STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 11333

RED VENTURES, LLC and MODERN CONSUMER RV, LLC, **Plaintiffs/Counterclaim Defendants,** **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.**	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SANCTIONS

NOW COME defendants/counterclaim and third-party plaintiffs, Michael Fishman ("Fishman"), Michael Jacobson ("Jacobson"), Steven Leavy ("Leavy"), Josh Reznick ("Reznick"), and Modern Consumer, LLC ("MC") (collectively, "defendants"), who, by and through counsel, respectfully submit this Memorandum in opposition to the motion for sanctions of plaintiffs/counterclaim defendants Red Ventures, LLC ("RV") and Modern Consumer RV, LLC ("MCRV"), and third-party defendants Ricardo Elias ("Elias"), Mark Brodsky ("Brodsky"), and Dan Feldstein ("Feldstein") (collectively, "plaintiffs").

FACTUAL BACKGROUND

Defendants respectfully direct the Court to the Affidavits of Mark A. Berube, Esq., sworn to November 9, 2009 ("Berube Affidavit") and Steven K. McCallister, Esq., sworn to November 9, 2009 ("McCallister Affidavit"), for a statement of the facts pertinent to this motion.

ARGUMENT

I

THE OCTOBER 12, 2009 MEDIATION WAS NOT A COURT-ORDERED MEDIATION SUBJECT TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS.

Plaintiffs' motion for costs is entirely premised on the argument that the October 12, 2009 Mediation, unilaterally cancelled by plaintiffs, was a Court-Ordered Mediation subject to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions ("Rules").[1] It was not.

[1] Even the Rules, which defendants contend are inapplicable under the circumstances, only provide that the Court "may" issue sanctions -- the imposition of sanctions is not mandatory but discretionary. See Rules, Rule 5. Further, an imposition of sanctions may only be made "after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law." Id. Any such hearing would only serve to inflate the parties' costs, especially given the necessity of appearances by counsel and parties located in New York, to amounts far in excess of the costs being sought in plaintiffs' unwarranted motion.

As set forth in the Berube and McCallister Affidavits, the October 12 Mediation was expressly understood as a voluntary, preliminary Mediation held upon the request of plaintiffs. See Berube Aff. at ¶¶ 3-5; McCallister Aff. at ¶¶ 3-4. The purpose of said Mediation was to explore the parties' initial positions and begin a settlement dialogue. Id. It was always understood that a second, formal Mediation would be held at or near the close of discovery, when the parties would be in a position to fully evaluate their respective positions. Id. Indeed, the lack of an Affidavit from Kenneth B. Oettinger, Jr., Esq., counsel to plaintiffs who requested the pre-discovery Mediation, to rebut defendants' understanding of this preliminary Mediation speaks volumes.

That the Court-Ordered Mediation would occur toward the end of discovery is confirmed by this Court's Order, the parties' joint pleadings, and the Rules themselves. A pre-discovery Mediation is nowhere set out or even contemplated in the Court's August 18, 2009 Case Management Order ("Order") or the parties' August 4, 2009 Case Management Report ("Report"). The Order requires that Mediation take place by June 30, 2010, while the Report contemplates that date being one month later -- July 30, 2010. These deadlines envisage completion of the vast majority of discovery, including all expert discovery, prior to any Court-Ordered Mediation. See Berube Aff. at ¶ 5. Indeed, the Rules themselves provide that "[a]s a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery ..." See Rules, Rule 3B.

Pursuant to this Court's Order, defendants have an obligation to attend one Mediation toward the close of discovery and by June 30, 2010. Defendants had no obligation to agree either to attend two Mediations or a preliminary Mediation as a courtesy and accommodation to plaintiffs. See Berube Aff. at ¶¶ 5-6. In these premises, plaintiffs' decision to cancel the

Mediation and move for sanctions for an alleged rules violation in connection with ***an entirely voluntary Mediation***, is not only legally unsupportable but extraordinarily counterproductive to any resolution of this litigation on the merits.

The underlying facts of the one case to which plaintiffs cite, Perry v. Cherokee Fin., 674 S.E.2d 780 (2009), only support defendants' position. There, the Court ordered the parties to engage in a single Mediation by May 31, 2007 -- after discovery and within 10 days of trial. Id. at 782. The Mediation was in fact held on May 15, 2007, within two weeks of the Court's post-discovery deadline. Id. And, defendants there, far from cancelling the Mediation, participated in an eight-and-a-half hour session with certain absent plaintiffs participating by telephone. Id.

Indeed, the unreasonableness of plaintiffs' decision is only highlighted when one takes account of the reasons why Messrs. Jacobson and Leavy did not attend the Mediation, and that both (i) had discussed settlement with Mr. Fishman, (ii) fully authorized him to negotiate on their behalf, and (iii) were available by telephone during the Mediation. See Berube Aff. at ¶¶ 7-8. Accordingly, plaintiffs' motion for sanctions should be denied in its entirety.

II

THE "HOURLY RATES" PLAINTIFFS REQUEST FOR THIRD-PARTY DEFENDANTS ELIAS, BRODSKY, AND FELDSTEIN ARE WHOLLY UNSUPPORTED AND UNREASONABLE.

By their motion, plaintiffs seek to recover third-party defendants' alleged lost time in attending the October 12, 2009 Mediation -- a Mediation they themselves cancelled. After conceding that none of these gentlemen are in fact "paid an hourly rate," plaintiffs, in the same breadth, value Elias' time at $400 per hour and Brodsky's and Feldstein's time at $300 an hour. See Henriques Aff. at ¶¶ 27-29. Plaintiffs seek a minimum of $4000 in costs based upon these fictitious "hourly rates." Plaintiffs' Memo. at 4. Plaintiffs do not and cannot demonstrate how these sums are reasonable, especially in light of the fact that these salaried employees are not out

of pocket any money as a result of attending the Mediation. Any recovery of third-party defendants' "hourly rates" should be denied.

III

PLAINTIFFS' REQUEST FOR COSTS FOR PREPATORY WORK IN THE EVENT ANOTHER PRELIMINARY MEDIATION IS NOT HELD SHOULD BE DENIED.

Plaintiffs argue that, in the event a further preliminary Mediation is not held, they should be awarded costs, in the additional amount of $10,411.50, related to their preparation for the preliminary October 12, 2009 Mediation. See Henriques Aff. at ¶¶ 11, 33. Plaintiffs maintain that these efforts "will have been wasted" absent another preliminary Mediation. Id. at 33. These preparation efforts mainly relate to the drafting of Mr. Henriques' much discussed, self-professedly estimable PowerPoint mediation presentation. Id. at 11.

Plaintiffs' request should be denied. Preparation for the Mediation, including preparation of Mr. Henriques' "PowerPoint mediation presentation," can hardly be characterized as wasted effort. Such preparatory work is obviously useful in focusing plaintiffs' litigation position and strategy. In addition, a revised and updated version of Mr. Henriques' PowerPoint could obviously be used at any later Mediation. The work done in preparation for the Mediation will aid and inform plaintiffs' efforts going forward, and plaintiffs' attempt to recover costs related thereto should be denied.

IV

PLAINTIFFS' REQUEST THAT DEFENDANTS JACOBSON AND LEAVY BEAR THE COSTS OF A FUTURE MEDIATION IS WHOLLY UNSUPPORTED.

Plaintiffs, in one sentence in their Motion, also request "that any fees associated with a rescheduled Mediation be the responsibility of Defendants Jacobson and Leavy." Plaintiffs' Motion at ¶ 15. Apart from this stand-alone request, plaintiffs offer no authority or argument as to why Jacobson and Leavy should be required to pay the costs of a *future* Mediation. Indeed,

the Rules themselves do not contemplate any such relief. Plaintiffs' unsupported request should be denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for sanctions should be denied in its entirety, and the Court should grant defendants such other relief as the Court deems just and proper.

Respectfully submitted, this the 9th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS has been served on all counsel of record via electronic filing with the North Carolina Business Court pursuant to N.C.B.C. Rule 6, this the 9th day of November, 2009.

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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