$1,026.00	\$1,026.00
Bonus				10.0%		
Payroll Increase				4.0%	\$1,368.00	\$1,368.00
Operations Payroll				\$40,229.46	\$40,229.46	\$40,229.46
enter	Stephen	3/26/2007	\$50,000.00 Sales	\$4,166.67	\$4,166.67	\$4,166.67
Wierzbicki	Jay	4/16/2007	\$41,800.00 Sales	\$3,466.67	\$3,466.67	\$3,466.67

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Xyience Inc.
Payroll and Headcount for FY July 07 through December 08

				Oct-07	Nov-07	Dec-07
Fortier Bryan	4/30/2007	\$59,000.00	Sales	\$4,916.67	\$4,916.67	\$4,916.67
Keeler Christopher	4/2/2007	\$51,000.00	Sales	\$4,250.00	\$4,250.00	\$4,250.00
Lushin Chad	4/23/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	\$3,416.67
Marquez Ray	10/17/2006	\$49,500.00	Sales	\$4,125.00	\$4,125.00	\$4,125.00
Sagan Randy	6/18/2007	\$45,000.00	Sales	\$3,750.00	\$3,750.00	\$3,750.00
Shackelford Tim	10/2/2006	\$51,000.00	Sales	\$4,250.00	\$4,250.00	\$4,250.00
Stewart Jana	1/22/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	\$3,416.67
Adams Kevin	7/30/2007	\$62,000.00	Sales	\$5,166.67	\$5,166.67	\$5,166.67
Alvarez Justo	10/8/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Arroyo Robert	8/6/2007	\$52,000.00	Sales	\$4,333.33	\$4,333.33	
Carpio Jenna	8/27/2007	\$38,000.00	Sales	\$3,166.67	\$3,166.67	
Mahlke Darin	9/8/2006	\$85,000.00	Sales	\$7,083.33	\$7,083.33	\$7,083.33
Catalino Gary	9/28/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Dassler David	9/17/2007	\$75,000.00	Sales	\$6,250.00	\$6,250.00	
Douglas Andy	10/8/2007	\$73,000.00	Sales	\$6,083.33	\$6,083.33	
Fortier Robert	7/20/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Garrido Leonardo	9/4/2007	\$39,000.00	Sales	\$3,250.00	\$3,250.00	
Gottfried Gregory	2/5/2007	\$45,000.00	Sales	\$3,750.00	\$3,750.00	
Gradiz Carlos	10/15/2007	\$40,000.00	Sales	\$3,333.33	\$3,333.33	
Hauser David	9/7/2007	\$65,000.00	Sales	\$5,416.67	\$5,416.67	
Hayden Brent	10/1/2007	\$39,000.00	Sales	\$3,250.00	\$3,250.00	
Hoffman Erie	7/16/2007	\$55,000.00	Sales	\$4,583.33	\$4,583.33	\$4,583.33
Huntowski Joseph	7/30/2007	\$38,000.00	Sales	\$3,166.67	\$3,166.67	\$3,166.67
King Gregory	7/23/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Leahy Tom	8/13/2007	\$62,000.00	Sales	\$5,166.67	\$5,166.67	
McCay Jennifer	9/26/2007	\$38,000.00	Sales	\$3,166.67	\$3,166.67	
McLoone Jason	9/4/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	
Navarro Jose	8/13/2007	\$52,000.00	Sales	\$4,333.33	\$4,333.33	\$4,333.33
Ozel Tony	8/13/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	\$3,416.67
Pollard Jill	9/15/2007	\$46,000.00	Sales	\$3,833.33	\$3,833.33	\$3,833.33
Raney Linda	9/15/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	
Rodriguez Peter	10/31/2007	\$38,000.00	Sales	\$3,166.67	\$3,166.67	
Park Robert	2/12/2007	\$70,000.00	Sales	\$5,833.33	\$5,833.33	\$5,833.33
Pettis Larry	7/10/2006	\$75,000.00	Sales	\$6,250.00	\$6,250.00	
Martin Jeffrey	6/26/2006	\$112,000.00	Sales	\$9,333.33	\$9,333.33	\$9,333.33
Hall Nitosha	3/20/2006	\$46,100.00	Sales	\$3,841.67	\$3,841.67	\$3,841.67
New	1/2/2008	\$46,000.00	Sales			
Christensen Beau	9/27/2006	\$75,000.00	Sales	\$6,250.00	\$6,250.00	
Anselmo Tony	2/20/2007	\$60,000.00	Sales	\$5,000.00	\$5,000.00	\$5,000.00
Berzman Lee	1/29/2007	\$65,000.00	Sales	\$5,416.67	\$5,416.67	
Briley Rick	4/16/2007	\$65,000.00	Sales	\$5,416.67	\$5,416.67	
Calderone Marc	1/16/2007	\$75,000.00	Sales	\$6,250.00	\$6,250.00	\$6,250.00
Guyot Paul	11/13/2006	\$60,000.00	Sales	\$5,000.00	\$5,000.00	
Hickman Keith	4/3/2007	\$65,000.00	Sales	\$5,416.67	\$5,416.67	
Marks Jason	4/30/2007	\$63,000.00	Sales	\$5,250.00	\$5,250.00	\$5,250.00
Sidorak Paul	1/16/2007	\$60,000.00	Sales	\$5,000.00	\$5,000.00	\$5,000.00
Zuluaga Herman	11/8/2006	\$65,000.00	Sales	\$5,416.67	\$5,416.67	\$5,416.67
Coffey William	11/13/2006	\$39,000.00	Sales	\$3,250.00	\$3,250.00	
Olson Timothy	3/5/2007	\$45,000.00	Sales	\$3,750.00	\$3,750.00	
Rios Cameron	1/10/2007	\$39,000.00	Sales	\$3,250.00	\$3,250.00	\$3,250.00
Rodriguez Samuel	12/7/2006	\$41,600.00	Sales	\$3,466.67	\$3,466.67	\$3,466.67
Samaha Thomas	4/9/2007	\$39,000.00	Sales	\$3,250.00	\$3,250.00	\$3,250.00
Tanner Duane	2/20/2007	\$41,000.00	Sales	\$3,416.67	\$3,416.67	
Rosales Jose	10/8/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Sanders Kenny	8/13/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	
Smith Kelly	10/8/2007	\$45,000.00	Sales	\$3,750.00	\$3,750.00	
Tennison Eugene	7/16/2007	\$39,000.00	Sales	\$3,250.00	\$3,250.00	
Theodorakis Christopher	8/1/2007	\$100,000.00	Sales	\$8,333.33	\$8,333.33	
Tursky Bernardo	10/8/2007	\$41,600.00	Sales	\$3,466.67	\$3,466.67	
Werner Dennis	7/30/2007	\$56,000.00	Sales	\$4,666.67	\$4,666.67	\$4,666.67
Zazueta James	9/24/2007	\$35,000.00	Sales	\$2,916.67	\$2,916.67	\$2,916.67
Zuluaga Carlos	9/4/2007	\$41,600.00	Sales	\$3,466.67	\$3,466.67	\$3,466.67
ZY	1/1/2008	\$39,000.00	Sales			
E	1/1/2008	\$39,000.00	Sales			
N	1/1/2008	\$39,000.00	Sales			
E	1/1/2008	\$39,000.00	Sales			
N	1/1/2008	\$39,000.00	Sales			
O	1/1/2008	\$39,000.00	Sales			
3	1/1/2008	\$39,000.00	Sales			
6	1/1/2008	\$39,000.00	Sales			
8	1/1/2008	\$39,000.00	Sales			
New	1/1/2008	\$39,000.00	Sales			

 You replied on 1/13/2008 12:24 PM.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Fri 1/11/2008 8:11 PM
To: Bill Bullard
Cc:
Subject: FW: Meeting
Attachments:

Bill,

Giving approval and letting Gus and Mike know you may be contacting them with questions. Their numbers are below.

From: Gus Prokos [mailto:GProkos@cott.com]
Sent: Friday, January 11, 2008 1:07 PM
To: Michael Levy
Subject: RE: Meeting

No problem Mike!

Bill or yourself can get in touch with myself or Mike Gibbons at any time via cell if necessary:

Gus: 416-902-0862

Mike: 416-716-5714

Talk to you soon.

From: Michael Levy [mailto:mlevy@Xyience.com]
Sent: Friday, January 11, 2008 4:03 PM
To: Gus Prokos
Subject: RE: Meeting

Thank you very much for meeting today. Please take Bill Bullard's call if he has any other questions he may want to discuss with you. Thanks. I will forward what I think are our priorities shortly.

From: Gus Prokos [mailto:GProkos@cott.com]

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Sun 1/13/2008 1:25 PM
To: Bill Bullard
Cc:
Subject: RE: Meeting
Attachments:

I was supposed to receive the analysis yesterday morning; I still haven't received the slotting fee plan. I am still waiting on a response from Omer.

-----Original Message-----

From: Bill Bullard [mailto:billb@gordonbiersch.com]
Sent: Sunday, January 13, 2008 12:24 PM
To: Michael Levy
Subject: Re: Meeting

Mike,

Any update on the slotting fee analysis/execution plan?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Michael Levy <mlevy@Xyience.com>
To: Bill Bullard <billb@gordonbiersch.com>
Sent: Fri Jan 11 20:11:35 2008
Subject: FW: Meeting

Bill,

Giving approval and letting Gus and Mike know you may be contacting them with questions. Their numbers are below.

From: Gus Prokos [mailto:GProkos@cott.com]
Sent: Friday, January 11, 2008 1:07 PM
To: Michael Levy
Subject: RE: Meeting

No problem Mike!


Bill or yourself can get in touch with myself or Mike Gibbons at any time via cell if necessary:

Gus: 416-902-0862

Mike: 416-716-5714

Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Thu 1/31/2008 9:26 AM
To: Bill Bullard
Cc:
Subject: RE: Kansas and Canada
Attachments:  Canada Sales for 2006 and 2007.xls(34KB)

Bill,

Take a look.

-----Original Message-----

From: Bill Bullard [mailto:billb@gordonbiersch.com]
Sent: Wednesday, January 30, 2008 8:12 PM
To: Michael Levy
Subject: Kansas and Canada

Mike,

I signed your slotting fee letter and it will be emailed to you first thing in am.

I also need some info on Canadian sales of Xyience for the past two years. What were beverage and supplement sales as a percent of the respective sales in US? Volume and dollars if you have them.

Sent from my BlackBerry Wireless Handheld

<p>DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us immediately at 800-994-3623 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Xyience Inc. </p>

Bill Bullard

From: Michael Levy [mlevy@Xyience.com]
To: Bill Bullard
Cc:
Subject: Required funding
Attachments:

Sent: Tue 2/19/2008 8:48 AM

Bill,

In taking a closer look at the budget, and in light of our conversation last week, I think we could get through our plan between now and a sale with another \$700,000 wire. This would leave a delta of total funds received of \$1.7M versus a budget of \$2.7M. Obviously if something arises which requires more capital, which I do not foresee, I will give you plenty of notice, but I am confident I can manage the business at this new level of financing to get us through the sales process. If you can send an additional wire this week, it would be very much appreciated.

Take care.

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us immediately at 800-994-3623 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Xyience Inc.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com]

Sent: Tue 2/19/2008 9:15 AM

To: Bill Bullard

Cc:

Subject: Dymatize order



Attachments:

Can I move forward on the \$15k Dymatize order?

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us immediately at 800-994-3623 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Xyience Inc.

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Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Wed 3/12/2008 4:25 PM
To: Bill Bullard
Cc:
Subject: FW: Breakdown of cash uses from funding
Attachments:  [Cash use on funding Rev 2.xls\(407KB\)](#)  [Cash use on funding \\$2.5M request.xls\(49KB\)](#)

Cash uses on funding of \$9.5M and \$2.5M.

I am looking for loan docs for \$1M bridge loan.

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us immediately at 800-994-3623 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Xyience Inc.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Thu 3/20/2008 7:53 AM
To: Bill Bullard
Cc:
Subject: FW: Availability
Attachments:

Bill,

Maurice is looking for clarification if you would like to meet with him next week, and what the agenda would be. Please let me know so I can follow up with him, thanks.

From: Michael Levy
Sent: Monday, March 17, 2008 2:31 PM
To: 'Bill Bullard'
Subject: FW: Availability

Bill,

What is good for you? Also, can you provide specifics of what you would like to discuss with Maurice for his preparation. Thanks.

From: Maurice Brisebois [mailto:mbrisebois@upper49th.com]
Sent: Saturday, March 15, 2008 7:39 AM
To: Michael Levy
Subject: RE: Availability

I can make myself available either of the days, both if needed. Please give me an idea of the agenda and I'll prepare in content as well as travel. Sorry for the tardiness, I'm in Anaheim at a trade show.

Maurice

-----Original Message-----

From: Michael Levy [mailto:mlevy@Xyience.com]
Sent: Wednesday, March 12, 2008 7:32 PM
To: Maurice Brisebois
Subject: Availability

Exhibit P

Bill Bullard

From: Csaba Reider [csabareider@gmail.com] **Sent:** Wed 1/9/2008 8:15 PM
To: Bill Bullard
Cc: Tony Pallante; Bill Smith; williamsmith4563@rogers.blackberry.net
Subject: Re: Levy's numbers
Attachments:

Bill, I can participate anytime after 12 PST, 3 Eastern. I will check with the other guys tomorrow.

I will be with Bill Smith and Tony in the morning and then with Mike at Lunch.

Cheers,

Csaba

On 1/9/08, **Bill Bullard** <billb@gordonbiersch.com> wrote:

After going through them Cott and Allen are the two areas of immediate attention. Also, there are some vendors, slotted in and employee costs that need to be cut.


I think I will have Levy come by tomorrow to discuss if you want to participate together. I have a targeted number I want to see if we can limit our exposure to during the BK process.

Talk to Smith and see if you guys want to join me and Levy in a Q&A session tomorrow over funding.

Let me know either way.

Sent from my BlackBerry Wireless Handheld

Exhibit Q

 You forwarded this message on 5/9/2008 10:27 AM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Michael Levy [mlevy@Xyience.com] **Sent:** Tue 4/1/2008 9:59 AM
To: Bill Bullard
Cc:
Subject: RE: Interest calc
Attachments:  ZYEN loans and accrued interest.xls(34KB)

-----Original Message-----

From: Bill Bullard [mailto:billb@gordonbiersch.com]
Sent: Tuesday, April 01, 2008 9:52 AM
To: Michael Levy
Subject: Interest calc

Need interest calc detail on two tranches of pre petition loan and Dip through 3-31-08. Call me.

Sent from my BlackBerry Wireless Handheld

<p>DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us immediately at 800-994-3623 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Xyience Inc. </p>

Exhibit R

**MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS
OF
XYIENCE INCORPORATED,
a Nevada corporation**

November 3, 2007

A duly noticed, special telephonic meeting of the Board of Directors (the “**Board**”) of Xyience Incorporated, a Nevada corporation (the “**Corporation**”), was held on November 3, 2007, in accordance with the Nevada Revised Statutes and the Corporation’s Bylaws.

Adam Frank, Kirk Sanford, Kathryn Lever, and Patrick Brauckmann, constituting all of the members of the Board, were present at the meeting. Also present at the meeting, at the request of the Board, were Board observer Bill Bullard, employees Michael Levy and Omer Sattar, and the Corporation’s counsel, Keith Sutton. Mr. Sutton acted as the recording secretary for the meeting.

A quorum being present, the meeting was called to order at 1:39 P.M. Pacific Daylight Time.

Observer Status of Bill Bullard

Mr. Bullard opened the meeting by expressing his concern that certain threatened shareholder lawsuits aimed at the Corporation and the members of the Board might negatively impact his duties as an officer of Fertitta Enterprises, Inc. (“**Fertitta**”) and potentially raise lender liability issues in connection with the recent loan made by Zyen, LLC to the Corporation (the “**Zyen Financing**”). In light of these concerns, Mr. Bullard stated that he would not accept his previous appointment to the Board, but would act as a Board observer on behalf of Zyen, LLC in accordance with the Board observer rights granted to Zyen, LLC as part of the Zyen Financing.

Resignation of Patrick Brauckmann

For reasons similar to those expressed by Mr. Bullard, Mr. Brauckmann next tendered his resignation to the Board, but stated that he would continue to act as a Board observer on behalf of Darlis Invest & Trade Corp.

Mr. Sanford indicated that it was advisable and in the best interests of the Corporation and its stockholders for the Board to accept the resignation of Mr. Brauckmann, and to reduce the number of authorized directors to three (3). Upon motion duly made by Mr. Sanford and seconded by Ms. Lever, the following resolution was approved:

RESOLVED, that the Corporation hereby accepts Mr. Brauckman’s resignation, effective immediately.

RESOLVED FURTHER, that the number of authorized members of the Board is hereby set at three (3) in accordance with Section 3(b) of the Bylaws.

Acceptance of Resignation of Bill Underhill

Mr. Frank next noted that Bill Underhill had tendered to the Corporation his resignation as a director pursuant to an email dated October 31, 2007, a copy of which is attached hereto as **Exhibit A**. Mr. Frank indicated that it was advisable and in the best interests of the Corporation and its stockholders for the Board to accept such resignation. Upon motion duly made by Mr. Sanford and seconded by Ms. Lever, the following resolution was approved:

RESOLVED, that the Corporation hereby accepts Mr. Underhill's resignation, effective as of October 31, 2007.

Approval of Board Minutes

The Board next reviewed the minutes of the meetings of the Board on each of September 21, 2007 (the "**September 21 Minutes**"), September 28, 2007 (the "**September 28 Minutes**"), October 1, 2007 (the "**October 1 Minutes**") and October 2, 2007 (the "**October 2 Minutes**") attached hereto as **Exhibit B**, **Exhibit C**, **Exhibit D**, and **Exhibit E**, respectively, each of which were previously circulated to the Board. Upon motion duly made by Mr. Sanford and seconded by Mr. Frank, the following resolution was approved:

RESOLVED, that the Board hereby adopts and approves the September 21 Minutes, the September 28 Minutes, the October 1 Minutes, and the October 2 Minutes, each in their entirety, and directs that a copy of such minutes be inserted in the minute book of the Corporation.

Financial Update and Strategy Session

Mr. Levy and Mr. Sattar next presented to the Board and the Board discussed in detail the Corporation's third quarter financial results, a forecast for the remainder of the fiscal year, the Corporation's marketing, sales and operational performance, and strategies to improve future performance.

Annual Meeting of the Stockholders

Mr. Frank next reminded the Board that it is necessary for the Corporation to hold its 2007 annual meeting of stockholders (the "**Annual Meeting of Stockholders**") for the election of directors and for the transaction of other business that may properly come before the meeting. Upon motion duly made by Mr. Frank and seconded by Ms. Lever, the following resolutions were approved:

RESOLVED, that the Annual Meeting of Stockholders shall be held at 10:00 A.M. local time on December 11, 2007 at a location to be designated by the Board in Las Vegas, Nevada; and

RESOLVED FURTHER, that November 30, 2007 (which is not less than 10 or more than 60 days prior to the date of the Annual Meeting of Stockholders) is hereby fixed as the record date for the determination of the stockholders entitled to notice of, and to vote at, the Annual Meeting of Stockholders, and no stockholders except those who are stockholders of record on such date shall be entitled to notice of, or to vote at, such meeting, notwithstanding any stock on the books of the Corporation or otherwise after such record date.

Approval of Amended and Restated Bylaws

Mr. Frank next indicated that, given the Corporation's growth and large number of stockholders and other factors, the Corporation had outgrown its current Bylaws. Mr. Frank therefore proposed that the Corporation amend and restate its Bylaws, in the form previously distributed to the Board and attached hereto as **Exhibit F**, so that they were state of the art and more appropriate for the Corporation at this stage of its development. Upon motion duly made by Mr. Sanford and seconded by Mr. Frank, the following resolution was approved:

RESOLVED, that, in accordance with Section 10(a) of the Bylaws, the Bylaws of the Corporation are hereby amended and restated in their entirety as set forth in the form attached hereto as **Exhibit F**.

Litigation Update

Next, Mr. Frank presented to the Board and the Board discussed in detail pending litigation in which the Corporation is named as a defendant. Mr. Frank indicated that, in the case of Neiber/Launch Marketing Concepts, Inc. v. Xyience Incorporated, a civil action brought by Neiber, on behalf of Launch Marketing Concepts, Inc. for \$1.3 million (the "**Neiber Dispute**"), it was advisable and in the best interests of the Corporation and its stockholders for the Corporation to settle the dispute for not more than \$22,000. Upon motion duly made by Mr. Sanford and seconded by Mr. Frank, the following resolution was approved:

RESOLVED, that the Corporation is hereby authorized to settle the Neiber Dispute on such terms as any executive officer of the Corporation determines are advisable, so long as the amount payable by the Corporation as part of such settlement does not exceed \$22,000.

RESOLVED FURTHER, that each executive officer of the Corporation is hereby authorized to enter into, on behalf of the Corporation, a settlement agreement consistent with the foregoing resolutions in order to settle the Neiber Dispute.

Financing Proposals from Potential Investors

Next, the Board discussed the urgent need for the Corporation to obtain additional financing. Mr. Sanford conveyed that he had preliminary discussions with a group of investors regarding an equity financing, and would keep the Board informed of any significant developments. Mr. Frank and Mr. Sanford also indicated that they would continue to track down any serious leads that were brought to their attention and were also speaking with two investment banks, Lazard Freres & Co. (“**Lazard**”) and Morgan Joseph, to assist the Corporation in obtaining financing.

General Authority

RESOLVED FURTHER, that any and all actions heretofore or hereafter taken by the officers or directors of the Corporation within the terms of any of the foregoing resolutions are hereby ratified and confirmed as the acts and deeds of the Corporation; and

RESOLVED FURTHER, that each of the officers and directors of the Corporation is hereby authorized to execute and deliver any and all documents and to take such other actions as they reasonably deem necessary, advisable or appropriate to carry out the purposes and intent of the foregoing resolutions.

There being no further business to come before the Board, the meeting was adjourned at 5:16 P.M. Pacific Daylight Time.

[REMAINDER LEFT BLANK – SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, I have caused these minutes to be duly executed as of the first date written above.

By: 

Keith Sutton, Recording Secretary

EXHIBIT A

From: BUnderhi@aol.com [mailto:BUnderhi@aol.com]
Sent: Wednesday, October 31, 2007 11:38 AM
To: Adam Frank
Subject: Board Resignation

Adam Frank, Chairman:

I am reluctantly submitting my resignation to the Board of Xyience. Although you and Kirk represented to several major shareholders and me (verbally and in writing) during the closing of the Fertitta deal that, among other things, no changes would be made to the Board prior to a shareholder meeting (other than the additions of Mr. Bullard and potentially Mr. Brauckmann and a UFC appointee), it has been made crystal clear by Mr. Bullard and Mr. Bruckmann as well as yourself that my resignation or removal from the Board was, unbeknownst to me, a condition to their deals with Xyience.

This fact has, as I have told you and Kirk and now Bill Bullard, put me in a tough spot with many shareholders who were rightfully counting on my Board presence. I cannot however, with my presence, put the shareholders at risk of a default with those lenders. I have no real choice but this resignation. Furthermore, I have long called for the shareholder meeting that I scheduled in June, which would finally give the shareholders a true voice in the management of Xyience. This meeting has been put off for almost five months. I also asked that an independent party (in addition to you and Kirk) be involved in the Fertitta negotiations as you both stated on numerous occasions that your continuation in management was a condition precedent to the deal, a representation that could not be verified, and that you both required significant additional compensation for that involvement. Like the shareholder meeting this request was ignored. Most disturbingly, I learned via mass e-mail that the company had ceased operations without a Board meeting despite explicit discussion that no drastic action would be taken without Board action. The following day I learned again via e-mail that Mr. Brauckmann had been added to the Board of directors as part of a subordination agreement that I have yet to see. Obviously, my input is neither valued nor required, and do I have any interest in continuing to receive veiled threats via e-mail from other Board members in the middle of the night.

As, until today, we have had no meeting since the Fertitta deal closed, and I have received no sales or operating information on Xyience during that time despite my request, it is also clear that my presence is hindering the Board's business in a manner that could prove harmful to shareholders, given the tight time frames mandated by the Fertitta deal.

Please notify the other Board members of my resignation and appropriately distribute this letter of resignation to them. I will forward it to those shareholders who believed there would not be a change of this type in the Board until the shareholder meeting.

I will separately respond to Mr. Brauckmann's e-mail of earlier this week and will cc only you as Chairman, rather than the entire Board. Feel free to distribute as you see fit. I sincerely wish Xyience and its shareholders (of which I am one) good fortune in the coming months.

Respectfully submitted,
William R. Underhill
October 31, 2007

EXHIBIT B

September 21 Minutes

[Attached]

EXHIBIT C

September 28 Minutes

[Attached]

EXHIBIT D

October 1 Minutes

[Attached]

EXHIBIT E

October 2 Minutes

[Attached]

EXHIBIT F

Second Amended and Restated Bylaws

[Attached]

Exhibit S

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE: Chapter 11
XYIENCE INCORPORATED,
No. BK-S-08-10474-MKN
Debtor.

DAVID HERZOG,
as Liquidating Trustee,

Plaintiff,

vs.

Adversary Case No. 09-1402-MKN
ZYEN, LLC, et al.,

Defendants.

DEPOSITION OF ADAM FRANK
Las Vegas, Nevada
Wednesday, May 25, 2011

Reported by:
Maria C. Wooley
CCR No. 488
Job No. 161844B

Page 1

1 APPEARANCES:

2

3 For David Herzog, as Liquidating Trustee
for the Estate of Xyience Incorporated:

4

LAW OFFICE OF JONATHAN A. BACKMAN
BY: JONATHAN A. BACKMAN, ESQ.
117 N. Center Street
Bloomington, Illinois 61701-5001
309.820.7420

7

email: jbackman@backlawoffice.com

8

For the Defendants:

9

GORDON & SILVER

10

BY: GREGORY E. GARMAN, ESQ.

11

JOEL Z. SCHWARZ, ESQ.

12

3960 Howard Hughes Parkway

13

Ninth Floor

14

Las Vegas, Nevada 89169

15

702.796.5555

16

email: ggarman@gordonsilver.com

17

jschwarz@gordonsilver.com

18

Also Present: Shannon Liberio

19

20

21

22

23

24

25

Page 3

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 IN RE: Chapter 11
5 XYIENCE INCORPORATED,
No. BK-S-08-10474-MKN
6 Debtor.

7 DAVID HERZOG,
as Liquidating Trustee,

8 Plaintiff,

9 vs.

10 Adversary Case No. 09-1402-MKN
ZYEN, LLC, et al.,

11 Defendants.

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15
16 Deposition of ADAM FRANK, taken on behalf of
17 David Herzog, as Liquidating Trustee for the Estate of
18 Xyience Incorporated, at Gordon & Silver, 3960 Howard
19 Hughes Parkway, 9th Floor, Las Vegas, Nevada, beginning
20 at 3:13 p.m. and ending at 5:17 p.m. on Wednesday,
21 May 25, 2011, before Maria C. Wooley, Certified Court
22 Reporter No. 488.
23
24
25

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1 Q Take a look at Exhibit 365 and let me know
2 if you recognize this as an exchange of e-mails with
3 Kirk Sanford and also with Frank Maher, a preliminary
4 summary of proposed terms for an engagement.
5 A Yeah, this looks familiar.
6 Q And this is dated August 21st, 2007, the
7 first e-mail on this?
8 A Yes. The Fertitta loan, when did that
9 close?
10 Q October 4th, 2007.
11 A Okay. Got it.
12 Q So I get back to the question.
13 Why was the decision made not to move
14 forward with someone in this case if you were
15 impressed with Morgan Joseph and with Frank Maher to
16 try to secure that additional financing that you knew
17 you were going to need before you closed the Fertitta
18 financing rather than waiting until after you closed
19 the Fertitta financing?
20 A So I just want to make sure I understand
21 your question.
22 You're saying why did we sort of postpone
23 the decision-making on this until after Fertitta was
24 closed? Why not sort of say -- why not make that
25 decision who was going to be our banker, so to speak,

Page 25

1 while we were doing the Fertitta loan?
2 Q Well, why not get started at least then?
3 A I mean my recollection is there was a pretty
4 long-standing relationship with Lazard. They had
5 been, you know, kind of in the pack as well. They had
6 been -- I think Lazard had been introduced to the
7 company back when Adam Roseman was trying to raise
8 financing.
9 That was my first recollection of a meeting
10 with Lazard. And there was a banker there who covered
11 the beverage base who I think Kirk and I had gotten to
12 know. And Kirk also had a preexisting relationship
13 with Lazard as a firm from maybe his GCA days or
14 something else. I had a relationship with Lazard
15 through another transaction I had done earlier in my
16 career.
17 So I think we kind of liked the Lazard guys
18 and they had done a lot of work for us early on. You
19 know, we felt like they were a better pedigree name
20 than Morgan Joseph.
21 And I think my recollection was that Ray
22 Sozzi was really pushing for Morgan Joseph. So, you
23 know, I think it was just a decision of which was the
24 right firm for us.
25 And I think probably Kirk and I felt we had

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1 a better relationship with the Lazard guys and, you
2 know, it's hard for me remember the exact state of
3 mind, but as I think about it now, you know, I think
4 we were probably pretty focused on getting that
5 Fertitta deal done, getting that milestone done and
6 then kind of moving onto the next mark.
7 Q And I appreciate that answer, the difficulty
8 between Morgan Joseph and Lazard.
9 The point of my question was a little
10 different, so I want to make sure I get an answer to
11 it.
12 You didn't retain Lazard for that purpose
13 prior to the -- that is, for the purpose of seeking to
14 raise additional funds prior to the closing of the
15 Fertitta facility either, did you?
16 A We didn't, and this may help sort of make
17 sense of it.
18 We didn't retain Lazard because Lazard was
19 sort of hanging around there sort of willing to help,
20 there was no official relationship there, but I think
21 they kind of -- our belief was that they were waiting
22 around willing to help but certain things had to be
23 cleaned up first. So, you know, again the Russell
24 Pike issue, that was a major thing, like no -- you
25 know, our experience had been that no institutional

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1 quality financing partner really wanted to get too
2 close to this thing until Russell Pike was, you know,
3 isolated from it and couldn't cause situations like he
4 was causing.
5 Q But Morgan Joseph was ready in August, at
6 least they so indicated?
7 A It certainly seemed that way, yes.
8 Q And you did understand that if you went
9 forward and closed the Fertitta financing and then you
10 didn't raise additional, at least \$7 million plus,
11 that was going to be the debt of the company? You
12 understood that; right?
13 A Yeah, yeah.
14 Q Let me show you a document that's been
15 previously marked as Exhibit 506 and ask you, have you
16 ever seen a copy of this e-mail until last night when
17 I sent it to you at like 2:00 in the morning?
18 A I read it this morning with the packet of
19 other materials you sent me.
20 Q Do you know why -- well, were you aware that
21 Cott was talking on or about October 4th, 2007 about
22 purchasing Xyience for somewhere in the neighborhood
23 of \$150 million?
24 A Yeah. I mean it's funny because I read this
25 this morning and it didn't strike me as something that

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1 I really recalled really specifically, which would be,
2 you know, sort of strange for something that seemed so
3 significant.

4 So, you know, my recollection was that I
5 think there was a brief time where there were maybe
6 some talks with Cott about, you know, either
7 something -- there was maybe something about buying
8 the company, I think there were probably more talks
9 about investing in the company, but there was
10 certainly a period where, you know, we thought maybe
11 there was a deal to be done with Cott, but I don't
12 think anything ever really -- I mean obviously nothing
13 ever really came of it.

14 You know, I don't have a lot of recollection
15 of it being a serious conversation. I mean to be
16 honest, this was a little bit -- I had to really think
17 to try to remember what this was.

18 Q All right. Now, October 4th, 2007 just
19 coincidentally happens to be the date of the
20 closing --

21 A Right.

22 Q -- of the \$12 million Zyen loan facility;
23 right?

24 A Yeah.

25 Q Shortly thereafter you went and you visited

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1 with people from an entity called Manchester?

2 A Correct.

3 Q And the people from Manchester had a
4 relationship with Cott?

5 A Correct.

6 Q Okay. Did you introduce -- Mr. Bullard came
7 along with you to this meeting?

8 A Correct.

9 Q And Mr. Bullard, he was a senior person, I
10 think the manager of Zyen; right?

11 A Sounds right, yeah.

12 Q And Zyen was a \$12 million lender?

13 A Yes.

14 Q I just want to make sure we've got the
15 players right.

16 A Yes.

17 Q Okay. Do you recall introducing Mr. Bullard
18 to the people at Manchester and Cott both as a new
19 lender to the company and also as a new member of its
20 Board?

21 A Introducing Bill as both those things?
22 Okay.

23 I guess I'm not sure I understand the
24 question. I certainly remember introducing Bill to
25 those guys. I don't remember exactly, you know, how I

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1 phrased it at the time.

2 Q Is it fair to say that at that time, that
3 is, the middle of October 2007, after the Zyen
4 \$12 million facility had closed, you viewed Bill
5 Bullard as a member of the board of directors?

6 A I don't know if that's fair to say.

7 I mean my recollection of it was that he had
8 the right to be on the Board or the right to appoint a
9 member of the Board but, you know, very quickly we got
10 an e-mail or something that said, you know, after
11 further considering it, he was going to decline that,
12 you know, or very quickly there was -- it became clear
13 that he wasn't going to be a member of the Board.

14 Q Well, let me just be clear, because in the
15 minutes of October 1st, 2007 he was appointed as a
16 Board member contingent on the closing of the Zyen --
17 you remember that; right?

18 A Yeah, that sounds familiar. And I've
19 actually recently looked at the Board minutes a few
20 months ago, so I remember seeing that.

21 Q And it was about 28 days or 30 days later
22 that he told you he decided he wasn't going to be a
23 Board member, he was going to be an appointee.

24 And what I'm asking you is during that
25 period did you view him as a Board member?

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1 A I didn't and, you know, personally I was
2 kind of disappointed that he didn't become a Board
3 member, that he never, you know, officially took on
4 that role because, you know, that was something that I
5 expected was going to happen.

6 You know, I don't remember exactly what the
7 sequence of the dates were but, you know, my
8 recollection of it was that he never really served in
9 that capacity and it was -- you know, just felt a
10 little disappointing.

11 Q When you say -- what makes you say that he
12 wasn't a Board member once you had appointed him and
13 the loan had closed?

14 A I mean I'm not a corporate lawyer, so I
15 can't speak to when officially, you know, that happens
16 versus not happens. And obviously I'm familiar enough
17 with the case to know that there is some, you know,
18 controversy, you know, resting upon that.

19 So, you know, I don't have a legal opinion
20 as to whether or not he was a Board member but, you
21 know, I can tell you how it felt to me as a Board
22 member as someone who was trying to, you know, get the
23 company to success. It felt like it was something he
24 was going to do but never did.

25 Q All right. Well, let me ask you, because

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1 wanted us to get 60-something percent but he had the
2 right to waive it.

3 So I think as we went through the
4 shareholder register, you know, there were lots of big
5 groups that easily got to that point and there were --
6 because of how much stock had been sold, there were a
7 lot of, you know, thousand share lots or 100 share
8 lots or whatever it was that were, you know, not
9 consequential in terms of getting to that threshold.

10 Q You ended up in the end getting approval
11 from only -- in terms of not percentages but roughly
12 10 to 15 shareholders; right?

13 A Yes, I remember that.

14 And just to add color to that, I mean I
15 think, you know, we wanted to get this deal done, we
16 thought it was in the best interest of the company, so
17 I think we were, you know, operating from a
18 perspective of efficiency, figuring out, you know, how
19 to get it done.

20 Q Okay. Just very generally where do you live
21 today?

22 A The Hughes Center, 1 Hughes Center Drive,
23 No. 505.

24 Q That's here?

25 A Yeah. Las Vegas, Nevada 89169.

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1 Q And you also have a place you stay in
2 California?

3 A Yeah.

4 Q Are you doing business there as well?

5 A Yeah. Well, I mean my business is primarily
6 here but, you know, I have a phone and an e-mail and a
7 computer, I can do business anywhere.

8 Q Okay. What's your date of birth?

9 A 10/23/71.

10 Q What's your highest level of education?

11 A Law school and MBA.

12 Q What law school?

13 A NYU.

14 Q Did you graduate?

15 A I did.

16 Q Did you become a lawyer?

17 A I never took the bar, no.

18 Q Okay. Did you say you also had an MBA?

19 A Yes.

20 Q From where?

21 A NYU also.

22 Q Are there any exams for that type thing?

23 A No.

24 Q So do you have the degree MBA?

25 A Yeah, I have that degree.

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1 Q During the past 24 hours, have you ingested
2 any substances or engaged in any activities that have
3 made it difficult for you to understand my questions
4 today and to give honest answers?

5 A No.

6 MR. BACKMAN: I have nothing further.

8 EXAMINATION

9 BY MR. SCHWARZ:

10 Q I'm just going to ask a few questions.
11 Since I didn't have the benefit of being here at the
12 beginning, I apologize if I retread old ground, but I
13 think we'll probably move through some of this
14 quickly.

15 Looking at Exhibit 506, that was the October
16 4th, 2007 e-mail from Bill Bullard to Lorenzo
17 Fertitta, do you remember looking at that earlier?

18 A I do.

19 Q It's talking about a verbal offer from Cott.

20 A Correct, yeah.

21 Q Do you recall having any discussions with
22 Mr. Bullard after October 4th, 2007 about a potential
23 purchase by Cott of Xyience?

24 A I mean I don't recall anything specific, but
25 I remember, you know, there was this general -- there

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1 was -- what I recall is a short period of interest
2 where it seemed like maybe there was a deal to be done
3 with Cott. And my recollection was more about, you
4 know, them investing a significant sum of money
5 potentially in the form of free product. I mean the
6 offer sounds sort of vaguely familiar and I remember
7 some sort of discussion there, but I don't recall it
8 specifically enough to lead me to believe that it was
9 ever that real. So I don't remember the exact dates
10 of what it was.

11 I remember that we did a trip up there, Bill
12 Bullard, myself and Kirk, and there was some
13 enthusiasm around that trip from kind of the first
14 part of it, but I sort of remember, you know, it kind
15 of fizzed after that. So I don't remember any
16 specific conversation with Bill but I think, you know,
17 there certainly would have been around Cott, you know,
18 around them having a significant interest in the
19 company.

20 Q Okay. You had said something about the fact
21 of you don't remember if you considered it to be a
22 real offer or not.

23 What was your perspective on whether it was
24 a real offer by the company? Did it ever materialize
25 into a term sheet or anything like that?

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1 A You know, I don't recall ever seeing a -- I
2 don't know. I don't recall the specifics. There may
3 have been some exchange on deal terms. I sort of
4 recall, you know, some discussion with Brent, I think
5 his name was Brent Willis, the CEO of Cott, you know,
6 we were dealing at the highest levels there and he was
7 a guy from InBev who was on the -- who was very much a
8 brand guy, he was the CEO of Cott but he was very much
9 a brand focused guy.

10 And Cott, you know, their traditional
11 business is as a manufacturer. So I recall that there
12 was some interest and that we were pushing him and
13 trying to sell him on Xyience, you know, being a great
14 sort of brand to play for Cott to get out of the
15 competitiveness of just being a manufacturer because
16 they had some -- they have some private label brand.
17 So we pushed him hard on that, sold him pretty hard on
18 that.

19 I remember -- you know, I think Bill was
20 part of those discussions. And, you know, my
21 recollection is there was a brief moment where it
22 seemed like, hey, maybe Cott is a real player at the
23 table here but it just, you know, without -- you know,
24 pardon the pun, it just kind of fizzed out was my
25 recollection.

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1 And what we later learned was that Brent
2 Willis was kind of on the outs with the management and
3 I think he was terminated. There was some initial
4 excitement and there may have been some term sheets
5 exchanged but, you know, in my mind it never really --
6 my recollection is on the purchase side, that was
7 not -- that doesn't stick out in my mind as being
8 serious for any amount of time.

9 And my recollection is that on the
10 investment piece, that was the conversation that had a
11 little more distance but ultimately never went
12 anywhere.

13 Q I think when I popped in you guys were
14 talking about the shareholder meeting, and if I'm
15 rehashing old ground, I apologize here.

16 Do you recall the decision to postpone the
17 shareholder meeting -- well, let's start with this.

18 Do you remember that there was a shareholder
19 meeting that was set to take place June 25th, 2007;
20 right?

21 A Yeah, I remember it being sometime in June.
22 That jogs my recollection.

23 Q And you remember that early in June the
24 decision was made by the Xyience board of directors to
25 postpone that meeting; correct?

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1 A Yeah, I mean it sounds right. I don't
2 remember specifically the dates, but I remember there
3 was a Board level decision made to postpone it under
4 advice by counsel.

5 Q Right.

6 And that was a unanimous decision of the
7 board of directors of Xyience at the time, wasn't it?

8 A I don't recall. If that's what it says in
9 the notes, then I'm sure that's what it was.

10 Q And at that time the Board was comprised of
11 you; correct? You were on the Board?

12 A Correct.

13 Q Kirk was on the Board?

14 A Correct.

15 Q Bill Underhill was on the Board?

16 A Correct.

17 Q Katie Reider was on the Board?

18 A Sounds right.

19 Q And Mike Kirkland was on the Board?

20 A Sounds right.

21 Q And do you recall that everyone of those
22 Board members signed off on the postponement of the
23 shareholder meeting?

24 A Yeah, you know, I recall that it was -- I
25 think it was a topic that came up a number of times.

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1 And we were advised by Eisner and Frank, you know,
2 very specifically on that issue, discussed at the
3 Board level and, you know, it sounds like, you know,
4 it made sense that it was a unanimous vote. I don't
5 recall exactly specifically but it sounds right.

6 Q And at that point when it was postponed,
7 there wasn't a date set, a specific date in the future
8 set for the meeting to occur; correct?

9 A I don't recall.

10 Q And one of the reasons that the Board didn't
11 feel it was appropriate at the time to conduct a
12 shareholder meeting was because there was an ongoing
13 audit.

14 Do you remember that?

15 A Yes.

16 Q And it wasn't complete at that time;
17 correct?

18 A Correct.

19 Q Did that audit ever get completed?

20 A Never.

21 Q Again, forgive me if you covered this,
22 talking about potential sources of financing other
23 than what ultimately was the Fertitta bridge loan and
24 the Zyen note.

25 Specifically with respect to Burrill, what

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Exhibit T

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE: Chapter 11
XYIENCE INCORPORATED,
No. BK-S-08-10474-MKN
Debtor.

DAVID HERZOG,
as Liquidating Trustee,
Plaintiff,

v.
Adversary Case No. 09-1402-MKN
ZYEN, LLC, et al.,
Defendants.

DEPOSITION OF WILLIAM BULLARD
Las Vegas, Nevada
Tuesday, May 24, 2011

Reported by:
Maria C. Wooley
CCR No. 488
Job No. 159848A

Page 1

1 APPEARANCES:
2
3 For David Herzog, as Liquidating Trustee
for the Estate of Xyience Incorporated:
4
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1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3
4 IN RE: Chapter 11
5 XYIENCE INCORPORATED,
No. BK-S-08-10474-MKN
6 Debtor.

7 DAVID HERZOG,
as Liquidating Trustee,
8 Plaintiff,
9
10 v.
Adversary Case No. 09-1402-MKN
ZYEN, LLC, et al.,
11 Defendants.

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15 Deposition of WILLIAM BULLARD, taken on behalf
16 of David Herzog, as Liquidating Trustee for the Estate
17 of Xyience Incorporated, at Gordon & Silver, 3960 Howard
18 Hughes Parkway, 9th Floor, Las Vegas, Nevada, beginning
19 at 12:06 p.m. and ending at 5:36 p.m. on Tuesday,
20 May 24, 2011, before Maria C. Wooley, Certified Court
21 Reporter No. 488.
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24 Exhibit 160 E-mail from Adam Frank, dated 73
October 2, 2007
25

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1 Agreement was ever operated under, but there was a
2 time when counsel asked me before having conversations
3 with them to enter into some type of Consulting
4 Agreement. I don't know if the entity was Manchester
5 or not, but there was a Consulting Agreement at one
6 point in time.

7 Q Let me show that to you. We're going to
8 mark this as document 494, and let me know if this is
9 the Consulting Agreement to which you were just
10 referring.

11 A Yes.

12 Q And this was entered into between you and
13 the Manchester Consolidated Group in or around
14 December 14, 2007?

15 A Right.

16 Q Can you tell me why this document wasn't
17 referenced in the Declaration you gave in Exhibit 338
18 where you were indicating there was no relationship
19 between the Manchester Group?

20 MR. GARMAN: Object to form of the question,
21 but you may answer.

22 THE WITNESS: I don't recall specifically.
23 I would be speculating that we never acted on this
24 agreement. That would be my own speculation.

25 ///

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1 possibly converting your loan into a portion of equity
2 and taking a piece of an entity that would own the
3 assets of Xyience?

4 A That's eventually what we came down to. I
5 don't recall when those conversations started or how
6 they evolved and when they evolved.

7 Q Okay. Just to be clear, and I don't want to
8 invade the attorney/client privilege, but you made
9 reference to a counsel recommending that a document of
10 this sort be entered into.

11 Was it Manchester's counsel that you were
12 referring to?

13 A No. It was my counsel.

14 Q Okay. I didn't mean to invade the
15 attorney/client privilege, but I just wanted to --
16 okay, so you were referring to your counsel.

17 Do you know who was representing you at the
18 time?

19 A Yes, Milbank Tweed.

20 Q Okay. Was it Mr. Paschall at Milbank or
21 Mr. Bray?

22 A There was a bunch of them.

23 Q Yes, there were. They were expensive, too?

24 I take it that's a nonresponse?

25 A Nonresponse to what?

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1 BY MR. BACKMAN:

2 Q And what do you mean by you never acted
3 under the agreement?

4 A I don't know if we ever compensated them
5 under this agreement or I received compensation, we
6 ever acted. It was purely at the time a
7 recommendation from the counsel I had at the time
8 before we started discussing or they started
9 discussing anything to do with Xyience.

10 Q And what were you working with Manchester
11 Group during December 2007 on?

12 A I don't recall what was going on back then.
13 I don't remember what was going on specifically. I
14 know they were interested in forming some type of
15 relationship, looking at some type of interest in
16 Xyience, the brand. That's about all I can remember
17 from back in 2007.

18 Q Is it fair to say that they were looking at
19 a possible deal involving the purchase of the assets
20 of Xyience?

21 A If they were, they would have been talking
22 to Xyience, the company, at the time. If they had
23 talked to me, they were probably talking to me based
24 on my loan, what my intentions were going forward.

25 Q I mean were you having discussion about

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1 Q You weren't answering that question, "They
2 were expensive, too"?

3 A That wasn't a question. That was a
4 statement.

5 Q Well, I asked it as a question, but if you
6 want to take it as a statement, fair enough.

7 MR. GARMAN: We'll reframe from answering
8 that one.

9 MR. BACKMAN: Fair enough.

10 BY MR. BACKMAN:

11 Q Okay. When you were provided -- when you
12 were providing the Declaration, the March 5th
13 Declaration that we talked about where the Consulting
14 Agreement was not referenced, did it occur to you that
15 the existence of the Consulting Agreement, although
16 you're saying it was never acted upon, might be of
17 interest to the parties who were reviewing the
18 Declaration?

19 A No.

20 Q Why is that?

21 A It just didn't strike me at the time that we
22 would be interested. We never acted on the agreement,
23 so I didn't know what the interest would have been.

24 Q Okay. Now, you've heard the term I think, I
25 think you've heard the term "lend to own," that there

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Exhibit U

 You forwarded this message on 1/11/2008 3:49 PM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Bill Bullard

From: Csaba Reider [csabareider@gmail.com] **Sent:** Fri 1/11/2008 11:13 AM
To: Bill Bullard
Cc: Tony Pallante; Bill Smith; williamsmith4563@rogers.blackberry.net
Subject: Draft Offer to Purchase Xyience
Attachments:  BEVCO offer to purchase Xyience.doc(67KB)

Bill, please review.

When you are ready to discuss let us know and we can have a conference call.

Cheers,

Csaba

NEWCO US CORP.
9 Country Estates Drive, Markham, Ontario, L6C 1A4
(t) 416-720-2299 (f) 416-467-7173

January __, 2008

Xyience Inc.
10650 West Charleston Blvd.
Suite 110, Las Vegas, NV, 89135

Dear Sirs:

This Letter Agreement outlines the terms and conditions upon which NEWCO US CORP ("NEWCO") will acquire 100% of the assets of Xyience Inc. ("TARGET"). By executing this Letter Agreement, the parties agree to proceed to the execution and delivery of a definitive agreement for the closing of this transaction. The terms and conditions contained herein are binding. The terms of the transaction, in summary, will be as follows:

- Structure:** NEWCO and TARGET will enter into a definitive agreement (the "Purchase Agreement") whereby 100% of the Assets used in the operating the business of TARGET will be purchased.
- Purchase Price:** Assumption of the note with Zyen LLC, owing to TARGET, in the total amount of \$8 million.
- Conditions Precedent:**
- i. Minimum working capital of \$4.5 million
 - ii. Minimum Revenue for 3 months prior to closing of \$1.8 million.
 - iii. 3 year sponsorship agreement with UFC (Zuffa) under terms satisfactory to NEWCO.
 - iv. Manufacturing supply agreement for all products in place under terms satisfactory to NEWCO.
 - v. Agreement with Zyen LLC related to new terms on the assumed note and other conditions necessary to close.
 - vi. DIP financing, subject to negotiation with Secured lender, for a minimum agreed upon amount to allow the business to operate in the ordinary course and satisfy day to day operations.
 - vii. An interim operating agreement to cover the period between Acceptance and Closing under terms satisfactory to NEWCO.
 - viii. Maintenance of listing at TARGET's top 20 customers as at January 1, 2008 through to Closing.
 - ix. Ability of Zyen LLC to appoint a monitor/management consultant of the business during the interim period until Closing which is satisfactory to NEWCO.
 - x. All necessary approvals, where applicable, of regulatory, stock exchange and securities authorities and commissions and compliance with requirements of applicable laws.
 - xi. TARGET shall have obtained all consents required under any

material agreements to which TARGET is a party.

Assets

Assets purchased will include all assets used in the TARGET business including but not limited to:

- i. all inventory and stocks
- ii. all accounts receivables and all claims whatsoever and indemnities payable under any contract of insurance as well as all sums from payment or perception of customers accounts, debts and claims, without responsibility for NEWCO to pay or to assume any responsibility or any obligation whatsoever related to the accounts;
- iii. the furnishings, material, equipment and vehicles where applicable;
- iv. all patents, trademarks, industrial designs, copyrights, licences, inventions and any others intellectual propriety rights, including but without limitation to the rights regarding all names, trademarks, telephone numbers, Web sites and domains and other intangibles used in operating the business;
- v. all rights, titles and interest in all contracts where applicable;
- vi. any other current assets such as deposits etc. used to run the business in the ordinary course.

Fees and Expenses:

NEWCO and TARGET shall each be responsible for their own expenses, including, but not limited to, legal counsel, accountants, business valuers and financial advisors, until such time as the Transaction is closed.

Conduct of Business:

Except with the prior consent of NEWCO, TARGET, and or any subsidiaries, will not directly or indirectly, do any of the following between acceptance of this offer and the Closing date:

- i. Sell, pledge, dispose of or encumber any assets except in the ordinary course of business.
- ii. Commit or expend more than \$5,000 in the aggregate with respect to capital expenditures
- iii. Commit or expend more than \$5,000 in operating expenses other than those incurred in the ordinary course of business.
- iv. Acquire by merger, amalgamation, consolidation or acquisition shares or assets, of any business operation.
- v. Enter into any new lending agreements or extend or otherwise modify existing lending agreements.
- vi. Enter into new leasing arrangements either of real estate or equipment with an annual aggregate cost exceeding \$5,000.
- vii. Employ or dismiss executive personnel or materially change the terms and conditions of their employment without prior consultation with NEWCO.

Due Diligence:

After execution of appropriate confidentially agreements TARGET shall

provide NEWCO and its representatives with reasonable access to financial information, books and other information relating to its operations and financial condition, as well as to its management and employees.

Representations and Warranties:

Customary representations and warranties will be made by each of NEWCO and TARGET in the documents relating to the Transaction.

Public Announcements:

Neither party shall disclose for any purpose whatsoever to any person (except agents or advisors) the existence or contents of this letter until required by relevant securities regulatory, stock exchange requirements or any legal requirements by a court of law. The parties will keep confidential and not disclose to any third party (except counsel or advisors) confidential information provided by the other party without prior written consent of the other party.

Closing Date:

On or before 30 days after acceptance of this offer.

If the foregoing is acceptable to you would you kindly sign the copy of this Letter Agreement where indicated and return to NEWCO on or before 5:00 p.m. (Eastern Standard Time), February 29, 2008, otherwise the offer contained herein shall forthwith terminate and be of no further force and effect.

Yours truly,

NEWCO

Per: _____

Csaba Rieder
President and CEO

Above offer accepted this

day of February, 2008.

XYIENCE INC.

Per: _____

, President