

Form Number 1

1 OPPS
2 Rich Bergeron
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6 Defendant as Pro Se Attorney
7

8
9 **DISTRICT COURT**

10
11 **CLARK COUNTY, NEVADA**

12
13
14 XYIENCE, INC., A Nevada Corporation,

CASE NO.: A544781

15
16 Plaintiff,

DEPT. No.: XVI

17
18 v.

19
20 Rich Bergeron, An Individual,

21
22 Defendant.
23
24

25 **OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

26
27 **INTRODUCTION AND TIMELINE:**

28
29 In December of 2006, Defendant Rich Bergeron received an email from a contact of his
30 regarding Xyience, Inc. that revealed several serious allegations against the company. Bergeron
31 noticed there was a case number within the email (#CV06-1859). He subsequently signed up for an
32 account with the PACER SERVICE SYSTEM, which he had worked with before as a full time
33 reporter for The Laconia Citizen newspaper in New Hampshire.

34 Bergeron also did an Internet search for the district attorney's email address (Full text of email
35 in Defense Exhibit 1) and for John Miller of the Criminal Complaints Division of Consumer Affairs.
36 He did find on-line several references to both the email address of the DA and to John Miller and the

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38 Criminal Complaints Division of Consumer Affairs.

39 Bergeron subsequently published the email on his MySpace page with a disclaimer attached
40 announcing not all of the email had been confirmed. He decided to look into the allegations and see if
41 any of them were true and took special care to remove the email address of the district attorney before
42 posting the email. He left a message for the district attorney and never received a call back. He did not
43 find any additional contact information on John Miller.

44 Once Bergeron secured access to the PACER system, he began to research Xyience in order to
45 find out if all of the email's contents were true. He started with the Phoenix Labs vs. Xyience lawsuit
46 and another suit filed against Xyience by Valint Consulting. Once he discovered and researched these
47 cases, he wrote stories detailing both of them and began to make contacts. Bergeron discovered a great
48 deal of shocking and unreported information within the case files of these lawsuits. Lawyers and
49 employees for Xyience had resigned at peculiar points in the Phoenix Labs case, timed around certain
50 depositions that were supposed to take place in the discovery process.

51 Bergeron began finding that much of the email submitted to him contained completely factual
52 information. The more he researched and made connections with witnesses, the more he discovered
53 that there was really nothing in the email that could be proven false. There was some information that
54 he could not verify completely, but he did not print anything in any of his stories he could not back up
55 with facts and/or witness testimony after he received and posted the initial email and disclaimer.

56 Bergeron began connecting with a myriad of sources through time spent researching the case
57 and finding new leads. A few of these sources asked that their names not be used because of death
58 threats they had received. Every one of Bergeron's sources that went on the record also received
59 threats.

60 Bergeron soon began to get threatening communications through MySpace and FightZoo.com
61 from people obviously connected to Xyience. Bergeron also received threatening emails at this time.
62 These communications all seemed to indicate Bergeron was onto something, and when the posters and
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64 messengers refused interviews to clear the company's name, Bergeron was convinced there was more
65 they were trying to hide from him. The profiles communicating with Bergeron were decorated with
66 Hell's Angels regalia, and the MySpace profile's owner kept telling him he should take down the
67 email. Bergeron communicated back and forth with the owner and suddenly found his profile deleted.
68 He never received any answer from MySpace as to why that happened. He later noticed that anyone
69 who gets a message can click an abuse button to get MySpace's attention if they don't like a particular
70 email. One poster on Fightzoo.com calling himself "Mr. Truth Untold" later admitted being
71 responsible for getting Bergeron's profile removed (Defense Exhibit 2).

72 Bergeron had spent thousands upon thousands of hours personally adding friends to his profile
73 to get his Fight News Unlimited fan base up to 5,000 friends on his MySpace profile he utilized as a
74 base to start a fight news business. It took him a significant amount of time to rebuild the site, but he
75 was able to take advantage of a promotion to get his own dot com at around the same time. While he
76 set about rebuilding his hundreds of stories and trying to reassemble his friends list, he was
77 continuously harassed by the anonymous posters on the other profiles and e-mailers who would never
78 use their real names. They started mentioning the name Mark Neiber religiously and tried to paint
79 Neiber as Bergeron's only source.

80 Not long after Bergeron began posting new stories in what became the Xyience Series on his
81 new Web-site, public blogs appeared insulting Bergeron and claiming he had an ongoing homosexual
82 relationship with Neiber (See Links in Defense Exhibit 3). Bergeron has never talked to Mark Neiber,
83 shared any kind of communications with him, or used any information in his stories that came from
84 Mark Neiber unless they pertained to the public records of Neiber's lawsuit against Xyience. The blogs
85 about Bergeron increased over time, utilizing pictures from his personal MySpace page and resumes
86 from public sites to spread complete falsehoods about Bergeron's history. These blogs pointed to

88 Bergeron being removed from a teaching position because of a problem with a minor, which was
89 completely false. They also claimed Bergeron had been kicked out of military school for honor code
90 issues, which also never happened. People obviously connected to Xyience also used Bergeron's
91 unlimitedfightnews.com comments section to launch baseless attacks against Bergeron and Neiber as if
92 the two were out to destroy Xyience. Some of these comments, including manufactured emails
93 purported to be sent back and forth between Neiber and Bergeron, were later linked to an IP address
94 shared by comments left with John Chadwell's company email address at Xyience (DEFENSE
95 EXHIBIT 4).

96 Representing himself as Xyience security, Chadwell contacted Bergeron and threatened he
97 would be criminally charged if he continued to contact Xyience employees to ask questions about the
98 company. Chadwell accused Bergeron of trying to extort the company, yet all Bergeron was trying to
99 obtain was information. Chadwell warned Bergeron that Neiber had been arrested for stalking and had
100 tried to extort the company and told Bergeron to call a Las Vegas detective to confirm the arrest.
101 Bergeron called the detective and did receive a call back a few weeks later. The detective confirmed
102 that Bergeron was not in any criminal trouble whatsoever and that Chadwell had made up the threat of
103 criminal charges.

104 Bergeron also received emails and recorded phone messages from Chadwell in Mid-March of
105 2007 that led to Xyience offering Bergeron a free ticket to fly to Xyience headquarters. Bergeron
106 would have to write a glowing story about Xyience in order to get the trip paid for, according to
107 Chadwell. Bergeron was also promised interviews with Ultimate Fighting Championships President
108 Dana White and access to UFC fighters if he would make the trip and write a positive story about the
109 company. Chadwell told Bergeron the offer had come out of discussions with Russell Pike himself and
110 other board members (See Defense Exhibit 3 For Link to Video). Around this time other comment
111 posters and anonymous e-mailers tried to tell Bergeron that Pike had nothing to do with the company
112 and was not there anymore.

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114 Bergeron finally exhausted his research and gave the case a rest after he became embroiled in
115 the middle of a family feud between Mark Kreichbaumer and his brother Andrew Kreichbaumer.
116 Bergeron was threatened on tape by Andrew Kreichbaumer's mother, and Andrew Kreichbaumer
117 threatened to sue him if he did not take down the blog he wrote about Andrew's involvement in
118 Xyience. Andrew Kriechbaumer co-founded the company with Pike and helped gather much of the
119 initial investment funds from his family. Bergeron also spoke with Joseph Kriechbaumer, the father of
120 the two brothers. Joe Kriechbaumer admitted he knew Russell Pike was a criminal (also on tape), but
121 he also added that Pike was at the same time a genius. Mark Kriechbaumer felt betrayed by his brother
122 for not receiving any kind of payback on a loan and a stock purchase he made to support Xyience in
123 the early stages of the company. Bergeron was able to discover through the two brothers and a UCC
124 Filing he paid to acquire that Pike bought back all of Andrew's shares at around .30 for each share.
125 Russell Pike's brother William Pike subsequently tried to contact Mark Kriechbaumer to complain
126 about the price of the sold shares making it into one of Bergeron's stories. Andrew Kriechbaumer
127 during one call also admitted a message meant for him was left on William Pike's cell phone once by
128 Bergeron.

129 William Pike later admitted receiving this message in a long, drawn out and bogus
130 psychological evaluation of Bergeron he posted on www.fightzoo.com (DEFENSE EXHIBIT 2)
131 through a profile named "Billythekid78." Pike's profile picture was a picture of Defendant Bergeron
132 himself. Around the same time, Russell Pike was apparently taking things a step further. In response to
133 some of Bergeron's posts linking to the series that were left on the forums at www.sherdog.com, a
134 poster named "Friends of Chuck" (Defense Exhibit 5) railed off repeated insults at Bergeron labeling
135 him a "cocksucker," claiming he was an escaped mental patient, and warning people his site had a
136 virus. The same poster later (in mid-July, 2007) responded to customer complaints about Xyience
137 products by admitting he was a co-founder of the company and he would be changing things soon.
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139 Since Andrew Kriechbaumer, the other co-founder, was no longer in any position to make any
140 decisions with the company at that point, all evidence points to the poster in question being Russell
141 Pike himself.

142 Most recently, Bergeron wrote a story about this very lawsuit. Several posters jumped at the
143 chance to comment. The bulk of them favored Xyience. Bergeron waited for the comment section to
144 fill up before doing IP address checks on the participants. Many of them could be linked to previous
145 comments. One particular poster had written previously that he was a Xyience shareholder. He lied and
146 used multiple fake names to make himself appear as an objective party after admitting his connection.
147 When caught, he finally admitted his connection to the company in Bergeron's latest blog. This poster
148 left over 100 comments on Bergeron's stories using multiple aliases. During the time he argued back
149 and forth with Bergeron, Bergeron repeatedly asked this person to post evidence of anything Bergeron
150 had lied about in his stories. The poster instead came up with evidence of Bergeron's other
151 employment history as a photographer and house painter but no substance to show Bergeron had ever
152 committed a wrongful act of any kind. (ALL COMMENTS BY THIS INDIVIDUAL ARE LISTED IN
153 DEFENSE EXHIBIT 6)

154 Bergeron has the bulk of evidence to prove those representing Xyience knowingly slandered
155 him while Plaintiff has absolutely no evidence that Defendant Bergeron committed any wrongful act
156 whatsoever against them. Bergeron, an individual, has been hit from all angles by those connected to
157 Xyience who are attempting to destroy his credibility because he knows too much about the ongoing
158 corruption there. Rather than compile anything of substance, these willing participants in a smear
159 campaign against Bergeron chose to viciously insult him and paint his occupations outside of his
160 writing as somehow dishonest.

161 Bergeron believes based on previous death threats handed out to his sources that even attending
162 a hearing in Nevada could potentially lead to his own murder or serious bodily harm. Those trying to
163 hide the truth for the plaintiff have always operated from the shadows while Bergeron has always put

his name on every comment and story he's presented. Xyience has not provided one shred of evidence to show Bergeron had any other intentions other than to inform the public of wrongdoing by Plaintiff, which is his protected right under the First Amendment of the U.S. Constitution.

In fact, Bergeron has publicly stated his hopes that Xyience will be able to move past the corruption and straighten itself out so the innocent parties involved in working for the company will not be adversely affected. He has also expressed the need for the sport of mixed martial arts to move beyond the corruption involved in Xyience's investor relations and shady business practices as a sponsor of the UFC.

Yet, the Plaintiff's actions have demonstrated not only their corrupt nature but also their attempts to twist the situation in their favor through perpetrating obvious lies about defendant. Bergeron has always gathered a significant amount of facts before posting anything, and he has never strayed from his high level of professionalism in this case. On the other hand, those connected to plaintiff have done whatever they could to try to silence and discredit Bergeron's reporting of the complete and accurate truth about their dealings.

Xyience's entire case is not only weak but also fraudulent in several aspects. Attorney Jamie Cogburn was given absolutely no credible evidence of any wrongdoing on the defendant's part, and he was no doubt told to make something stick so the company could collect on \$15 million from a purported investor Plaintiff has not even proved to actually exist. By pressing this case with a complete lack of any viable shred of proof that Bergeron committed any wrongful act, Cogburn is making a mockery of this court and the legal process.

ARGUMENT

I. THE REQUESTED INJUNCTION WOULD BE AN UNLAWFUL PRIOR RESTRAINT.

A. "prior restraint on expression comes ... with a 'heavy presumption' against its constitutional
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191 validity.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (quoting *Carroll v. President*
192 *and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)). A court-issued preliminary injunction is a
193 particularly dangerous form of prior restraint. “Injunctions ... carry greater risks of censorship and
194 discriminatory application than do general ordinances.” *Madsen v. Women's Health Ctr.*, 512 U.S. 753,
195 764 (1994). As the Supreme Court has explained:

196 [P]rior restraints on speech and publication are the most serious and the least tolerable
197 infringement on First Amendment rights. A criminal penalty or a judgment in a defamation
198 case is subject to the whole panoply of protections afforded by deferring the impact of the
199 judgment until all avenues of appellate review have been exhausted. Only after judgment has
200 become final, correct or otherwise, does the law's sanction become fully operative.
201 A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it
202 can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior
203 restraint “freezes” it at least for the time.

204 *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

205 In recognition of these principals, “courts have long held that equity will not enjoin a libel.”
206
207

208 *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees And Restaurant Employees*
209 *International Union*, 239 F.3d 172 (2d Cir. 2001). The Fourth Circuit has also recognized this rule. *See*
210 *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“Generally an injunction will not issue to restrain
211 torts, such as defamation or harassment, against the person. . . . There is usually an adequate remedy at
212 law which may be pursued in seeking redress from harassment and defamation”). *See also Am. Malting*
213 *Co. v. Keitel*, 209 F. 351, 354 (2d Cir.1913) (“Equity will not restrain by injunction the threatened
214 publication of a libel, as such, however great the injury to property may be. This is the universal rule in
215 the United States and was formerly the rule in England.”); *Procter & Gamble Co. v. Bankers Trust*
216 *Co.*, 78 F.3d 219, 225 (6th Cir.1996) (refusing to enjoin publication of trade secrets improperly
217 obtained in violation of a protective order, noting, “[t]he private litigants’ interest in protecting their
218 vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior
219 restraint.”).

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221 The plaintiff's claims that Bergeron's speech will injure their ability to enroll new investors, or to keep
222 current investors satisfied, does not change the analysis. Similarly, in *Metropolitan Opera Association,*
223 *Inc. v. Local 100, Hotel Employees And Restaurant Employees International Union*, 239 F.3d 172 (2d
224 Cir. 2001), where the court reversed a preliminary injunction that had been granted against a union's
225 allegedly defamatory speech, the court did "not ascribe any particular significance to the district court's
226 finding that the Union was motivated to coerce the Met through social pressure and the threat of social
227 ostracism." 239 F.3d at 177. The court acknowledged that "the Union's methods may be harassing,
228 upsetting, or coercive, but unless we are to depart from settled First Amendment principles, they are
229 constitutionally protected." *Id.* at 178. Bergeron's actions were not nearly as severe in this case.

230 In *CBS v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun, acting as Circuit Justice, stayed a
231 preliminary injunction issued by a lower court to prevent a television network from airing footage that
232 was allegedly unlawfully obtained at a meat packing plant. Despite the lower court's findings that the
233 broadcast "could result in a significant portion of the national chains refusing to purchase beef
234 processed at [the plaintiff's plant] and thereafter in the [plaintiff's] plant's closure" and that "[p]ublic
235 dissemination of [the plaintiff]'s confidential and proprietary practices and processes would likely
236 cause irreparable injury to [the plaintiff]," Justice Blackmun found that the injunction was an unlawful
237 prior restraint. Indeed, the injunction was so constitutionally objectionable that Justice Blackmun
238 considered it an "extraordinary circumstance" justifying the immediate stay of a lower court order by a
239 single Justice. 510 U.S. at 1317. Bergeron broke no laws in obtaining his evidence and information.

240 In sum, a preliminary injunction against alleged defamation, based on bare allegations of injury
241 by the plaintiff, violates the First Amendment. The plaintiff's request for a preliminary injunction
242 should therefore be denied. Furthermore, plaintiff seeks to restrain Bergeron from writing future stories
243 in this series in the injunction. Such an overbroad injunction would violate both the First Amendment

245 and Rule 65(d) of the Federal Rules of Civil Procedure, which requires that injunctions be “specific in
246 terms” and “describe in reasonable detail... the act or acts sought to be restrained.” Xyience cannot
247 describe in reasonable detail what has yet to be printed. Xyience also asks this court to remove an
248 entire story from Bergeron’s site containing information that they have yet to prove is false. Even in
249 its complaint, Xyience identifies only a few statements on the Web-site that it alleges to be false. The
250 complaint fails to quote any of the allegedly false statements in full, explain what in particular about
251 the statements is false, or provide any proof of such falsehood.

252 The situation mirrors that in *Metropolitan Opera, supra*. There, the court found a preliminary
253 injunction to be unconstitutional because “the injunction is vague as to what the Union may say and
254 what statements might lead to a finding of contempt of court. It puts the Union at risk of punishment
255 for good faith efforts to advocate publicly its position.” The court went on to observe:

256 . . . The reality of such risk is brought home by the fact that the district court found the Union in
257 contempt for chanting “Shame on You” and “No More Lies.” The Union has no way of
258 determining from the text of the injunction whether other chants or statements in the future will
259 lead to further contempt sanctions.
260

261 The proposed preliminary injunction puts the defendant at risk of contempt for their attempts to
262 tell the true story behind the plaintiff’s corrupt activity. The First Amendment does not permit this.
263

264 **II. PLAINTIFF MISREPRESENTS THEIR OWN EVIDENCE**

265 Plaintiff speculates that an email Bergeron published on a now defunct MySpace account included
266 false statements. Bergeron published this email (See Entire Unedited Email in Defense Exhibit 1),
267 which Xyience Counsel misrepresents as “an article,” with an editor’s note attached. The note claimed
268 only that the email came from a reliable source, that Bergeron had verified the email address of the
269 Nevada District Attorney said email was sent to, and that he would be looking further into the
270 allegations contained within the email. Bergeron subsequently verified several portions of the email
271 which were indeed fact.

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273 Bergeron obtained court documents and evidence that: proved Xyience was indeed part of an
274 SEC investigation of AA Capital CEO and President John Orecchio (See Defense Exhibit 7); indicated
275 Phoenix Labs had sued and subsequently settled out of court with Xyience in attempt to secure over
276 \$500,000 in unpaid debts; and confirmed that Xyience did have several burned investors attempting to
277 draft a class action lawsuit against them.

278 Xyience Counsel further misrepresents Plaintiff's Exhibit 1 as claiming that a class action
279 lawsuit was "already underway" against his client. The email actually asserts that the class action suit
280 was "currently being drafted." Another contention in the email Plaintiff's counsel called into question
281 regarded "shell corporations" constituted by Xyience, Inc. which Bergeron did not definitively verify
282 immediately. He did find later that Xyience, Inc. did have multiple smaller corporations as Nevada
283 Business Entities under the Xyience name that have since been dissolved and removed from all records
284 searches. Coincidentally these entities disappeared not long after Former CEO and Co-Founder Russell
285 Pike had been ousted from a leadership role as part of the mandate resulting from AA Capital offshoot
286 Brush Monroe's partial liquidation of their Xyience stock.

287 Bergeron's MySpace account was removed from MySpace after he exposed the issues behind
288 the Phoenix case and another lawsuit brought against Xyience by Valint Consulting. Bergeron had by
289 then begun to receive threatening communications from another profile decorated with Hell's Angels
290 regalia and a Skull and Crossbones as the main profile picture. These communications were supportive
291 of Xyience, Inc. and indicated the owner of the profile at the very least knew Russell Pike personally.
292 The messenger was particularly angered by the email Bergeron had posted on his site. Bergeron
293 offered to remove the email from his MySpace page if he could secure an interview with Russell Pike.
294 The messenger refused. Bergeron's site was deleted very soon after corresponding with the mysterious
295 profile's owner. Plaintiff has provided no proof Bergeron's MySpace page was deleted for posting

297 defamatory material. Anyone who receives a message they do not like can click a “report abuse”
298 button and get someone’s profile removed.

299 The deletion of Bergeron’s MySpace profile also makes it irrelevant to the preliminary
300 injunction being sought for Bergeron’s current Web-site, because it no longer exists in connection with
301 Bergeron, and Bergeron did not print the email on his new site, nor did he even quote anything from it.
302 He did later find out that much of its contents were accurate and true, and he always presented due
303 evidence whenever he did present one of the email’s points in his stories.

304 Bergeron faced anonymous and vicious attacks through several on-line profiles around the time
305 of his MySpace problems. He received numerous messages through email and social Web-site profiles
306 regarding a Mark Neiber, who Xyience officials have repeatedly claimed is Bergeron’s only source,
307 which is utterly false. Bergeron received messages through a profile at www.fightzoo.com where the
308 messenger launched continuous attacks against Bergeron under the name of “Mr. Truth Untold”
309 (Defense Exhibit 2) and featured a similar skull and crossbones for his profile picture as Bergeron
310 encountered on MySpace. Later, another profile was formed on fightzoo.com named “Billythekid78”
311 that featured Bergeron’s picture on it. This profile posted violent, slanderous messages about Bergeron
312 through the forums on the site, including a fabricated complete psychological evaluation (Defense
313 Exhibit 2). The poster intimated through his communications certain information that led Bergeron to
314 determine he was William Pike, Russell Pike’s brother. William Pike launched specific threats and
315 referred to Bergeron as a “faggot” among other insults.

316 In early March, 2007 Bergeron obtained the url www.unlimitedfightnews.com and posted
317 stories there about Xyience, Inc. that specifically centered around Russell Pike’s questionable business
318 history, past convictions for check fraud and money laundering, and a series of financial transgressions
319 Pike committed against a company called Nitro Supplements. Bergeron produced these stories relying
320 on official court documents obtained through the PACER SERVICE SYSTEM (DEFENSE EXHIBIT
321 8) and testimony from several anonymous, inside sources in a position to know about all of Pike’s

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323 activities. At no time did Bergeron ever use information he did not confirm through at least two
324 sources of this variety. In many cases Bergeron also received actionable information from sources he
325 named who gave him clues “off the record.” While unable to quote these sources on the information
326 they gave him, he was able to use their information to back up what his anonymous sources told him.

327 Bergeron’s sources continuously reported that they knew death threats were going around to
328 those who were trying to expose a suspected unusual, secret, corrupt partnership between Xyience Co-
329 Founder Russell Pike and Ultimate Fighting Championship President Dana White. These anonymous
330 sources were all in a position to know something was going on between the two regarding investor
331 funds, but none of them could go as far as saying they witnessed any direct cash transactions between
332 the two, which all of Bergeron’s stories clearly denote.

333 Plaintiff completely and irresponsibly misrepresents Bergeron’s initial story posted on
334 www.unlimitedfightnews.com about Xyience. Plaintiff’s case points to a myriad of charges Bergeron
335 never alleged himself, inferred, or even hinted at through his own contentions. Bergeron’s sources
336 lodged the allegations against Xyience, and Bergeron reported their testimony accurately. These
337 sources also did not specifically name the entire UFC as a party to the reported suspected transactions
338 of advertising and sponsorship revenue between Pike and White. The sources quoted by Bergeron were
339 all in a position to witness first hand some of the activity that occurred between Dana White and
340 Russell Pike. One particular source also sat in on meetings with Xyience officials and SPIKE TV
341 representatives and took part in day to day activities of the company.

342 Bergeron is well aware of the UFC’s tendency to file lawsuits whenever threatened in the least
343 bit. The Fertitta Brothers are multi-millionaires who own multiple casino chains in addition to UFC
344 parent company Zuffa. The depth of their financial power is tremendous. Bergeron has been told a
345 great deal more than he printed about the UFC’s involvement with Xyience. He was even told

347 numerous times that the Fertitta Brothers were planning to invest \$10 to \$15 million in Xyience, which
348 now seems very peculiar since Xyience indicates one investor plans to offer them the highest figure in
349 that range if Bergeron's stories are removed from the Internet. Bergeron held back on printing certain
350 allegations and worded certain aspects of his stories properly, taking special care not to print anything
351 the UFC or Zuffa could sue him for, and to date they have not even threatened to. Their relationship to
352 the corruption as an entire entity is tenuous at best, which is exactly the way Bergeron has always
353 characterized it.

354 Bergeron has even recently discovered that Station Casinos (owned by the Fertittas) publicly
355 endorsed this case's residing judge at one point (a letter announcing such is listed on the judge's Web-
356 site).

357 Bergeron never intended to try to prove or even delve too far into the role the UFC as a whole
358 might have played in the reported transactions between White and Pike. Although Bergeron had his
359 suspicions about the bigger picture, he knew he had the most evidence and corroborating witnesses
360 regarding Russell Pike's involvement and the corroborating history of Pike's previous behavior with
361 other corporations. He knew he could only print what the strongest evidence he had could corroborate.
362 He also knew the Fertittas and the UFC as a whole did not need to perpetrate a continuous scam to
363 make money, as their Mixed Martial Arts promotions are now the most popular and dominant segment
364 of the sport in the world. It was Russell Pike and his partners at Xyience who had the most to gain in
365 the partnership.

366 Plaintiff provided absolutely no unbiased evidence that anything Bergeron printed about the
367 Pike and White partnership was in any way false. Plaintiff relies on a simple affidavit for the bulk of
368 their claims, an affidavit signed by a member of their own corporation who would be in a position to
369 profit if their case is successful. This is akin to a student writing his own note to the teacher to dismiss
370 himself from school early. This should not be considered evidence. The only other evidence Plaintiff
371 offers is the Defendant's own work product. Even in presenting that material, Plaintiff is not in any

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way specific about what particular allegations are false and how they can be proven so. For instance, if Xyience is or ever was under investigation by the SEC, they would have no way of knowing or demonstrating that until charges come down.

Plaintiff's counsel is perpetrating a grand fraud on this court by continuing to press this case with an absolute lack of credible, verifiable evidence and by further absolutely and completely misrepresenting and exaggerating what they do present as evidence. The bulk of the supporting documents held by Plaintiff in this matter are Bergeron's own. Even in presenting those they leave out a significant portion of the complete picture. They omit over 60 comments posted on Bergeron's initial story while trying to claim there are no positive comments about Xyience at the same time. They also misquote and manipulate the email that Bergeron posted on his MySpace site.

III. DEFENDANT'S EVIDENCE FAR OUTWEIGHS PLAINTIFF'S AND DEMANDS THE SCRUTINY OF THE CRIMINAL COURT SYSTEM RATHER THAN THIS CIVIL COURT'S

ATTENTION

Bergeron has collected a stockpile of documents, recorded conversations, and communications of the scope and breadth that will serve a great and altruistic purpose if it were all to be turned over to the proper government agencies for a formal investigation. Rather than any hasty injunction in this frivolous civil case, it is a lengthy, involved criminal investigation that should result from Xyience's activities.

It would cost Bergeron a fortune to print and produce the physical evidence in his possession and on his home computer. He has hours of recorded conversations as well. He is one man, an individual, and in this case his adversary is a major corporation. Bergeron cannot even afford an attorney. He has had to take time out of his busy schedule running his Web-site on his own to fight this frivolous case, which has already cost him money he can't spare. A plane ticket alone to appear in

397 Nevada would bankrupt Bergeron if he could even scrape together the funds to buy it. Plaintiff even
398 makes it a point to argue Bergeron makes “no revenue” from his site. He has put most of his income
399 from ads and sponsorships back into expenses for his site, and he has used the rest for modest living
400 expenses. He relies on the great potential of the site to increase in value, and he would not risk having
401 the site removed from the Internet based on some crude charade or any kind of personal grudge.

402 Bergeron is a journalist with extensive background in newspaper reporting, including other
403 investigative reports and coverage of First Amendment case law. Plaintiff cannot prove Bergeron has
404 any malicious intent to cause harm to Xyience. In fact, Bergeron would like to see the company
405 cleaned up so it can resume sponsoring fighters in the UFC and existing employees who were not party
406 to the corruption can be rewarded for the good work they’ve done for the company. Bergeron’s
407 motivations all lie in making the general public aware of Plaintiff’s activities because they are
408 legitimately corrupt and need to be addressed by the proper authorities. Bergeron’s site shows without
409 a doubt that he cares deeply about combat sports, a genre of the fight industry that Xyience’s behavior
410 has cast a dark shadow over.

411 Bergeron has never once been accused of, found guilty of, or proven to have made up any
412 quotes in any previous story in over five years of reporting. There is no evidence he would ever
413 misrepresent evidence to sensationalize a story. He is well versed in the laws of slander and libel, and
414 he values the principles of journalistic ethics. He further lives by the “service before self” mentality
415 ingrained in him during his attendance at The Air Force Academy, Norwich University, and Virginia
416 Military Institute. He had an impeccable record at all three schools and lived under honor codes that
417 held all attending cadets to a higher standard of integrity.

418 On the other hand, Russell Pike, who has been featured in most of Bergeron’s allegations of
419 corruption, is a convicted felon. He has a documented history of bilking investors and has been to
420 federal prison for money laundering. He has perpetrated a pattern of criminal fraud that is not disputed
421 in any way by Plaintiff’s case. Much of the corruption and suspected criminal activity that has crippled
422

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423 Xyience's ability to turn a profit happened under Pike's leadership and direction. Pike and his partners
424 have left a trail and pattern of fraud behind them that is almost identical to what happened under Pike's
425 direction at John Scott's Nitro. Between unpaid bills, mounting civil lawsuits filed by both individuals
426 and corporations, and the failure to retain any steady leadership, Xyience is reeling and now looks as if
427 it will not be able to right itself regardless of whether Bergeron's stories are removed from the Internet.

428 In fact, the most damning evidence for Defendant Bergeron and against Xyience lies within
429 Plaintiff's casework itself. Plaintiff calls into question only minimal aspects of the entire story they
430 present as evidence. It must be therefore assumed that those portions Plaintiff has no question about or
431 argument to dispute must be points of fact they believe and know to be true. Much of the points they
432 don't dispute come from the same sources who gave evidence Plaintiff does challenge.

433 For instance, Plaintiff does not dispute Bergeron reporting that Russell Pike outright stole a
434 company called John Scott's Nitro out from under the original owner so he could start Xyience, Inc. in
435 the first place. None of Bergeron's information about Pike's devious behavior at John Scott's Nitro
436 was questioned at all, and it was extensively laid out in the story. Bergeron even outlines Xyience's
437 attempt to trade access to UFC fighters for him writing a positive story about Xyience. Plaintiff does
438 not argue this is false.

439 Furthermore, Plaintiff only includes one of several stories written by Bergeron, all of which
440 outline serious ongoing corruption at the company and point to specific documents that prove it. In the
441 amount of time between the moments these stories were published and the time Xyience sued, nothing
442 changed about the validity of the information in Bergeron's reports.

443 Plaintiff has simply decided to file suit now in a rush to make \$15 million. With that payoff in
444 mind, Attorney Cogburn threw together a hasty, sloppy, and irresponsible case, a case which this court
445 should be completely offended by. In the request for an injunction Plaintiff repeatedly mentions the

447 scope of the merits as a determining factor as to whether an injunction can be secured. They do not
448 have any merits whatsoever to speak of and therefore cannot claim those non-existent merits fall
449 within any scope.

450 Bergeron always acted in good faith, gave both sides equal time and opportunity to explain
451 themselves, and tried to get official word from Russell Pike on numerous occasions. Pike continued to
452 refuse to provide any defense for his actions or explanation for his reported questionable behavior.
453 Bergeron also made attempts to reach new leadership at the company and each time noticed that the
454 new hires soon disappeared not long after they came on board. Bergeron has been told that Adam
455 Roseman of Arc Investments actually received death threats to keep him silent about what was going
456 on at Xyience. Former Xyience Counsel Pete Rinato refused to discuss Roseman's exit.

457 Bergeron made specific promises not to reveal the names of his sources in order to obtain the
458 information he used to produce his investigative series. Bergeron does have recorded phone calls,
459 email addresses, and other contact information for these sources he could reveal to any investigator in
460 a criminal case on the matter if deemed necessary. However, no names of these sources can be
461 revealed to anyone associated with Plaintiff for the physical well-being and protection of these sources
462 alone.

463 Bergeron never made up quotes from Attorney David Winterton, and Plaintiff does not have an
464 affidavit from Winterton or any other evidence to show he did. If the case were to go to trial, Bergeron
465 would be confident in calling Winterton to testify in his defense.

466 **IV. FAIR PLAY AND SUBSTANTIAL JUSTICE HAVE BEEN SKEWED BY PLAINTIFF'S**
467 **ACTIONS AND THEIR FALSE CHARACTERIZATION OF THIS CASE**

468 Bergeron is the real target of defamation. He can demonstrate that fair play and substantial justice
469 would only be served by this court transferring this case to the criminal level and exonerating Bergeron
470 of all civil charges. He has been physically threatened and subjected to slander in several anonymous
471 comment postings, emails, and blogs (See Links Within Defense Exhibit 3) created about him, some of

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473 which he can link directly to Plaintiff. These blogs paint him as having a homosexual affair with Mark
474 Neiber: a man he has never met, spoken to, or communicated with in any fashion. Bergeron is also not
475 homosexual. When Bergeron posted links to his Xyience stories on www.sherdog.com under the
476 profile Boxer_47 he was subjected to more slander, insulting remarks falsely painting him again as a
477 homosexual, as an escaped mental patient, and making false claims that visitors to his Web-site would
478 obtain a virus. These posts also recommended that Bergeron should be beaten up for his stories.

479 The profile on sherdog.com launching these baseless attacks later posted a message claiming he
480 was a co-founder of Xyience who had come up with the company name. (See Defense Exhibit 5) The
481 poster was subsequently banned from the forum for his hate speech. Bergeron also retained copies of
482 comment postings that were attempted in his own blog that closely matched the defamatory blogs on
483 other sites. Bergeron was able to verify the IP address linked to these comments was the same IP
484 address connected to a Xyience email address for John Chadwell (Defense Exhibit 5). The most recent
485 comment postings on Bergeron's latest story show that those commenting are clearly connected to the
486 company and have repeatedly hidden behind constantly changing fake names. Bergeron has never
487 posted anything anonymously or under any alias regarding Plaintiff.

488 Xyience Counsel contends that Bergeron maliciously and knowingly disseminated false
489 information when Bergeron always used due diligence in obtaining multiple sources for each major
490 claim and back up documents to corroborate witness testimony. Xyience has not offered any
491 significant burden of proof as to any of Bergeron's reporting being questionable in any capacity, nor
492 have they established a motive for Bergeron to produce false stories about the company. Furthermore,
493 Plaintiff continually misrepresented evidence it presented or provided incomplete evidence in this case.
494 Bergeron never announced, stated, or claimed outright that the behavior his sources described was
495 anything more than alleged, reported, or apparent due to conclusions he made related to extensive

497 evidence he collected. Plaintiff cannot possibly dispute that.

498 Plaintiff cites an “article” that is really an email posting. They later go on to claim erroneously
499 that charges within the email about Xyience’s involvement in an SEC investigation were included in a
500 “barrage of articles.” They claim that Bergeron did not let positive comments on his initial
501 unlimitedfightnews.com Xyience story, but they leave over 60 comments attached to the full version of
502 Plaintiff’s Exhibit 2 unaccounted for in their version of the document, and those comments feature
503 several instances of people sticking up for Xyience.

504 There are inferences made in Bergeron’s stories that come from sources who can be
505 definitively documented, but their identity cannot be shared with Xyience officials. These anonymous
506 sources would be put in harm’s way if their names were revealed. Other cooperating witnesses have
507 received multiple death threats for going on the record with Bergeron.

508 Furthermore, if necessary Bergeron can provide documentation to show much of what he
509 reported on was already a pervasive belief in the industry before he began writing his series. Multiple
510 forums for story and comment postings across the industry also betray a large portion of the general
511 fan base rejecting and ridiculing Xyience for poor product taste, a genuine lack of results to justify the
512 high pricing, and cheesy marketing ploys. Bergeron also discovered that Xyience reported well over
513 \$55 million in losses for Fiscal Year 2006 (DEFENSE EXHIBIT 9), well before Bergeron began
514 working on the story.

515 In addition, Bergeron has been contacted since the lawsuit went public with more evidence that
516 Xyience is still perpetrating fraud. There are multiple ongoing civil lawsuits against Xyience with one
517 containing allegations of RICO Act violations. A new lawsuit appeared in the past few weeks, and in
518 another lawsuit (Bardo Equities vs. Xyience) the plaintiff has yet to be paid by Xyience as part of the
519 agreed upon settlement won by the Plaintiff. Bergeron also obtained an email from a current client of
520 Xyience (Exhibit 10) in which they confess to not being paid and report major issues with the way
521 Xyience markets themselves compared to what their numbers actually show.

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523 Consider that Xyience calls Xenergy one of the best selling energy drinks in the country.

524 Xenergy's release date was late last year. There is no possible way with the drink only so far available
525 at a handful of stores and one major chain (7-11) that it would be able to boast that claim truthfully.
526 They have not even had significant time to get a foothold in the industry, never mind be able to claim
527 they somehow come close to dominating it. Indeed, if Xenergy was one of the best selling energy
528 drinks in the nation, Xyience should not be suffering from such heavy losses as they accuse Bergeron
529 of causing them to sustain. They should not have to rely on investment capital to survive.

530 Pike's iron grip on this corporation is what is defaming and damaging it. His mere association
531 with this company causes investors who know about his involvement and his criminal past to steer
532 clear of it. Those impeccable leaders brought in to right the ship have all come and gone, and so have
533 numerous employees. Xyience's own lawyers resigned in their Phoenix Labs case. Bergeron only
534 made it easier to find out how Pike was connected to the company and made Pike's criminal history
535 known. He only reported the truth about the company and those involved in the corruption there. He
536 uncovered all that they were trying to hide, and he let the world know before the company could inflict
537 anymore harm on any more uneducated investors. Bergeron has been told by initial investors that Pike
538 always promised to only make 500,000 pre-IPO shares available to investors. He has since
539 manipulated PPM books, sold millions of shares in the company, and now claims a hardship in
540 attracting potential future investors due to Bergeron's true stories exposing his activities. As for current
541 investors, it is hard to believe they would support further diluting the value of their own shares by
542 making \$15 million in further shares available.

543 The court should have no reason to believe Plaintiff's contentions about the potential \$15
544 million investment in the first place. Plaintiff claims this investor is only willing to provide funds if
545 Bergeron's stories are taken off the Internet. If it is true that the potential investor's reasoning lies in

547 their belief that Bergeron's stories are false why is there no affidavit from this investor? What does
548 Plaintiff present in their case to prove these investors who aren't contributing this capital are not, in
549 fact, more concerned about the real, documented activities of Plaintiff that Bergeron has exposed?
550 Further, where are the affidavits to show these investors actually exist at all, regardless of the real
551 reasons why they are hesitant to contribute any funds?

552 What is even more preposterous about Plaintiff's claim of damages done by Bergeron is that
553 Plaintiff claims potential future income as losses. Bergeron cannot be held responsible for someone's
554 personal choice to avoid a particular investment. If Xyience had adequate proof to show Bergeron's
555 stories were in any way false, it should be simple for them to be able to convince potential investors to
556 disregard what Bergeron wrote. Xyience officials have repeatedly been given the opportunity to
557 provide whatever proof they can that Bergeron's stories are flawed. They have never produced a single
558 shred of evidence as to their innocence or Bergeron's being guilty of defamation. They have chosen to
559 instead publicly harass Bergeron with baseless, childish insults.

560 CONCLUSION

561 Bergeron did a public service and should not be punished for that or made to spend money he
562 doesn't have to defend himself against what is clearly a frivolous case designed to chill protected free
563 speech for the sole purpose of great financial gain. Bergeron has made no profit off this investigation,
564 has received no great personal recognition or reward, and has no reason or capacity to benefit in any
565 possible way from Xyience's demise. He is motivated only by the possibility of inspiring justice and is
566 not even interested in seeking damages for Xyience's defamation of his good name. He is willing to
567 provide the contents of his computer to any agency for the purpose of going forward with an
568 investigation into Xyience and their questionable and likely illegal activities.

569 Before any decision is made the court should honestly and objectively consider all the
570 evidence, the bulk of which can be obtained through Bergeron's own site
571 (<http://www.unlimitedfightnews.com/id16.html>) and was carelessly and purposely omitted by Plaintiff's

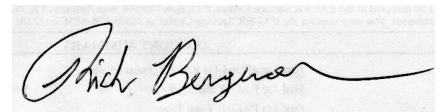
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counsel. There is absolutely no supporting documentation to justify a preliminary injunction.

Defendant asks the court to deny Plaintiff's Motion for a Preliminary Injunction. A federal criminal investigation into the Plaintiff and their attorney would be more appropriate. This court would only be empowering the plaintiff to perpetrate more fraud in the future if it were to allow this case to continue against Bergeron.

Dated this 20th Day of August, 2007

By:



Rich Bergeron

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Serving as Attorney Pro Se