

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

**IN RE: XE SERVICES ALIEN TORT  
LITIGATION**

**No. 1:09-cv-615  
No. 1:09-cv-616  
No. 1:09-cv-617  
No. 1:09-cv-618  
No. 1:09-cv-645  
No. 1:09-cv-1017  
No. 1:09-cv-1048  
(consolidated for pretrial purposes)  
(TSE/IDD)**

**DEFENDANTS' RESPONSE TO PLAINTIFFS' PURPORTED  
WITHDRAWAL OF STIPULATION OF DISMISSAL WITH PREJUDICE  
AND FILING OF AMENDED COMPLAINTS**

On November 5, 2009, Plaintiffs, through both of their counsel, and Defendants concluded an agreement to settle these cases. The next day, November 6, 2009, Plaintiffs' counsel filed a Stipulation of Dismissal with Prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1).

The filing of that Stipulation of Dismissal with Prejudice immediately terminated these lawsuits; further action by the Court was not required. Plaintiffs cannot revive terminated actions through a purported "withdrawal" of the Stipulation of Dismissal. The only way that Plaintiffs may attempt to reopen these terminated cases – if that is what one or more Plaintiffs wish to do – is to seek relief pursuant to Federal Rule of Civil Procedure 60. The Court accordingly should issue an order denying Plaintiffs' attempted unilateral withdrawal of the Stipulation of Dismissal.

Plaintiffs' purported filing of the amended complaints is ineffective because the actions were terminated by the filing of the Stipulation of Dismissal, as well as for the additional reason

that Plaintiffs had neither Defendants' consent nor the Court's permission to file amended complaints on Sunday, November 8. The amended complaints accordingly should be stricken from the record of these actions.

**A. Plaintiffs May Not Unilaterally “Withdraw” The Stipulation Of Dismissal Because The Filing Of The Stipulation Immediately Terminated These Lawsuits.**

Rule 41(a)(1) states that “the plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared.” Plaintiffs did just that, filing the Stipulation of Dismissal, which specified that the dismissal was with prejudice. *See* Dkt. No. 123;<sup>1</sup> *see also* Fed. R. Civ. P 41(a)(1)(B) (stating that dismissal is without prejudice “[u]nless the notice or stipulation states otherwise”). The filing of that Stipulation “dismiss[ed] [the] action without a court order” by operation of Rule 41 (a)(1).

Numerous courts have recognized that “the entry of such a stipulation of dismissal is effective automatically” at the time it is filed. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984); *see In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988); *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998); *Berishev v. Chertoff*, 486 F. Supp. 2d 202, 205 (D. Mass. 2007) (“If a joint stipulation for dismissal is made pursuant to Rule 41(a)(1) – with or without prejudice – it is effective upon filing and neither requires nor allows judicial action to effectuate the dismissal.”); *see also* 9 Wright & Miller, Fed. Prac. & Proc. Civ. § 2363 (3d ed.) (“A voluntary dismissal by stipulation under Rule 41(a)(1)(A)(ii) is effective immediately upon filing and does not require judicial approval.” (footnote omitted)).

“Once the stipulation is filed, the action on the merits is at an end.” *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989). The court cannot take any further action because it lacks

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<sup>1</sup> The docket numbers cited herein refer to the docket in *Sa’adoon*, No. 09-615. Identical stipulations were filed in all seven consolidated cases.

jurisdiction—“there is no ‘case or controversy’ pending in light of the dismissal.” *GMAC Commercial Mortgage Corp. v. LaSalle Bank N.A.*, 213 F.R.D. 150, 151 (S.D.N.Y. 2003); *see Kay v. Online Vacation Ctr. Holdings Corp.*, 539 F. Supp. 2d 1372, 1374-75 (S.D. Fla. 2008) (“By filing a Notice of Voluntary Dismissal with Prejudice, Plaintiff extinguished the case or controversy between himself and Defendants . . .”); *Mutual Produce, Inc. v. Penn Cent. Transp. Co.*, 119 F.R.D. 619, 621 (D. Mass. 1988); *Reagan v. Fox Navigation LLC*, No. Civ. A. 302CV627CFD, 2005 WL 2001177, at \*1 (D. Conn. 2005).

By filing the Stipulation of Dismissal with Prejudice, Plaintiffs here terminated their controversy with Defendants and divested this Court of jurisdiction in these actions. Because the actions were terminated, Plaintiffs may not withdraw the Stipulation and this Court lacks the power to authorize them to do so.

**B. Plaintiffs’ Only Avenue For Attempting To Revive These Actions Is To Seek Relief Pursuant To Rule 60.**

The Federal Rules of Civil Procedure establish a procedure for relief from the erroneous termination of an action: a motion under Rule 60 for relief from judgment. Indeed, courts have recognized that a Rule 60 motion is the only available remedy for plaintiffs in the situation that may be presented here – a party contending that his or her attorney acted without authority in filing a stipulation of dismissal with prejudice.

Rule 60(b) provides that a court “may relieve a party or its legal representative from a final judgment, order, or proceeding” for six enumerated reasons, including mistake. Fed. R. Civ. P. 60(b). “An unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b).” *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985); *see Smith*, 881 F.2d at 904; *Hinsdale v. Farmers Nat’l Bank & Trust Co.*, 823 F.2d 993, 996 (6th Cir. 1987).

The court's opinion in *Zogheib v. U.S. Bancorp*, No. 2:05-CV-1354 JCM (LRL), 2007 WL 1612145 (D. Nev. 2007), *aff'd sub nom Zogheib v. Coast Hotels & Casinos, Inc.*, 325 Fed. Appx. 602 (9th Cir. 2009), is directly on point here. The parties in *Zogheib* filed with the court a stipulation of dismissal with prejudice. Four days later, the plaintiff filed a Notice of Withdrawal of the stipulation, requesting that the court "not approve and file" the stipulation. The court initially granted the request, but, after the defendant filed a motion to enforce the stipulation, the court held that a Rule 60(b) was the appropriate mechanism for the plaintiff to a claim that his attorney lacked the authority to enter into a settlement agreement. 2007 WL 1612145, at \*6.

The *Zogheib* court conducted an evidentiary hearing and concluded that the plaintiff failed to carry his "heavy burden to establish that his attorney acted without authority in agreeing to the stipulation to dismiss." *Id.* at \*6 (citing *Surety Ins. Co. v. Williams*, 729 F.2d 581, 583 (8th Cir. 1984)). The court explained that, to obtain relief under Rule 60(b), "Zogheib must establish through competent evidence that his attorney lacked actual, implied, or apparent authority to stipulate to a dismissal. Zogheib must also show that his change of heart is not simply motivated by a case of buyer's remorse." *Id.* (citing *Surety Ins. Co.*, 729 F.2d at 583, and *Smith*, 627 F.2d at 795). Accordingly, the court rescinded its order granting the plaintiff's request to withdraw the stipulation of dismissal. *Id.* at \*7.

Other courts have imposed a similarly heavy burden on parties seeking to overturn settlements entered into by their attorneys, requiring proof that the attorney was "acting without authority of the party to that party's detriment." *Cashner v. Freedom Stores*, 98 F.3d 572, 577 (10th Cir. 1996). If the client made an informed choice to settle and thereafter changed his mind, he is not entitled to relief from judgment. *E.g.*, *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101-02 (9th Cir. 2006) ("A party will not be released from a poor litigation decision made

because of inaccurate information or advice, even if provided by an attorney. Latshaw’s decision to accept the offer was deliberate and independent. In such situations, regret caused by new knowledge does not justify rescinding a decision.”); *Andrulonis v. United States*, 26 F.3d 1224, 1235 (2d Cir. 1994) (Rule 60(b) “does not allow district courts to indulge a party’s discontent over the effects of its bargain” (citation and internal quotation marks omitted)).

Plaintiffs here have not even invoked Rule 60(b), let alone attempted to make the evidentiary showing required to justify the extraordinary remedy of relief from judgment under Rule 60(b). *See, e.g., United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (Rule 60(b) provides for “extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances”). For this reason as well, Plaintiffs’ purported withdrawal of the Stipulation of Dismissal with Prejudice should be rejected.

**C. The Amended Complaints Should Be Stricken.**

Plaintiffs’ filing on Sunday, November 8 of amended complaints in all seven cases was plainly improper. Because the actions were terminated on November 6 by the filing of the Stipulation of Dismissal with Prejudice, amended complaints could not be filed. *See supra* section A.

The amended complaints purportedly filed November 8, 2009 represent Plaintiffs’ third (and in some cases, fourth) attempt to file a proper complaint in these cases. Plaintiffs obtained neither the permission of the Court (which in its November 3, 2009 Order authorized the filing of amended complaints “by 5:00 p.m., Friday, November 6, 2009” (Dkt. No. 120)) nor the consent of the Defendants, and therefore filed these complaints in violation of Fed. R. Civ. P. 15(b) as well. For both of these reasons, the amended complaints should be stricken.<sup>2</sup>

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<sup>2</sup> If these amended complaints had been properly filed, Defendants would move to dismiss them on numerous grounds, as well as to strike portions of them under Rule 12(f).

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court issue an order denying Plaintiffs' attempt to "withdraw" the Stipulation of Dismissal with Prejudice filed November 6 and striking the amended complaints purportedly filed on November 8, 2009.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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