



Entered on Docket
October 23, 2008

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re
XYIENCE INCORPORATED,
a Nevada corporation,

Debtor.

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

Date of Hearing: August 26, 2008
Time of Hearing: 1:30 p.m.
Location: 300 Las Vegas Blvd. South
Courtroom #2
Las Vegas, Nevada 89101

**ORDER: (1) APPROVING DEBTOR'S DISCLOSURE STATEMENT; AND
(2) CONFIRMING DEBTOR'S PLAN OF REORGANIZATION**

1 On August 26, 2008, the hearing (“Confirmation Hearing”) on final approval of the
2 Debtor’s Disclosure Statement to Accompany Debtor’s Plan of Reorganization (“Disclosure
3 Statement”), as Amended (DE 231, 238, 255, 291, 308), and confirmation of Debtor’s Plan of
4 Reorganization (DE 191) (the “Plan”) filed by Xyience Incorporated, Debtor and Debtor in
5 Possession (“Debtor”) was held in this chapter 11 case. The creditors and parties in interest who
6 appeared at the Confirmation Hearing and the counsel who appeared at the Confirmation Hearing
7 are identified in the record of the Confirmation Hearing.

8 The Court has heard the arguments and representations of counsel regarding confirmation
9 of the Plan at the Confirmation Hearing, the Court has taken judicial notice of the papers and
10 pleadings on file in the Debtor’s chapter 11 case, and the Court has reviewed and considered the:
11 (1) Disclosure Statement, as Amended; (2) Plan; (3) Objection of Plaintiff Shareholders to
12 Debtor’s Plan of Reorganization (DE 261); (4) Limited Objection to Confirmation of Plan Filed
13 by John P. Bertuccini (DE 262); (5) Objection of the Official Committee of Unsecured Creditor’s
14 to the Debtor’s Plan of Reorganization (DE 283); (6) Debtor’s Brief in Support of the Section
15 506(c) Surcharge Requested by the Plan (DE 285); (7) Declaration of Laurel E. Davis Regarding
16 Tabulation of Ballots Submitted with Respect to Debtor’s Plan of Reorganization, as
17 Supplemented (DE 287, 296); (8) Debtor’s Reply and Memorandum of Points and authorities in
18 Support of Confirmation of Debtor’s Plan of Reorganization; and (9) Declaration of Omer Sattar
19 in Support of Debtor’s Plan of Reorganization (DE 290). All defined terms used in this Order are
20 used as defined in the Plan, Disclosure Statement and Liquidating Trust Agreement.

21 On August 26, 2008, the Court announced its findings of fact and conclusions of law on
22 the record, which statements on the record shall constitute the Court’s findings of fact and
23 conclusions of law under Fed.R.Civ.P. 52 as made applicable by Fed.R.Bankr.P. 7052 and 9014.
24 Any finding of fact shall constitute a finding of fact, even if it is stated as a conclusion of law.
25 Any conclusion of law shall constitute a conclusion of law, even if it is stated as a finding of fact.

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1 **IT IS HEREBY ORDERED AS FOLLOWS:**

2 1. Proper, timely, adequate, and sufficient notice of the Plan and Disclosure
3 Statement, the relief requested and the deadlines for voting thereon and objecting thereto, was
4 provided, was reasonable and appropriate under the circumstances and comports with the
5 requirements of due process, applicable Bankruptcy Rules and the rules of this Court, such that no
6 other or further notice was required.

7 2. The Plan is hereby amended and corrected as follows:

8 (a) Section 4.3 is amended as follows

9 **4.3 Class 3 - Key Management Secured Claim.** If the Bankruptcy Court permits the
10 Debtor to do so pursuant to this Plan, the Key Management Secured Claim shall be surcharged
11 pursuant to Section 506(c) to the extent of the Manchester Sale Proceeds. As a result, the Key
12 Management Secured Claim would become a **Class 4** General Unsecured Claim. Alternatively, if
13 the Court does not approve the proposed surcharge of the Key Management Secured Claim, the
14 Allowed Key Management Secured Claim will be satisfied by payment of the Manchester Sale
15 Proceeds to Key Management. Class 3 is impaired under this Plan, and it is entitled to vote on
16 this Plan. [Amendment in bold type.]

17 (b) Section 5.2 is amended as follows:

18 **5.2 Notice of Effectiveness.** When all of the steps contemplated by **Article 8** have
19 been completed, the Debtor or Liquidating Trustee shall file with the Bankruptcy Court and serve
20 upon all Creditors and all potential holders of Administrative Claims known to the Debtor
21 (whether or not disputed), a Notice of Effective Date of Plan. The Notice of Effective Date of
22 Plan shall include notice of the Administrative Claim Bar Date. [Amendment in bold type.]

23 (c) Section 1.1.31 is amended as follows:

24 **1.1.31 Effective Date.** The last to occur of: (a) the first Business Day that is at least
25 eleven (11) days after the Confirmation Date and on which no stay of the Confirmation Order is
26 in effect; and (b) the Business Day on which all of the conditions set forth in **Article 8** of this
Plan have been satisfied or waived. [Amendment in bold type.]

27 3. The Objection of the Official Committee of Unsecured Creditors has been
28 withdrawn.

29 4. The Objection of Plaintiff Shareholders is resolved as follows: The Plan's
30 treatment of Class 5 Equity Interests in Section 5.1.6 shall not prejudice the claims of Plaintiffs in
31 Adv. Proc. 08-1082-MKN.

32 5. The Objection of John P. Bertuccini is overruled.

1 6. The Debtor's request to surcharge the Class 3 Secured Claim 11 U.S.C. § 506(c) to
2 the extent of the Manchester Sale Proceeds in the amount of \$200,000 is approved.

3 7. The Debtor's request to pay the surcharged funds directly to Zuffa Marketing,
4 LLC is approved.

5 8. Nevada Title Company is hereby ordered and directed to immediately pay Zuffa
6 Marketing, LLC the \$200,000 Manchester Sale Proceeds on deposit in Escrow Number 08-03-
7 0032-VKB, plus any accrued interest.

8 9. To the fullest extent permitted by 11 U.S.C. § 1141 and based upon the facts and
9 circumstances of this case, the provisions of the Plan and this Order shall bind the Debtor and all
10 Creditors and Equity Interest holders of the Debtor, whether or not the Claims or Equity Interests
11 of such Creditors or Interest Holders are impaired under the Plan, whether or not such Creditors
12 and Equity Interest Holders have filed proofs of Claim or Interest or are deemed to have filed
13 proofs of Claim or Interest in this Case.

14 10. The Debtor and the Liquidating Trustee are authorized to take all actions necessary
15 to implement the Plan and the transactions contemplated therein in accordance with the terms of
16 the Plan. The Debtor and the Liquidating Trustee are authorized to execute, deliver, file, or
17 record such contracts, instruments, notes, releases, indentures, mortgages, deeds, assignments, or
18 other agreements or documents and take any such other action that they determine is necessary or
19 appropriate to effectuate the Plan, this Order, and the transactions contemplated thereby, all
20 without further application to or order of this Court, and regardless of whether such actions or
21 documents are specifically referred to in the Plan, this Order or the Liquidating Trust Agreement.
22 To the extent that, under applicable non-bankruptcy law, any of the foregoing actions would
23 otherwise require the consent or approval of the officers, directors or shareholders of the Debtor,
24 this Order shall constitute such consent or approval.

25 11. From and after the Effective Date, except for the shareholder derivative action
26 presently pending as Adv. No. 08-1107, the Bergeron matter presently pending as Adv. No. 08-

1 1082, the Committee Action presently pending as Adv. No. 08-1094, and except as provided in
2 the Plan and this Confirmation Order, all entities that have held, currently hold or may hold a
3 Claim or an Equity Interest or other right of a Equity Interest holder that is terminated pursuant to
4 the terms of this Plan are permanently enjoined from taking any of the following actions on
5 account of any such Claims or Equity Interests or rights: (a) commencing or continuing in any
6 manner any action or other proceeding against the Debtor, Liquidating Trust or its respective
7 property; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award,
8 decree or order against the Debtor, Liquidating Trust or its respective property; (c) creating,
9 perfecting or enforcing any Lien or encumbrance against the Debtor, Liquidating Trust or its
10 respective property; (d) asserting a setoff, right of subrogation or recoupment of any kind against
11 any debt, liability or obligation due to the Debtor, Liquidating Trust or its respective property;
12 and (e) commencing or continuing any action, in any manner or any place, that does not comply
13 with or is inconsistent with the provisions of the Plan, this Order or the Bankruptcy Code.
14 Nothing in the Plan shall affect, release, enjoin or impact in any way the prosecution of the
15 Claims of Creditors treated by the Plan or the Litigation Claims transferred to the Liquidating
16 Trust pursuant to the Plan. The Debtor shall retain the right to file all appropriate pleadings or
17 actions that may be necessary to preserve its rights and protect the Estate's interest in Claims or
18 Litigation Claims.

19 12. No holder of a Claim or Equity Interest may receive any payment from or seek
20 recourse against any assets that are distributed or to be distributed under the Plan, except for those
21 assets required to be distributed to such holder as expressly provided for in the Plan and as
22 otherwise provided in the Plan. As of the Effective Date, all entities and persons are precluded
23 from asserting against any assets that have been distributed or will be distributed under the Plan
24 any claims, rights, causes of action, liabilities or interests based upon any act or omission,
25 transaction or other activity of any kind or nature that occurred prior to the Effective Date, other
26 than as expressly provided in the Plan or this Confirmation Order, regardless of the filing, lack of

1 filing, allowance or disallowance of such a Claim or Equity Interest and regardless of whether
2 such an entity has voted to accept the Plan.

3 13. From and after the Effective Date, the Debtor, the Liquidating Trust, the
4 Liquidating Trustee, the Statutory Committee, the Professionals nor any of their respective
5 present or former members, directors, officers, managers, employees, advisors, attorneys or
6 agents, shall have or incur any liability to any holder of a Claim or Equity Interest or any other
7 party-in-interest, or any of their respective agents, employees, representatives, financial advisors,
8 attorneys or Affiliates, or any of their successors or assigns, for any act or omission in connection
9 with, relating to, or arising out of (from the Petition Date forward), the Bankruptcy Case,
10 Liquidating Trust, the pursuit of confirmation of this Plan or the consummation of this Plan,
11 except for gross negligence and willful misconduct, and in all respects shall be entitled to
12 reasonably rely upon the advice of counsel with respect to their duties and responsibilities under
13 this Plan or in the context of the Case.

14 14. The Debtor is obligated to pay U.S. Trustee quarterly fees based upon all
15 disbursements of the Debtor in accordance with the sliding scale set forth at 28 U.S.C. §
16 1930(a)(6). These fees accrue throughout the pendency of the case until entry of a final decree.
17 U.S. Trustee fees paid prior to confirmation of a plan of reorganization shall be paid by the
18 Debtor on or before the effective date of the Plan pursuant to 11 U.S.C. § 1129(a)(12).

19 15. All U.S. Trustee fees accrued post-confirmation will be timely paid on a calendar
20 quarterly basis and reported both on post-confirmation reports required by Local Rule 3020 and
21 in post-confirmation operating reports required by the U.S. Trustee Guidelines. Final fees will be
22 paid on or before the entry of a final decree in this case.

23 16. The Court shall retain jurisdiction as provided by Article 9 of the Plan.

24 17. If and to the extent that there is any direct conflict between the terms of the
25 Liquidating Trust Agreement and the Plan, the terms of the Liquidating Trust Agreement as set
26 forth in the Disclosure Statement Supplement filed as Docket Entry 308 shall control.

1 18. If and to the extent that there is any direct conflict between the terms of the Plan
2 and the terms of this Order, the terms of this Order shall control. The failure to reference any
3 particular provision of the Plan in this Order shall have no effect on the binding effect,
4 enforceability, or legality of such provisions, and such provisions shall have the same binding
5 effect, enforceability or legality as every other provision of the Plan.

6 SUBMITTED BY:

7 FENNEMORE CRAIG, P.C.

8 By /s/ Laurel E. Davis

9 Laurel E. Davis

10 Jon T. Pearson

11 Counsel for the Debtor and Debtor in Possession

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1 **LR 9021 CERTIFICATION**

2 In accordance with LR 9021, counsel submitting this document certifies as follows:

3 The Court waived the requirement of approval under LR 9021, with the
4 consent of counsel.
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6 The following counsel waived the requirement of approval:

7 J. Michal Bloom, Staff Attorney, Office of the U.S. Trustee

8 Greg Garman, counsel for Zyen, LLC, and approved

9 Daniel Newman, counsel for Plaintiff shareholders
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11 No parties appeared or filed written objections, and there is no trustee
12 appointed in this case.

13 A copy of this proposed order was delivered to all counsel who appeared at
14 the hearing, any unrepresented parties who appeared at the hearing, and any trustee
15 appointed in this case, and each has approved or disapproved the order, or failed to
16 respond, as indicated below: (list each party and whether the party has approved or failed
17 to respond to the document).
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19 Eric Hone, counsel for Zuffa Marketing, LLC, approved
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21 Harley Goldstein, counsel for Official Unsecured Creditor Committee, approved
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