

**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**

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' 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 Reply Memorandum in Support of their Motion for Sanctions.

**SUMMARY**

Defendants Jacobson and Leavy acknowledge that they did not attend the Mediation, in violation of the Rules Implementing Statewide Mediated Settlement Conference in Superior Court Civil Actions (the “Rules”). Defendants’ entire defense centers on the strained argument that the October 12, 2009 Mediation (the “Mediation”) was not a “real” mediation subject to the Rules. This contention is without merit.

## ARGUMENT

### I. The October 12, 2009 Mediation Was A Court-Ordered Mediation Subject To The Rules.

Defendants do not dispute that David Hamilton was designated as the mediator for the court-ordered mediation. (Affidavit of Mark P. Henriques [“Henriques Aff.”] at ¶ 8). Nor do Defendants deny that David Hamilton exercised his authority to set the mediation date of October 12, 2009. (Henriques Aff. at ¶ 10). Since the Mediation was scheduled by the court-appointed mediator, there is simply no basis to conclude that it was not a mediation under the Rules.

Neither the Berube or McAllister affidavit alleges any agreement that the Mediation would not be subject to the Rules. The Affidavit of Kenneth B. Oettinger, Jr. (“Oettinger Aff.”), filed herewith and attached as Exhibit A, confirms that there was never any agreement to limit the parties duties under the Rules. (Oettinger Aff at ¶ 10). While the parties did agree that their first mediation would not result in *impasse*, but would be continued to a second session near the close of discovery (Oettinger Aff. at ¶ 8), this hardly means that the first session would not be conducted in accordance with the Rules.

Defendants reference to the 2010 deadline for completion of mediation is irrelevant. The deadline establishes an outside limitation by which the mediation must be completed. The parties can, and in this instance did, agree to conduct mediation earlier. The fact that the Mediation took place before the court-imposed deadline does not relieve the parties of their obligation to comply with the Rules.

Defendants do not dispute the fact that they failed to advise counsel for Plaintiffs that they would not be attending the mediation. Mr. Berube acknowledges that Mr. Jacobson was never scheduled to attend the mediation (Berube Aff at ¶ 7). This fact was never conveyed to counsel for Plaintiffs. A simple letter, e-mail or telephone call stating that two of the Defendants

would not be attending could have resolved the issue. Defendants added insult to injury by refusing to even discuss rescheduling the mediation unless Plaintiffs waived any claim to recover the cost of attending the cancelled session. Defendants' conduct clearly justifies an award of sanctions.

II. Red Ventures' Top Three Executive Officers Cancelled Business Obligations In Order to Attend The Mediation.

Aware of their obligation to personally attend, Red Ventures Chief Executive Officer Ric Elias, Chief Finance Officer Mark Brodsky and Chief Marketing Officer Dan Feldstein each blocked off the entire day to attend the Mediation. (Henriques Aff. at ¶ 30). The cancellation resulted in a significant opportunity cost to Red Ventures. Compensation for time lost due to a cancelled mediation is clearly contemplated by the Rules. The \$3,000 amount sought is modest under the circumstances.

III. All Preparation Time Is Compensable.

As reflected in the Henriques Affidavit, the undersigned spent 18.3 hours preparing for the Mediation. The powerpoint presentation will have to be completely redone if mediation does not take place until the end of discovery. Similarly, the case evaluation and analysis of key issues will change as a result of discovery. Accordingly, Plaintiffs should be compensated for all attorney's fees associated with the Mediation (\$7,411.50).

IV. Defendants Jacobson and Leavy Should Bear The Costs of A Subsequent Mediation Session.

Because the mediation session was properly convened and may have resolved the case, there may have been no need for a future mediation session. It is entirely reasonable that the cost of a re-convened mediation be borne by Defendants Jacobson and Leavy. *See Perry v. Cherokee*, 674 S.E.2d 780 (2009).

## CONCLUSION

While they complain about travel expenses, Defendants elected to retain counsel in New York and Raleigh. Local counsel could have saved travel dollars and raised a flag when it became apparent that personal attendance would not occur. Instead, Defendants flaunted the Rules by showing up with only two of the four individual Defendants and insisting that Mediation proceed without their attendance. Defendants compounded their error by refusing to re-schedule the session.

Plaintiffs' request is straight-forward. The Mediation was cancelled because Defendants Jacobson and Leavy failed to attend without notice or excuse. Plaintiffs are entitled to recover the associated costs and attorneys fees.

Respectfully submitted this 18<sup>th</sup> day of November, 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 18<sup>th</sup> day of November, 2009, the foregoing **PLAINTIFFS'REPLY 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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