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Entered on Docket
October 28, 2011

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

XYIENCE INCORPORATED,
a Nevada corporation,

Debtor.

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

DAVID 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.

Adversary No.: 09-1402-MKN

MEMORANDUM OPINION CONCERNING MOTION FOR SANCTIONS

INTRODUCTION

This is an adversary proceeding in bankruptcy. Fed. R. Bankr. P. 7001.
A chapter 11 plan of reorganization was confirmed in the underlying case, in

1 which Xyience, Incorporated (“Xyience” or “Debtor”) is the debtor. Plaintiff is
2 the Liquidation Trustee pursuant to the confirmed plan. The Trustee is responsible
3 for pursuing the Debtor’s litigation claims. In this lawsuit, Plaintiff seeks to
4 recover allegedly avoidable preferential and fraudulent transfers and to recover
5 damages claimed to have resulted from Defendants’ participation in a dishonest
6 ‘loan to own’ scheme, which caused Debtor to lose its assets. Under a ‘loan to
7 own’ scheme, a target entity is caused to borrow money on terms which it cannot
8 or will be prevented from repaying. In other words, default is assured. The loan is
9 secured by the assets of the target, so the lender and its conspirators will be able to
10 foreclose and end up owning.

11 Defendant Zyen, LLC, (“Zyen”) is a Nevada limited liability company.
12 Zyen loaned \$12,000,000 to Xyience in December, 2007. The loan was secured by
13 all assets of Xyience. Defendants are alleged to have caused Xyience to default on
14 the repayment of the loan from Zyen, so that the assets of Xyience would pass to
15 an entity favored by Defendants.

16 Defendant Fertitta Enterprises, Inc., (“Fertitta”) s a Nevada corporation.

17 Defendant William Bullard (“Bullard”) is a resident of the State of Nevada.
18 He is the chief financial officer of Fertitta and a manager of Zyen.

19 Defendants Adam Frank, Kirk Sanford, and Omer Sattar, individuals, have
20 settled with Plaintiff. The “Remaining Defendants” who are the subject of this
21 motion are Zyen, Fertitta, and Bullard,

22 The motion before the court concerns a discovery dispute. Plaintiff seeks
23 sanctions against Defendants because of their failure to establish a protective
24 discovery hold on documents related to Defendants’ business dealings with
25 Debtor, erasure of documents that were electronically stored, and Defendants’
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1 failure to produce available business records with reasonable promptness.

2 The motion for sanctions was heard on September 30, 2011. Johnathan A.
3 Backman, Esq., appeared for plaintiff, the moving party. Gregory E. Garman, Esq.,
4 and Joel Z. Schwarz, Esq., of Gordon Silver, appeared for Defendants.

5 The parties filed supplemental memoranda on October 12, 2011, and the
6 matter was submitted.

7
8 **FACTS**

9 On October 4, 2007, Zyen loaned to Xyience \$12 million (“\$12 Million
10 Loan”). Under the \$12 Million Loan, Xyience granted Zyen a security interest in
11 all or substantially all of Xyience’s assets. Bullard anticipated litigation in
12 connection with this loan. Less than a month later, on November 3, 2007, during a
13 Xyience board meeting, Bullard indicated that he would not accept an appointment
14 to the Xyience board due to a threatened shareholder lawsuits aimed at Xyience
15 and members of Xyience’s board. (Dkt. #107-18)¹. Bullard stated that such an
16 appointment could also negatively impact his duties as an officer at Fertitta and
17 potentially raise lender liability issues in connection with the recent \$12 Million
18 Loan made by Zyen to Xyience. Instead Bullard indicated that he would serve as
19 “board observer” as contemplated in the \$12 Million Loan.

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21 _____
22 ¹ The minutes state, “ Mr. Bullard opened the meeting by expressing his concern that
23 certain threatened shareholder lawsuits aimed at the Corporation and the members of the Board
24 might negatively impact his duties as an officer of Fertitta Enterprises, Inc. (“**Fertitta**”) and
25 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.”

1 On December 7, 2007, a derivative action was filed in the Eighth Judicial
2 District Court, County of Clark, State of Nevada, by certain shareholders of
3 Xyience, including the Klingenberg Children's Education Trust, against Xyience,
4 as nominal defendant, and several of Xyience's officers ("State Court Action").
5 The State Court Action concerned the \$12 Million Loan provided by Zyen to
6 Xyience. Bullard was not named as a defendant in the State Court Action.

7 On January 18, 2008, Xyience filed a voluntary Chapter 11 petition. On
8 March 31, 2008, the Official Committee of Unsecured Creditors of Xyience,
9 Incorporated, which was appointed in the Xyience bankruptcy case filed an
10 adversary complaint against Zyen related to the \$12 Million Loan ("UCC
11 Litigation"). Gordon Silver served as Zyen's counsel in the UCC Litigation and
12 filed a motion to dismiss shortly after the UCC Litigation was initiated.

13 On or around March 13, 2008, an amended complaint was filed in the State
14 Court Litigation. Gordon Silver, on behalf of defendants Zyen and Fertitta,
15 removed the State Court Action to the United States Bankruptcy Court for District
16 of Nevada on April 4, 2008. Gordon Silver immediately filed a motion to dismiss
17 the State Court Action. Both the State Court Action and the UCC Litigation were
18 dismissed by the bankruptcy court for lack of standing. The court found that
19 derivative claims remain with Xyience and are to be administered as assets of the
20 estate. Those rulings left it to Plaintiff, the Liquidation Trustee under the chapter
21 11 plan, to pursue the claims asserted in the State Court Action and the UCC
22 Litigation.

23 On December 29, 2009, Plaintiff filed the instant adversary complaint
24 against the Defendants. On June 25, 2010, Defendants made certain Rule 26
25 disclosures to Plaintiff. The initial Rule 26 disclosures provided just short of
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1 2,000 pages of documents from Zyen. On August 4 and 5, 2010, Defendants
2 provided supplemental disclosures to their Rule 26 disclosures. These
3 supplemental Rule 26 disclosures provided documents from former defendants
4 Sattar and Sanford.

5 On August 23, 2010, Plaintiff served upon Defendants its second set of
6 discovery requests (“Second Discovery Request”), seeking electronically stored
7 information (“ESI”) and hard copy documents from Bullard, Fertitta and Zyen
8 specifically. By the Second Discovery Request, Plaintiff specifically sought ESI
9 and hard copy documents created between April 1, 2007, and January 2008
10 (“Relevant Time”). On October 14, 2010, after receiving an extension from
11 Plaintiff, Defendants provided responses and objections to Plaintiff’s Second
12 Discovery Request, but provided no ESI or hard copy documents responsive of
13 Plaintiff’s Second Discovery Request. In fact, Defendants provided no ESI or
14 hard copy documents on October 14, 2010, at all. Defendants instead indicated
15 that if business records existed that were in the possession of Defendants,
16 Defendants would provide such documents to Plaintiff as soon as they were
17 gathered.

18 October 19, 2010, Bullard provided a total of 107 pages of documents, none
19 of which were from the critical period of June, 2007, to January, 2008, or that
20 otherwise concerned the \$12 Million Loan. Zyen produced some 86 pages of
21 documents and 267 pages of documents were provided by Milbank, Tweed &
22 Hawley, the law firm representing Zyen in the negotiation and consummation of
23 the \$12 Million Loan.

24 Later, in December of 2010, Defendants served upon Plaintiff discovery
25 supplements number five (hard copy documents from an entity called Manzen),
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1 number six (ESI from Manzen) and number seven (hard copy documents from
2 former Defendant Adam Frank. However, Defendants failed to provide Plaintiff
3 the specific ESI and hard copy documents created during the Relevant Time that
4 Plaintiff requested in its Second Discovery Request (from Bullard, Fertitta and
5 Zyen). Plaintiff was forced to postpone the deposition of Bullard scheduled for
6 December 20, 2010, due to delays in producing Bullard's emails and other data
7 from Xyience's servers.

8 Bullard is also an officer of an entity known as Gordon Biersch Brewing
9 Company ("Gordon Biersch"). He used a Gordon Biersch computer for email on
10 matters unrelated to the business of Gordon Biersch. Those matters included
11 correspondence and documents Xyience and Zyen. In December, 2010, counsel
12 for the parties discussed the possibility that relevant documents may still be on
13 Bullard's Gordon Biersch, even though the matters of interest had occurred three
14 years earlier.

15 Nothing from the Gordon Biersch computer was produced by Defendants,
16 so Plaintiff was required to serve a subpoena duces tecum ("Subpoena") on
17 Gordon Biersch a non-party, on May 2, 2011.

18 Plaintiff also served a subpoena ("PMK Subpoena") for the person most
19 knowledgeable ("PMK") regarding the Gordon Biersch computer system and
20 servers. Gordon Biersch designated Bullard as the PMK. A deposition was
21 scheduled for May 24, 2011, wherein Bullard would be deposed in his individual
22 capacity as well as the Gordon Biersch PMK.

23 An IT specialist was brought in, prior to Bullard's depositions, to get
24 Bullard up to speed on the Gordon Biersch computer system and servers.
25 Defendants claim that work with the IT specialist enabled Bullard to locate an
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1 archive file on his Gordon Biersch computer, where he discovered approximately
2 148 pages of responsive ESI. Bullard provided the responsive ESI to Plaintiff at
3 Bullard's May 24, 2011 deposition.

4 Included in the 148 pages of responsive ESI provided to Plaintiff at
5 Bullard's May 24, 2011 deposition was an email dated October 3, 2007 ("October
6 3 Email"). The October 3 Email was from Bullard to Lorenzo Fertitta ("Mr.
7 Fertitta"). In the October 3 Email, Bullard wrote to Mr. Fertitta:

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

15 Have no idea yet if this is legit yet.

16 We funded today and vested our warrant.

17 (Dkt. #107-7).

18 During Bullard's deposition, when Plaintiff inquired as to whether there
19 existed any additional documents responsive of Plaintiff's Second Discovery
20 Request or subpoenas, Bullard indicated that he was not sure, because he deleted
21 emails and documents related to Xyience. When Plaintiff's counsel asked Bullard
22 if a litigation hold was ever put in place, Bullard stated that he was not aware of
23 any.²

24 Plaintiff next asked Bullard about his secretary, Pegi Nadeau ("Nadeau"), an
25 employee of Fertitta. Emails previously provided to Plaintiff showed copies to
26 Nadeau. Plaintiff's counsel asked Bullard if he had checked to see if there was an

27 ² "Q - Was a litigation hold ever placed to your knowledge, that is, stop any deletion of
28 any e-mails related to Xyience going through the Gordon Biersch? A - I'm not aware of any."
29 Bullard deposition, May 24, 2011, p. 13; l. 15-19.

1 archive file on Nadeau's computer that contained ESI and documents responsive
2 of the Second Discovery Request. Bullard stated that he had not. After Bullard's
3 deposition, Defendants searched Ms. Nadeau's computer at Fertitta.
4 Subsequently, on June 24, 2011, Defendants provided an additional 1404 pages of
5 ESI and documents responsive of Plaintiff's Second Discovery Request and
6 subpoenas.

7 Plaintiff filed the instant motion for sanctions on August 8, 2011.

8 ISSUES

- 9 I. What authority, if any, authorizes sanctions against Defendants?
10 II. Are sanctions against Defendants appropriate?

11 DISCUSSION

12 I. **Under what authority may the court sanction Defendants?**

13 In its Sanctions Motion, Plaintiff requests that this court enter an order
14 imposing monetary and other sanctions, including attorney's fees and the entry of
15 a partial judgment on certain claims, against Bullard, Fertitta and Zyen for their
16 failure to produce critically important ESI and other documents for nearly nine
17 months after production was due. Plaintiff additionally seeks such sanctions on
18 grounds that Bullard admitted in his deposition that he deleted or otherwise
19 destroyed ESI and hard copy documents likely responsive of the Second
20 Discovery Request, that he abided by no document retention policy at any time,
21 and was not advised by Gordon Silver to impose a litigation hold even though
22 litigation regarding the \$12 Million Loan was foreseeable. Plaintiff maintains that
23 ESI and hard copy documents from the Relevant Time are critical to proving its
24 case.

25 Plaintiff asserts that the court has authority to impose such sanctions under

1 Rules 37(d)(1)(A)(ii) and 37(d)(3).³ However, Defendants are not subject to
2 sanctions under 37(d) because they did not “fail” to respond to the Second
3 Discovery Request.

4 Rule 37(d) sets forth that the court where the action is pending may, on
5 motion, order sanctions if “[a] party, after being properly served with . . . a request
6 for inspection under Rule 34, fails to serve its answers, objections or written
7 response.” Rule 37(d)(1)(A)(ii). Rule 37(a) provides that “[f]or purposes of this
8 subsection, an evasive or incomplete disclosure, answer, or response must be
9 treated as a failure to disclose, answer or respond.” RULE 37(a)(4). As such,
10 “evasive” or “incomplete” responses are explicitly contemplated in FRCP 37(a)
11 but not in FRCP 37(d)(1)(A)(ii). FRCP 37(d)(1)(A)(ii) requires a total failure to
12 respond.⁴ See Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 995 (8th Cir.

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14 ³Unless otherwise noted, all Rule references are to the Federal Rules of Civil Procedure.

15 ⁴According to Moore’s Federal Practice:

16 There is a distinction between a complete failure to respond to a discovery
17 demand and an incomplete response. If a response is given, but the
18 discovering party deems the response to be incomplete, that party must
19 move to compel an adequate response. The sanctions that are available to a
20 party that has prevailed on a motion to compel are limited to expenses,
21 including reasonable attorney’s fees, incurred in making the motion, unless
22 the moving party already has secured a court order directing the discovery
23 to be provided, and the party that was subject to that order has failed to
24 comply.

25 In sharp contrast, if there is a complete failure by a party to appear at his or
26 her own deposition, or to respond to interrogatories or requests for
production, in that no answers, objections, or responses of any kind are
served, and no motion for a protective order is filed, then the moving party
has immediate access to a wide range of sanctions, provided that party has
attempted in good faith to secure a response through negotiations. There is
no requirement that the moving party must have first secured a court order

1 1975) (“[t]he provisions of Rule 37(d) with regard to interrogatories do not apply
2 when the failure to comply is anything less than a total failure to respond. . . .
3 Similarly, a Rule 37(d) sanction is improper where a written response to a request
4 to inspect documents is made but is not satisfactory.”). Therefore, Defendants’
5 assertion that they are not subject to sanctions under FRCP 37(d)(1)(A)(ii) is
6 correct, as Defendants did respond to Plaintiff’s Second Discovery Request.

7 Another possible remedy for an evasive and incomplete response is a
8 motion to compel a discovery response under FRCP 37(a)(3)(B). See GFI
9 Computer Industries, Inc. v. Fry, 476 F.2d 1, 3 (5th Cir. 1973) (“[P]laintiff’s
10 remedy for incomplete or otherwise objectionable answers to interrogatories, and
11 for failure to produce pursuant to a Rule 34 request, was to file a motion under
12 Rule 37(a) for an order requiring defendant to answer and to produce documents
13 for inspection.”).

14 A motion to compel would probably have served no purpose under the
15 present facts. By the time that Plaintiff filed the present motion for sanctions,
16 Bullard’s destruction of emails was known, and the items on the Gordon Biersch
17 and Nadeau computers had, belatedly, been produced. Court action was
18 necessary, without a motion to compel, to address the question of sanctions.

19 Even if the Federal Rules of Civil Procedure do not authorize sanctions
20 against Defendants in this bankruptcy adversary proceeding, the court still has
21 inherent powers to impose sanctions related to discovery abuses. The Ninth

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23 directing its opponent to provide the discovery in question.

24 See 7 Moore’s Federal Practice, § 37.03 (Matthew Bender 3d ed.) (citations and footnotes
25 omitted). See also Laclede Gas Co. v. G. W. Warnecke Corp., 604 F.2d 561, 564-65 (8th Cir.
1979) (court distinguishes FRCP 37(a) from FRCP 37(d) relating to interrogatories).

1 Circuit has recognized that, “[t]he inherent powers of federal courts are those
2 which are necessary to the exercise of all others, and include the ‘well-
3 acknowledged’ inherent power to levy sanctions in response to abusive litigation
4 practices.”⁵ Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir.
5 1985) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65, 65 L. Ed. 2d
6 488, 100 S. Ct. 2455 (1980)). “[A] bankruptcy court's inherent power allows it to
7 sanction ‘bad faith’ or ‘willful misconduct,’ even in the absence of express
8 statutory authority to do so. It also ‘allows a bankruptcy court to deter and provide
9 compensation for a broad range of improper litigation tactics.’” Price v. Lehtinen
10 (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). It takes conduct something
11 more egregious than mere negligence or recklessness to constitute bad faith or
12 willful misconduct. Id.

13 For dismissal to be proper under the court’s inherent powers, the conduct to
14 be sanctioned must be due to “willfulness, fault, or bad faith.” Anheuser-Busch,
15 Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995). “Dismissal
16 under a court's inherent powers is justified in extreme circumstances in response to
17 abusive litigation practices and to insure the orderly administration of justice and
18 the integrity of the court's orders.” Halaco Engineering Co. v. Costle, 843 F.2d
19 376, 380 (9th Cir. 1988) (citations omitted).

20 Fjelstad involved a negligence and product liability action related to a
21 motorcycle that caused or contributed to injuries in a collusion. 762 F.2d at 1336.
22 Plaintiffs sued American Honda Motor Co., Inc. (“Honda”), the distributor of the
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24 ⁵ Defendants acknowledge that the court has authority to sanction a party for litigation
25 abuses under its inherent powers, but allege that such sanctions cannot be applied here, because
26 Defendants’ conduct was not willful or in bad faith.

1 motorcycle. Id. Plaintiffs served their first set of interrogatories upon Honda but
2 Honda neither responded or objected to the interrogatories, nor did it seek a
3 protective order within thirty days as required by Rule 33(a). Id. After months of
4 informal efforts to obtain answers to the interrogatories, the district court issued an
5 order on March 8, 1983, directing all counsel to "meet all discovery deadlines
6 imposed by the Federal Rules of Civil Procedure and all Court-imposed
7 deadlines." Id. Shortly after entry of the March 8, 1983 order, Honda served an
8 unsworn rough draft of its answers to some of the interrogatories upon plaintiffs.
9 Id.

10 Plaintiffs moved for sanctions for Honda's failure to respond to discovery
11 on May 13, 1983. Id. On August 8, 1983, the court ordered that Honda fully and
12 completely answer all of the plaintiffs' interrogatories by August 29, unless it
13 informed the court by affidavit that it could not provide the requested information.
14 Id. Consequently, on August 23, Honda informed the court that it could not
15 provide certain information requested, because such information was in the sole
16 possession of Honda's Japanese parent corporation, Honda Motor Co., Ltd., which
17 would not divulge such information unless it was a party to the lawsuit. Id.

18 Plaintiffs, in Fjelstad, amended their complaint and joined Honda Limited as
19 a defendant. Id. Plaintiffs thereafter served interrogatories upon Honda Limited
20 on September 16, 1983. Id. On January 13, 1984, plaintiffs again sought sanctions
21 against both Honda defendants for their willful filing of evasive, misleading,
22 incomplete, and false answers to interrogatories and their failure to comply with
23 the court's order. Id. at 1336-37. On March 1, 1984, the court imposed a \$50,000
24 sanction against the Honda defendants, "[s]pecifically citing Honda Limited's
25 filing of incomplete and misleading answers to interrogatories and [] Honda's one
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1 year delay in producing an accident reconstruction videotape and its production of
2 requested owner's manuals just three days before depositions.” Id. at 1337.

3 On March 19, 1984, plaintiffs requested that the court enter a judgment of
4 liability against the Honda defendants for their failure to comply with the court’s
5 order and answer outstanding interrogatories. Id. The court eventually granted
6 the motion as to both Honda defendants, and the Honda defendants appealed,
7 suggesting that the district court had no authority to impose discovery sanctions
8 against them, and that their conduct did not warrant the severe sanction of default
9 judgment on the issue of liability. Id.

10 On appeal, the Ninth Circuit first acknowledged that the district court relied
11 on two independent sources of power in imposing the sanction of partial default
12 judgment against the Honda defendants: (a) its inherent power to supervise and
13 establish law concerning the conduct of litigation; and (b) Rule 37. Id. at 1337-38.
14 Although the court recognized that “[w]hether a court has power to dismiss a
15 complaint because of noncompliance with a production order depends exclusively
16 upon Rule 37’ and that ‘reliance upon ‘inherent power ’ can only obscure analysis
17 of the problem.’ . . . [the court recognized that the Supreme] Court also has
18 indicated that district courts may rely upon their inherent powers in penalizing
19 some forms of discovery abuse [and that] [i]n this case, the district court invoked
20 its inherent authority only to penalize conduct that it did not find to violate either
21 its discovery orders or the discovery rules.” Id. at 1338.

22 In discussing the district court’s inherent powers, the Fjelstad court held that
23 when a party has willfully deceived the court and engaged in conduct utterly
24 inconsistent with the orderly administration of justice, courts have inherent power
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1 to sanction the party, even to dismiss an action. Id. That said, the Fjelstad court
2 found that “[d]ue process limits the imposition of the severe sanctions of dismissal
3 or default to ‘extreme circumstances’ in which ‘the deception relates to the matters
4 in controversy’ and prevents their imposition ‘merely for punishment of an
5 infraction that did not threaten to interfere with the rightful decision of the case.’”
6 Id.

7 The Fjelstad court acknowledged that the district court invoked its inherent
8 authority to impose sanctions against Honda Limited for its refusal to disclose
9 manufacturing and design information to Honda before Honda Limited was joined
10 as a defendant, its failure to disclose that policy to Honda when Honda first sought
11 the information, and its providing information in a piecemeal fashion in order to
12 force plaintiffs to seek court intervention. However, the Ninth Circuit found that
13 such conduct did not deceive the district court about the issues in controversy or
14 threaten to interfere with a correct decision. Also, the conduct of Honda Limited
15 could not be characterized as ‘utterly inconsistent with the orderly administration
16 of justice.’” Id. On that basis, the court held that the facts of the case did not
17 present the extreme circumstances that would justify imposition of a judgment of
18 liability under the court's inherent power.” Id.

19 While a judgment as to liability is a sanction available under the court’s
20 inherent power to punish litigation abuses, a court may impose a variety of other,
21 lesser, sanctions under its inherent powers. For example, “[u]nder its ‘inherent
22 powers,’ a district court may also award sanctions in the form of attorneys' fees
23 against a party or counsel who acts ‘in bad faith, vexatiously, wantonly, or for
24 oppressive reasons.’” Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006)

1 (citing Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir.
2 1997)). A court awarding attorney's fees as a sanction must make an express
3 finding that the sanctioned party's behavior "[c]onstituted or was tantamount to
4 bad faith." Id. "A party 'demonstrates bad faith by delaying or disrupting the
5 litigation or hampering enforcement of a court order.'" Id. As always, an
6 attorney's fee sanction must be "reasonable." Id.

7 Courts additionally have the inherent power to exclude evidence as a
8 sanction for flagrant abuses of the discovery process. Merrick v. Paul Revere Life
9 Ins. Co., 500 F.3d 1007, 1014 (9th Cir. 2007) (court granted a motion in limine,
10 and suppressed certain evidence, because a party withheld evidence that it was
11 ordered to produce). Sanctions available under a court's inherent powers include
12 issuing a public reprimand or criticism; awarding attorney's fees, costs, and other
13 monetary sanctions; disqualification, suspension or disbarment of attorney; and
14 any other litigation-based sanction that is made to fit the offense. See 30 Moore's
15 Federal Practice, § 807.01[5][a]-[d].

16 **II. Are sanctions against Defendants appropriate?**

17 The consequences of Defendants' discovery misconduct are not sufficiently
18 developed to justify a finding of liability in this complex matter. In addition, it
19 now appears that Plaintiff does not intend to pursue the issue of document
20 destruction any further.⁶

21
22 ⁶ On October 27, 2011, one day before the issuance of this memorandum, the parties filed
23 the following stipulation (Dkt. no. 126, p. 2, ¶ 7): "No further motions, affidavits, declarations, or
24 papers and pleadings of any kind shall be filed by the Plaintiff, the Trustee and/or his agents,
25 including but not limited to his legal counsel and consulting and/or testifying expert witnesses,
26 with the Court in this case or in any other proceeding, alleging and/or seeking sanctions or other
relief based upon the purported destruction or failure to maintain documents or electronically

1 However, the facts do justify the imposition of monetary sanctions.

2 No litigation hold for the preservation of documents was ever instituted,
3 even after three lawsuits were filed concerning the Zyen - Xyience loan.

4 Bullard admits that he has destroyed documents. What he destroyed, and
5 when has not been, and may never be, known. Defendants are not in a position to
6 question the relevance of the things that have been destroyed. The destroyed
7 documents no longer exist, because of the acts of Bullard and, possibly, others. A
8 party responsible for document destruction “can hardly assert any presumption of
9 irrelevance as to the destroyed documents.” Leon v. IDX Sys. Corp., 464 F.3d
10 951, 959 (9th Cir. 2006).

11 Defendants have offered no explanation of why they failed to check the
12 Gordon Biersch computer equipment used by Bullard for his business activities
13 unrelated to Gordon Biersch . The Gordon Biersch issue was discussed between
14 counsel at least as early as December, 2010, but there was no production until
15 Bullard’s deposition in May, 2011. Plaintiff was forced to serve subpoenas upon
16 Gordon Biersch , a non-party, in order to get some production from Bullard’s
17 Gordon Biersch computer.

18 Defendant’s also failed to make a timely inspection of the computer used by
19 Bullard’s secretary, Nadeau, even though existing emails showed copies to her.
20 Such conduct can only be described as intentionally dilatory.

21 Defendants have produced many pages of documents in response to
22 Plaintiff’s discovery requests, but that does not excuse the willful, bad faith

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24 stored information by Defendants, Manzen, LLC, and/or any officers, directors, employees,
25 agents and/or affiliates thereof;”

1 conduct described above. That conduct has harmed, delayed, and increased the
2 cost of Plaintiff's attempts to prosecute this adversary proceedings, and will not be
3 tolerated.

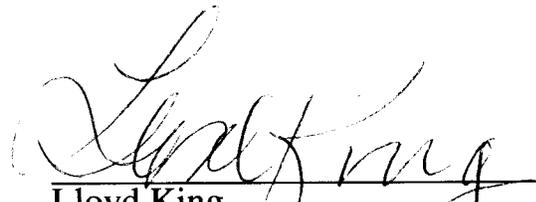
4 **CONCLUSION**

5 Defendant's willful, bad faith discovery behavior justifies the imposition of
6 monetary sanctions to reimburse Plaintiff's expenses, costs, and reasonable
7 attorney's fees. The sanctions are being imposed pursuant to this court's inherent
8 power to supervise and control pending litigation.

9 The next step is for Plaintiff to file a supplemental motion, requesting
10 specific dollar amounts from the three remaining defendants, together with an
11 appropriate justification for the requests.

12 An order will be entered, granting Plaintiff's Motion for Sanctions against
13 the remaining Defendants, Zyen, LLC, Fertitta Enterprises, Inc., and William
14 Bullard, as to monetary sanctions only.

15 Dated: October 28, 2011.

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18 Lloyd King
United States Bankruptcy Judge
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