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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 MICHAEL C. BAUERLEIN, et al., ) No. CIV 04-1904-PHX-SMM  
10 Plaintiffs, )  
11 vs. ) **MEMORANDUM OF DECISION AND**  
12 EQUITY RESIDENTIAL PROPERTIES) **ORDER**  
13 MANAGEMENT CORP.; et al., )  
14 Defendants, )  
15

16 Pending before the Court is Plaintiff's Motion to Compel Defendants Equity and Lotus to  
17 Reimburse Plaintiff the Costs Associated With the April 13, 2007 Mediation.<sup>1</sup> (Doc. 199). After  
18 careful consideration, the Court issues the following ruling.

19 On June 19, 2006, Plaintiff Michael Bauerlein, his statutory beneficiaries and Defendants  
20 Equity and Lotus conducted the first mediation before Marc Appel in this matter. Defendant Jumbo  
21 had yet to enter its appearance at that time. The mediation was unsuccessful.

22 On February 22, 2007, the parties, including Jumbo, attended a Preliminary Pretrial  
23 Management Conference. Subsequently, the Court ordered that the parties conduct a second

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25 <sup>1</sup>The Court will remind parties that all PDF documents must be created by a word  
26 processing program. **Failure to comply with local rules will result in the Court striking the**  
27 **document from the record.** See LRCiv 7.1(c)(Documents submitted for filing in the ECF  
28 System shall be in a Portable Document Format (PDF)...**documents shall be converted to PDF**  
**directly from a word processing program** (e.g., Microsoft Word® or Corel WordPerfect®),  
rather than created from the scanned image of a paper document.) LRCiv 7.1(c). (emphasis  
added)

1 mediation before May 1, 2007. This mediation took place on April 13, 2007 before retired Justice  
2 of the Arizona Supreme Court, Thomas Zlaket (hereinafter "the mediator"). Those in attendance  
3 were Plaintiff Michael Bauerlein and his counsel, counsel for Plaintiff Shannon Bauerlein, counsel  
4 for Defendant Jumbo, counsel for Defendant Equity, Equity's representative Joel Davis, counsel  
5 for Defendant Lotus and Lotus' local insurance representative. This mediation, and the events that  
6 took place, are the subject of this Motion. Plaintiffs contend that Defendants acted in bad faith  
7 by allowing Equity's representative with settlement authority, Joel Davis, to leave the mediation  
8 early. Shortly after Mr. Davis left, Lotus' local insurance representative with settlement  
9 authority, Howard, left the mediation. Plaintiff was not made aware of Davis or Howard's  
10 departure until the mediator mentioned it. Plaintiff argues that had Defendants warned Plaintiffs'  
11 counsel they were only willing to attend for less than three hours, Plaintiff would not have agreed  
12 to the costs of bringing the mediator to Phoenix from Tucson and Plaintiffs' counsel would not have  
13 agreed to do such a short and limited mediation.

14 After careful consideration of the Plaintiff's motion and the Defendants' Response thereto,  
15 the Court finds that the reason for the unsuccessful mediation was not in fact bad faith, but was  
16 rather a culmination of factors such as a vast divergence of the estimates of the value of the claims;  
17 the fact that everyone was under the impression that Defendant Jumbo, a party not involved in the  
18 first mediation, intended to offer money toward settlement; the fact that Jumbo's counsel was not  
19 given settlement authority; and the fact that Jumbo would not pay any amount to settle based on the  
20 belief that it is essentially judgment proof as a Taiwanese corporation without any U.S. holdings.

21 Furthermore, in order to ease the minds of the Plaintiffs, neither Mr. Davis of Equity , nor  
22 Howard of Lotus simply left the mediation without conferring with the mediator and granting  
23 settlement authority to the appropriate individuals. Mr. Davis had notified the mediator of his  
24 flight situation and had been advised by the mediator that the case would not settle based on the  
25 parties' individual evaluations of the claims because they were too far apart and had too divergent  
26 estimates of the value of their claims. Moreover, the mediator was amenable to Mr. Davis leaving  
27 for his flight as long as Mr. Davis left Equity's counsel with authority to settle all claims, which he  
28 in fact did. With regard to Howard, Lotus's contends that he remained at the mediation for a

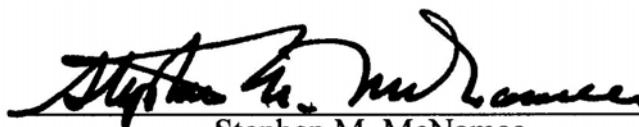
1 significant time after Mr. Davis departed, had attempted to negotiate a settlement, but because the  
2 parties had reached an impasse, he decided to confer settlement authority upon counsel for Lotus  
3 and to make himself available by telephone in the event that the attorneys and the mediator  
4 believed that somehow they could overcome impasse.

5 The fact of the matter is that neither counsel nor mediators can ever truly foresee the exact  
6 duration of a mediation. Part of agreeing to participate in mediation is knowing that it is a process  
7 that may end at the occurrence of an impasse. Inevitably, when parties come to a point where the  
8 estimates of the value of their claims are so divergent that the mediator does not foresee a  
9 settlement, an impasse has occurred and often times a settlement cannot be reached. It is the Court's  
10 finding that bad faith was not involved here, rather, an impasse occurred and settlement was  
11 unattainable.<sup>2</sup>

12 Accordingly,

13 **IT IS HEREBY ORDERED DENYING** Plaintiff's Motion to Compel Defendants Equity  
14 and Lotus to Reimburse Plaintiff the Costs Associated With the April 13, 2007 Mediation. (Doc.  
15 199).

16 DATED this 22<sup>nd</sup> day of May, 2007.

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21 Stephen M. McNamee  
22 United States District Judge  
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28 <sup>2</sup>The Court will refrain from commenting on the issue of the payment of lunch.