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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,

Plaintiff,

v.

RYAN LAMBERSON,

Defendant.

NO: 13-CV-0395-TOR

ORDER OF DISMISSAL

RYAN LAMBERSON,

Counter Claimant,

v.

ELF-MAN, LLC,

Counter Defendant.

BEFORE THE COURT is Plaintiff/Counter Defendant's Motion to Dismiss
(ECF No. 59).

1 Plaintiff/Counter Defendant Elf-Man, LLC, moves to dismiss all of its
2 claims with prejudice, and unconditionally asserts that it will not enforce
3 Copyright Registration No. PA 1-823-286 against Lamberson for any act occurring
4 to the present date. ECF No. 59 at 1. Elf-Man further contends that Lamberson's
5 counterclaims for declaratory judgment of noninfringement and copyright
6 invalidity and unenforceability should be dismissed, because declaratory judgment
7 counterclaims may only be brought to resolve actual controversies under 28 U.S.C.
8 § 2201. Because Elf-Man has stated that it will not enforce the asserted copyright
9 against Lamberson, there is no ongoing "actual controversy" as required. *See*
10 *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (The actual controversy "must be
11 extant at all stages of review, not merely at the time the complaint is filed."). As
12 such, the action in its entirety should be dismissed, Elf-Man argues.

13 Lamberson responds that he consents to the dismissal with prejudice
14 provided the Court imposes certain conditions: that Elf-Man pay costs and
15 reasonable attorney fees in advance. ECF No. 67 at 2. Lamberson contends that he
16 has pleaded all the elements of a Consumer Protection Act claim (though not the
17 express claim) and reserved the right to expressly lodge such a claim if Elf-Man's
18 still-pending first motion to dismiss Lamberson's counterclaims is denied. *Id.* at
19 10. Since the Court has yet to rule on this motion, however, Lamberson concedes
20 that he is not yet in a position to request amendment of his counterclaim to add a

1 third count for a CPA violation, and is therefore willing to concede that dismissal
2 with prejudice of the copyright claims against him would moot the two currently
3 lodged claims for declaratory relief. *Id.* at 11.

4 The Court agrees with the parties that Elf-Man’s claims and Lamberson’s
5 declaratory judgment counterclaims should be dismissed. Under Federal Rule of
6 Civil Procedure 41(a)(2), “an action may be dismissed at the plaintiff’s request only
7 by court order, on terms that the court considers proper.” “A district court should
8 grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can
9 show that it will suffer some plain legal prejudice as a result.” *Smith v. Lenches*,
10 263 F.3d 972, 975 (9th Cir. 2001) (holding that the district court did not abuse its
11 discretion in dismissing plaintiff’s federal law causes of action with prejudice on
12 plaintiff’s motion for voluntary dismissal under Rule 41(a)(2)). Here, Lamberson
13 does not object to the dismissal of the counterclaim (provided his conditions are
14 met). For this reason, and because Elf-Man moves to dismiss its claims with
15 prejudice, the court finds that there is no plain legal prejudice to Lamberson.

16 The Court declines to grant Lamberson’s request that the Court impose
17 *payment* of costs and attorney fees as a condition of dismissal—rather than
18 allowing dismissal followed by a request for attorney fees. *See Heckethorn v.*
19 *Sunan Corp.*, 992 F.2d 240, 242 (9th Cir. 1993) (holding that district court’s
20 condition that plaintiff’s former counsel pay attorney fees to the defendant had no

1 basis because Fed. R. Civ. P. 41(a)(2) is itself not a specific statutory authority for
2 imposition of sanctions against an attorney). Rather, the Court will entertain
3 Lamberson's timely motion for attorney fees and costs if there are independent
4 grounds for asserting the same.

5 **IT IS HEREBY ORDERED:**

- 6 1. Pursuant to Plaintiff/Counter Defendant Elf-Man's Motion to Dismiss
7 (ECF No. 59) all its claims and causes of action in this matter are
8 **DISMISSED** with prejudice and all of Defendant's counterclaims are
9 **DISMISSED** without prejudice.
- 10 2. All pending motions are **DENIED** as moot. All remaining hearings and
11 the jury trial are **VACATED** as moot.
- 12 3. The Court will consider Defendant's timely filed motion for attorney fees
13 and costs, if any.

14 The District Court Executive is hereby directed to enter this Order, enter
15 Judgment accordingly, and furnish copies to counsel.

16 **DATED** July 10, 2014.



20

Thomas O. Rice
THOMAS O. RICE
United States District Judge