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**February 2, 2008**

Fennemore Craig, P.C.  
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[Proposed] Counsel for Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re  
XYIENCE INCORPORATED,  
a Nevada corporation,  
  
Debtor.

Chapter 11  
No. BK-S-08-10474-MKN  
  
Date: February 12, 2008  
Time: 9:30 a.m.  
[Order shortening time requested.]

**APPLICATION TO APPROVE SALARIES IN EXCESS  
OF \$100,000 PER YEAR**

Xyience, Incorporated (“Xyience”), Debtor and Debtor in Possession (collectively “Debtor”), respectfully requests entry of an order approving payment to four persons whose salaries are in excess of \$100,000 per year (“Salary Motion”). The Salary Motion is supported by the papers and pleadings on file herein and the following Memorandum of Points and Authorities, and the accompanying Declaration of Omer Sattar.

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1 mixed martial arts<sup>1</sup> (“MMA”), and other forms of extreme sports. Among other things,  
2 Xyience has been a longtime sponsor of the ULTIMATE FIGHTING  
3 CHAMPIONSHIP® (the “UFC”), a U.S. based MMA organization. The UFC is currently  
4 recognized as the largest MMA promotion in the world and it has become the second most  
5 popular sporting event for 18-34 year old males, behind the National Football League.  
6 Based upon the post-petition agreement entered into with Zuffa Marketing, LLC, Xyience  
7 retains its status as the Official Energy Drink of the UFC.  
8

9  
10 7. On January 23, 2008, the Bankruptcy Court heard the Debtor’s Emergency  
11 Application for Authorization to Pay Salaries, Commissions, Employee Benefits, Accrued  
12 Vacation and Reimbursable Employee Expenses (“Payroll and Benefits Motion”). In  
13 conjunction with the Payroll and Benefits Motion, the Court required the Debtor to file a  
14 motion seeking the Bankruptcy Court’s approval of compensation paid to all employees  
15 who are presently paid an annual salary in excess of \$100,000. This Salary Motion is  
16 filed for the purpose of seeking that approval.  
17

18 8. During the January 23, 2008 hearing on the Payroll and Benefits Motion,  
19 counsel for Xyience advised the Court that it may be necessary to file the Salary Motion  
20 under seal. After the hearing, and upon discussion with the Xyience officers and  
21 employees who are paid salaries in excess of \$100,000 per year, it was determined that  
22 Xyience would instead provide a full and complete public disclosure of the information  
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25 <sup>1</sup> MMA is a full contact combat sport in which a wide variety of fighting techniques  
26 are used, including striking and grappling.

1 requested by the Court in the Salary Motion.

2 9. On the Petition Date, Xyience employed 39 full time, salaried employees.  
3  
4 Due to cost cutting measures necessitated by the critical cash shortage facing Xyience pre-  
5 petition and the budget imposed by Zyen, LLC in conjunction with the post-petition DIP  
6 financing, on January 25, 2008, Xyience laid off 12 employees. As a result, Xyience  
7 presently employs 25 full time, salaried employees and two part time salaried employees.

8 10. On January 23, 2008, Xyience employed six persons who were paid salaries  
9 in excess of \$100,000 per year. Those persons are Susan Curry, Vice President of  
10 Manufacturing; Vicki DiBernardo, Vice President of Human Resources and  
11 Administration; Michael Levy, Chief Financial Officer; Jeffrey Martin, Eastern Division  
12 Manager; Ruben Rios, Vice President of Sales; and Omer Sattar, Chief Operating Officer  
13 and President. Ms. Curry was hired May 8, 2006, and Ms. DiBernardo was hired April 3,  
14 2006. Prior January 25, 2008, both Ms. Curry and Ms. DiBernardo were paid an annual  
15 salary of \$120,000. After January 25, 2008, Ms. Curry and Ms. DiBernardo voluntarily  
16 reduced their full time employment to part time employment, and they presently receive  
17 salaries under \$100,000 per year. As a result, subsequent to January 25, 2008, Xyience  
18 pays four persons salaries in excess of \$100,000 per year.

19 11. Omer Sattar is the President and Chief Operating Officer for Xyience, and  
20 he is paid an annual salary of \$125,000 and the Debtor pays for his medical coverage at a  
21 cost of \$4,462 per year. Mr. Sattar was hired November 28, 2007, and he is also a  
22 Director of Xyience. His job description is attached to the supporting Declaration of  
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1 Omer Sattar as Exhibit 1.

2 12. Michael Levy is the Chief Financial Officer for Xyience. Mr. Levy is paid  
3 an annual salary of \$150,000. Mr. Levy is also a Director of Xyience. Mr. Levy was  
4 hired July 21, 2006, and his job description is attached to the supporting Declaration of  
5 Omer Satar as Exhibit 2.  
6

7 13. Ruben Rios is Vice President of Sales for Xyience. Mr. Rios is paid an  
8 annual salary of \$120,000, an annual car allowance of \$12,000 and Xyience pays Mr.  
9 Rios' medical benefits for himself and his family at an annual cost of \$14,280.  
10 Additionally, Mr. Rios receives sales commissions based upon the volume of products  
11 sold. In light of Xyience's current budget and the time frames imposed by the DIP  
12 Financing Agreement with Zyen, LLC, it is difficult to calculate the amount of  
13 commissions which will accrue for payment to Mr. Rios in 2008; however, in 2007, Mr.  
14 Rios was paid \$55,638 in sales commissions. Mr. Rios was hired December 27, 2006, and  
15 his job description is attached to the supporting Declaration of Omer Satar as Exhibit 3.  
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18 14. Jeffrey Martin is the Eastern Division Sales Manager for Xyience. Mr.  
19 Martin is paid an annual salary of \$112,000 and an annual car allowance of \$12,000.  
20 Additionally, Mr. Martin receives sales commissions based upon the volume of products  
21 sold. In light of Xyience's current budget and the time frames imposed by the DIP  
22 Financing Agreement with Zyen, LLC, it is difficult to calculate the amount of  
23 commissions which will accrue for payment to Mr. Martin in 2008; however, in 2007, Mr.  
24 Martin was paid \$43,907 in sales commissions. Mr. Martin was hired June 26, 2006, and  
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1 his job description is attached to the supporting Declaration of Omer Satar as Exhibit 4.

2 15. Xyience Directors Adam Frank, Kirk Sanford, Lanis O’Steen and Jerry  
3 Kramer were not on the payroll on the Petition Date, and they are not on the payroll, post-  
4 petition. Furthermore, last week, Mr. Frank, Mr. Sanford, Mr. O’Steen and Mr. Kramer  
5 each resigned from the Xyience Board of Directors.  
6

7 **LEGAL ANALYSIS**  
8

9 Chapter 11 of the Bankruptcy Code allows officers and directors of a debtor to  
10 remain in possession of the company, and to continue to operate its business with the goal  
11 of reorganizing and adjusting its debts. See 11 U.S.C. §§ 1107 and 1108 (2005). Most  
12 courts have held that a debtor’s corporate officers and directors do not fall within the  
13 category of “professional persons”<sup>2</sup> who are governed by Section 330 of the Bankruptcy  
14 Code and, therefore, they generally do not need court approval under Section 327 of the  
15 Bankruptcy Code to continue in their employment with the debtor. See, e.g., In re Fortune  
16 Natural Resources Corp., 366 B.R. 558, 562 (Bankr. E.D. La. 2007); In re Bartley Lindsay  
17 Co., 137 B.R. 305, 308 (Bankr. D. Minn. 1991).

18 As a general rule, if an officer or director is indeed an employee and he or she is  
19 paid as part of the ongoing operation of the business, the debtor is not typically required to  
20 seek the Court’s approval. In re Fortune Natural Resources Corp., 366 B.R. at 563.  
21 However, a Court may require approval of compensation paid to officers or directors  
22 under Section 327 of the Bankruptcy Code. See, Matter of All Seasons Indus., Inc., 121  
23 B.R. 822, 825; see 11 U.S.C. 1129(a)(5)(B) (requiring the debtor to disclose the identity

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25 <sup>2</sup> A “professional person” is limited to persons in those occupations which play a central role in the  
26 administration of the debtor’s proceedings. In re Matter of Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y.  
1981).

1 of any insider that will be employed or retained by the reorganized debtor, and the nature  
2 of any such compensation); In re Fortune Natural Resources Corp., 366 B.R. at 563 (court  
3 approval may be required where an officer or director undertakes a role analogous to that  
4 of a “professional” as defined by the Bankruptcy Code, in conjunction with the post-  
5 petition duties and responsibilities of a debtor in possession).

6 This Salary Motion was filed at the request of the Court in conjunction with the  
7 Payroll and Benefits Motion that was heard and granted by the Court on January 23, 2008.  
8 The accompanying Declaration of Omer Sattar provides full disclosure of compensation  
9 paid to any employee in excess of \$100,000 per year. As demonstrated by Mr. Sattar’s  
10 declaration, each of these four employees is employed and paid as part of the ongoing  
11 business operations of the Debtor, and they are not “professionals” who require Court  
12 approval for payment of their salaries post-petition. Consequently, the salaries of these  
13 four individuals should be approved for payment in the ordinary course of business.

14 **CONCLUSION**

15 Xyience therefore seeks entry of an order approving payment of all salaries in  
16 excess of \$100,000 in the ordinary course of business, without further approval of or  
17 application to the Bankruptcy Court.

18 Respectfully submitted,

19 FENNEMORE CRAIG, P.C.

20 /s/ Laurel E. Davis

21 By \_\_\_\_\_  
22 Laurel E. Davis

23 [Proposed] Counsel for Debtor and Debtor in  
24 Possession

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**CERTIFICATE OF SERVICE**

1. On February 2, 2008, I served the following document(s):

**APPLICATION TO APPROVE SALARIES IN EXCESS  
OF \$100,000 PER YEAR**

2. I served the above-named document(s) by the following means to the persons as listed below:

a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

SHEENA R. AEBIG: [saebig@williamskastner.com](mailto:saebig@williamskastner.com)

GREGORY E GARMAN: [bankruptcynotices@gordonsilver.com](mailto:bankruptcynotices@gordonsilver.com),  
[bknotices@gordonsilver.com](mailto:bknotices@gordonsilver.com)

U.S. TRUSTEE - LV – 11: [USTPRegion17.lv.ecf@usdoj.gov](mailto:USTPRegion17.lv.ecf@usdoj.gov)

b. **United States mail, postage fully prepaid on January 18, 2008**  
(list persons and addresses):

(See attached mailing matrix)

c. **Personal Service** (List persons and addresses):

For a party represented by an attorney, delivery was made by handling the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

d. **By direct email (as opposed to through the ECF system)**  
(list persons and email addresses):

GERALD M GORDON: [bankruptcynotices@gordonsilver.com](mailto:bankruptcynotices@gordonsilver.com),  
[bknotices@gordonsilver.com](mailto:bknotices@gordonsilver.com)

