

IN THE UNITED STATES COURT  
DISTRICT OF KANSAS

SAMUEL K. LIPARI, )  
)  
*Plaintiff,* )  
)  
v. ) Case No.2 :07-cv-02146-CM  
)  
U.S. BANCORP and )  
U.S. BANK NATIONAL ASSOCIATION, )  
)  
*Defendants.* )

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OCT 28 PM 3:33  
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BY [Signature] DEPUTY  
AT KANSAS CITY, KS

**REPLY TO DEFENDANTS' CONDITIONAL STIPULATION OF DISMISSAL**

Comes now the plaintiff Samuel K. Lipari appearing pro se and responds to the defendant's conditional stipulation of dismissal dated October 21<sup>st</sup> 2008.

The plaintiff has not stipulated to any attorney's fees. The defendant's motion for such fees as a condition failed

The defendants' repeatedly in bad faith burdened the plaintiff with motions and requests violating the Federal Rules of Civil procedure including a second motion to dismiss. There could not have been two motions for dismissal:

"We are presented here with a unique situation, however, because the cause of action not incorporated in the second amended complaint had already been subjected to a 12(b)(6) ruling. The opposing party could not therefore direct a further motion at that cause of action."

*Davis v. TXO Production Corp*" 929 F.2d 1515 at 1517 (C.A.I 10 (Ok!), 1991).

Because the same matter or controversy is before the court in two case numbers, no fees are warranted for dismissal:

"Kidde re-filed its complaint the same day it moved to dismiss Kidde I. Thus, the district court had before it two complaints that were the same, except that Kidde II was filed after Kidde I had allegedly cured the standing problem that had been raised in Kidde I.6 Nevertheless, USI opposed Kidde's motion to dismiss, arguing that it would be "severely prejudiced if Kidde were allowed to simply dismiss its claim without prejudice and then start over," because it has expended significant resources and effort on Kidde I. The problem with that argument is an unstated and apparently false assumption. The implicit assumption is that USI cannot use the same factual and legal resources in Kidde II that it developed in Kidde I. The record belies that. It appears instead that the effort USI has expended in preparing for the first trial will not be wasted. USI can, and no doubt will, use in the second action the discovery and work product obtained in the first, which is a compelling reason to conclude that the district court did not abuse its discretion in dismissing Kidde I. See *Davis*, 819 F.2d at 1275 (noting with approval precedent reversing denial of voluntary dismissal when the defendant had shown no prejudice beyond "the annoyance of a second litigation upon the same subject matter" (quoting *Durham*, 385 F.2d at 369)),"

*Walter Kidde Portable Equipment, Inc. v. Universal Security Instruments, Inc.*, 479 F.Jd 1330 at 1337-1338 (Fed. Cir., 2007).

The Tenth Circuit rule in *AeroTech, Inc. v. Estes*, 110 F.Jd 1523 and at fn I (C.A.I 0 (Colo.), 1997) is that fees with a voluntary dismissal with prejudice are improper:

"Today, we continue to adhere to the rule that a defendant may not recover attorneys' fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances. When a plaintiff dismisses an action without prejudice, a district court may seek to reimburse the defendant for his attorneys' fees because he faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him. See *Cauley*, 754 F.2d at 771-72. In contrast, when a plaintiff dismisses an action with prejudice, attorneys' fees are usually not a proper condition of dismissal because the defendant cannot be made to defend again. *Id.* Of course, when a litigant makes a repeated practice of bringing claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing party and the judicial system, attorneys' fees might be appropriate. But such an exceptional circumstance is not present here. Accordingly, we conclude that the district court did not abuse its discretion in denying attorneys' fees under Rule 41(a)(2)."

*AeroTech, Inc. v. Estes*, 110 F.3d 1523 (C.A.I 0 (Colo.), 1997). The Tenth Circuit has determined that fees as a condition of dismissal are normally only appropriate in voluntary dismissals without prejudice. See *US. ex rel Stone v. Rockwell Intern. Corp.*, 282 F.Jd 787 (10th Cir., 2002).

This court's own rule or precedent is that a voluntary dismissal with prejudice does not require an order:

The Kansas District court's own precedent is that on a motion under 41(a)(2) seeking dismissal without prejudice requires a court order:

Under Rule 41(a)(2), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Thus, a dismissal without prejudice under Rule 41(a)(2) depends on the Court's discretion."

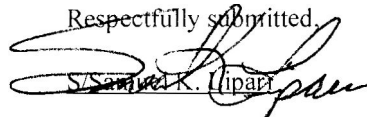
*103 Investors I, L.P. v. Square D Co.*" 222 F.Supp.2d 1263 at 1270-1271 (D. Kan., 2002)

The plaintiff's stipulation of dismissal with prejudice is a judgment on the merits. See *Astron Indus. Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 at 960 (C.A.5 (Fla.), 1968), *Pultney Arms LLC v. Shaw Industries Inc.*" 3:00cv2052(JBA) at pg.1 (D. Conn, 9/6/2002) (D. Conn" 2002),

#### CONCLUSION

The plaintiff respectfully reminds the court that the court's conduct toward the parties in relationship to resolving any claims brought by the plaintiff has ended. Those claims have now been removed from this proceeding. The defendants have not brought any counterclaims.

Respectfully submitted,

  
S. Samuel K. Lipari

Samuel K. Lipari  
Plaintiff  
*Pro se*

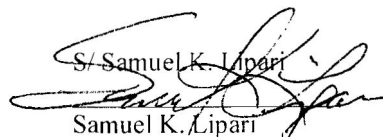
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via email, on this 28th day of October, 2008 to:

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S/ Samuel K. Lipari  
Samuel K. Lipari

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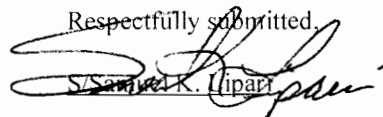
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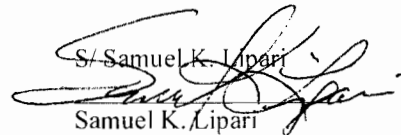
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