

**STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG**

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-11333**

**RED VENTURES, LLC and MODERN
CONSUMER RV, LLC,**

Plaintiffs,

v.

**MODERN CONSUMER, LLC, MICHAEL
FISHMAN, MICHAEL JACOBSON,
STEVEN LEAVY and JOSH REZNICK,**

**Defendants/Counterclaim
and Third-Party Plaintiffs,**

v.

**RICARDO ELIAS, MARK BRODSKY and
DAN FELDSTEIN,**

Third-Party Defendants

**MEMORANDUM IN SUPPORT OF
MOTION FOR SANCTIONS**

Plaintiffs Red Ventures, LLC (“Red Ventures”) and Modern Consumer RV, LLC, and Third-Party Defendants Ricardo Elias, Mark Brodsky and Dan Feldstein (collectively “Plaintiffs”), proceeding by and through undersigned counsel, submit this Memorandum in Support of their Motion for Sanctions.

FACTUAL BACKGROUND

This is a case for fraudulent inducement, breach of contract, unfair and deceptive trade practices, and other claims in connection with the acquisition by Red Ventures of Modern Consumer, LLC (“Modern”), an entity formerly owned by the four individual defendants, for ten million dollars in cash, plus a 4.4% equity interest in Red Ventures. (Complaint at ¶ 1, 12, & 123-202). The parties agreed to conduct an early mediated settlement conference and selected David Hamilton as mediator for the case. (Affidavit of Mark P. Henriques [“Henriques Aff.”]at

¶¶ 6-8). After Mr. Hamilton provided several available dates in October, 2009, counsel for defendants selected October 12, 2009, as the date for the mediation. (Henriques Aff. at ¶ 9). However, when the mediation was convened, two of the four individual defendants did not appear at the mediation. (Henriques Aff. at ¶¶ 14-15). Defendants' counsel advised that defendant Michael Jacobson ("Jacobson") was travelling "out of the country," though he was not aware of Jacobson's specific location, and defendant Steven Leavy ("Leavy") had "just become a new father." (Henriques Aff. at ¶ 15). There was no notification to the mediator or to Plaintiffs' counsel that these individual defendants would not be present. (Henriques Aff. at ¶ 14). Because two of the four individual defendants did not appear, the mediation could not proceed. (October 13, 2009 letter of David Hamilton, Henriques Aff. at ¶ 21).

ARGUMENT

Rule 5 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions (the "Mediated Settlement Conferences Rules"), which applies to Business Court cases pursuant to Rule 19.1 of the North Carolina Business Court Rules, specifically provides that if a party required to attend the mediated settlement conference fails to attend without good cause, a Superior Court Judge may impose upon the party any appropriate monetary sanction "including, but not limited to, the payment of fines, attorney's fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference." *See also*, N.C. Gen. Stat. § 7A-38.1 (authorizing the Mediated Settlement Conference Rules and providing for the same sanctions upon a party's failure to appear at mediation).

In one of the few reported decisions regarding sanctions for failure to attend mediated settlement conferences, the Court of Appeals recently concluded that the court can properly award sanctions where it finds that parties failed to attend without good cause. *See Perry v. Cherokee*

Fin., 674 S.E.2d 780 (2009). “Good cause” in the context of failure to attend a mediation is a party’s “inability to attend caused ‘neither by its own conduct nor by circumstances within its control.’” *Id.*, at 786 (quoting *Triad Mack Sales & Serv., Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 438 S.E.2d 485 (1994)). In *Perry*, the court indicated that incidents such as flight delays or transportation problems could excuse a party’s attendance at a mediation. *Id.* However, here Jacobson and Leavy offer no such explanation. Instead, it appears that these defendants simply elected not to attend the mediation.

Moreover, the defendants cannot claim that the timing of the mediation was inconvenient, because counsel for defendants selected the date. (Henriques Aff. ¶ 9) If a different mediation date would have suited Jacobson’s travel plans, or the expected arrival of Leavy’s child, a different date should have been selected initially or a request should have been submitted, in advance of mediation and pursuant to the Mediated Settlement Conference Rules, to reschedule to a more convenient time. Here, no such rescheduling request was made, and counsel for defendants refused at the convened mediation to offer dates that defendants Jacobson or Leavy would attend mediation.¹

Indeed, counsel for defendants conceded that they did not make an effort to have Jacobson or Leavy present because they did not understand that their attendance was required. (Henriques Aff. at ¶ 16) However, failure to read the rules does not constitute “good cause” for failing to appear.

¹ Counsel for defendants indicated that they would only discuss rescheduling the mediation if Plaintiffs waived their right to seek costs based on defendant Jacobson and Leavy’s failure to appear. (Henriques Aff. at ¶ 19).

Because Jacobson and Leavy failed to appear at the mediation without excuse or good cause, the question before the Court is the appropriate amount of sanctions to award Plaintiffs. N.C. Gen. Stat. § 7A-38.1 and Rule 5 speak of “fines, attorney’s fees, mediator fees, expenses and loss of earnings incurred by persons in attendance.” Although the undersigned spent more than 18 hours preparing for the mediation (Henriques Aff. ¶ 11), much of this work may still be used in a subsequent early mediation. Assuming an early mediation is re-scheduled, Plaintiffs only seek compensation for time spent on October 12, 2009. This period of three hours (from 7:30 a.m. until 10:30 a.m.) results in attorney’s fees of \$1,215. (Henriques Aff. ¶13, 31) The anticipated mediator’s fee that Plaintiffs are entitled to recover is \$368.75. (Henriques Aff. ¶ 32)

Estimating the value of lost time by the Third-Party Defendants is more difficult. Third-Party Defendant Ricardo Elias is the Chief Executive Officer, Dan Feldstein is the Chief Marketing Officer and Mark Brodsky is the Chief Financial Officer of Red Ventures. (Henriques Aff. ¶¶ 22, 23 and 24) These Third Party Defendants are the owners and leading executives of a company with over 500 employees. (Henriques Aff. ¶ 25) While these individuals do not have established “hourly rates” their time and productivity is at least as valuable as that of their attorney. Hourly rates of \$400, \$300 and \$300 respectively are reasonable and fair. (Henriques Aff. ¶¶27, 28 and 29) Despite the fact that all three individuals blocked out an entire day for the mediation, Plaintiffs only seek reimbursement for 4.0 hours (7:00 a.m. to 11:00 a.m., which includes travel time from Ballantyne) at \$1,000 per hour (\$400 + \$300 + \$300), for a total of \$4,000.

CONCLUSION

If early mediation is re-scheduled, Plaintiffs seek a total compensation of \$5,583.75 from Defendants Jacobson and Leavy as a result of their failure to appear at the mediation. If mediation does not take place until after depositions, Plaintiffs are also entitled to recover for their time spend

preparing for early mediation, which is \$7,411.50 in attorney's fees and \$3,000 in lost client time.
(Henriques Aff. ¶ 25), for total fees and costs of \$15,995.25.

Respectfully submitted this 19th day of October, 2009.

/s/ Mark Henriques _____

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CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that this Memorandum of Law complies with the word limitations set forth in N.C. Bus. Ct. Rule 15.8 and is less than 7,500 words.

I HEREBY CERTIFY that on this the 19th day of October, 2009, the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS** was served upon opposing counsel, as provided below, via the Business Court's electronic filing system:

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