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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PHOTOMEDEX, INC., a Delaware
Corporation,

Plaintiff,

vs.

RA MEDICAL SYSTEMS, INC., a
California Corporation, and DEAN IRWIN,
an individual,

Defendant.

CASE NO. 08-CV-2224 WQH

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss filed by Defendants RA Medical Systems, Inc. and Dean Irwin. (Doc. # 5).

BACKGROUND

On December 2, 2008, Plaintiff, Photomedex Inc. (Photomedex), filed this action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration that Photomedex did not act with malice in bringing an underlying federal action against the Defendant, RA Medical Systems (RA Medical), and an order restraining RA Medical from instituting any action against Photomedex for malicious prosecution based upon the underlying federal action. *Complaint*, p. 5. The Complaint alleges that on October 30, 2008, RA Medical issued a press release “announcing the filing of a lawsuit against PhotoMedex for malicious prosecution based on the Underlying Federal Action.” *Id.* at 3. The Complaint alleges that RA Medical has not served Plaintiff with the malicious prosecution complaint and that any lawsuit

1 action fails to meet the requisite amount in controversy, fails to state a justiciable claim ripe
2 for adjudication, and presents no actual case or controversy.

3 Photomedex contends that the requisite amount in controversy is satisfied because RA
4 Medical previously sought over \$280,000 in attorney’s fees resulting from the underlying
5 federal action.¹ Photomedex contends that an actual controversy ripe for adjudication exists
6 before this Court because RA Medical has threatened Photomedex with a malicious
7 prosecution lawsuit in an attempt to damage its business.

8 DISCUSSION

9 I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

10 Amount in Controversy

11 A suit may be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure
12 where there is a “lack of jurisdiction over the subject matter.” Fed. R. Civ. P. 12(b)(1).
13 “The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28
14 U.S.C. §§ 1331 and 1332. Section 1331 provides for ‘federal-question’ jurisdiction, § 1332
15 for ‘diversity of citizenship’ jurisdiction.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513
16 (2006); 28 U.S.C. §§ 1331-1332. “A plaintiff properly invokes § 1331 jurisdiction when
17 she pleads a colorable claim ‘arising under’ the Constitution or laws of the United States.
18 She invokes § 1332 jurisdiction when she presents a claim between parties of diverse
19 citizenship that exceeds the required jurisdictional amount, currently \$ 75,000.” *Arbaugh*,
20 546 U.S. at 513 (citing 28 U.S.C. §§ 1331-1332). The party which invokes jurisdiction
21 bears the burden of demonstrating its existence. *Kokkonen v. Guardian Life Ins. Co. Of*
22 *Am.*, 511 U.S. 375, 377 (1994).

23 RA Medical asserts that this Court lacks subject matter jurisdiction on the grounds
24 that the Complaint fails to show that the claim meets the requisite amount in controversy.
25 RA Medical contends that this Court does not have subject matter jurisdiction because
26 Photomedex has failed to allege the \$75,000 amount in controversy required under 28

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28 ¹ On January 12, 2009, Photomedex, pursuant to Federal Rules of Evidence 201(c) and (d), filed a request for
judicial notice of the district court’s order denying RA Medical’s motion for attorney’s fees in the underlying federal
action. (Doc. # 7). The Court takes judicial notice of the document.

1 U.S.C. § 1332(a)(1). RA Medical contends that Photomedex does not seek monetary
2 damages but seeks only an equitable determination through the Declaratory Relief Act,
3 under 28 U.S.C. § 2201. RA Medical contends that Photomedex cannot assert that
4 \$280,000 in attorney’s fees from another unrelated lawsuit satisfies the controversy
5 requirement for this lawsuit.

6 Photomedex asserts that the amount in controversy requirement is satisfied because
7 RA Medical previously sought attorney’s fees in excess of \$280,000 in the underlying
8 federal action. Photomedex asserts that the attorney fees from the underlying federal action
9 satisfy the amount in controversy requirement in the present declaratory judgment action
10 because it is this amount that is at stake in the pending state malicious prosecution case.
11 Photomedex asserts that this Court has subject matter jurisdiction because the amount in
12 controversy threshold has been met by the value of the underlying litigation, that is, the
13 \$280,000 in attorney’s fees sought by RA Medical, which exceeds the requisite \$75,000
14 under 28 U.S.C. § 1332.

15 The courts have held that “[i]n actions seeking declaratory or injunctive relief, it is
16 well established that the amount in controversy is measured by the value of the object of
17 the litigation.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977).
18 Attorney’s fees may be included in the amount in controversy determination “where an
19 underlying statute authorizes an award of attorney’s fees.” *Galt G/S v. JSS Scandinavia*,
20 142 F.3d 1150, 1156 (9th Cir. 1998); *see also Surber v. Reliance Nat’l Indem. Co.*, 110 F.
21 Supp. 2d 1227, 1232 (N.D. Cal. 2000). Under California malicious prosecution law, “the
22 measure of compensatory damages for the malicious prosecution of a civil action includes
23 attorney fees and court costs for defending the prior action.” *Bertero v. Nat’l Gen. Corp.*
24 1974 13 Cal.3d 43, 59; *see also Crowley v. Katleman* 1994 8 Cal.4th 666, 688.

25 As a result of the underlying federal action, RA Medical unsuccessfully sought
26 attorney’s fees in excess of \$280,000. (Doc. # 7). According to the Complaint filed in
27 state court for malicious prosecution, RA Medical seeks compensatory damages, including
28 damages in the form of attorney fees, as a result of being maliciously prosecuted by

1 Photomedex in the underlying federal action.² As stated in *Bertero*, the Court may consider
2 attorney fees from a prior action when measuring compensatory damages for malicious
3 prosecution cases. The Court concludes that Photomedex has made a prima facie showing
4 that attorney’s fees from the underlying federal action satisfy the requisite amount in
5 controversy for this declaratory judgment action.

6 **Case or Controversy**

7 RA Medical contends that Photomedex “seeks an advisory opinion from this Court
8 in an effort to preempt Defendants’ malicious prosecution action in state court.” *Mot. to*
9 *Dismiss*, p. 7. RA Medical contends that the “issue is not ripe for adjudication by this
10 Court because the malicious prosecution lawsuit filed against Photomedex is pending in
11 State Court,” and, “there is no actual case or controversy for this Court to adjudicate.” *Id.*
12 at 2. RA Medical contends that “[a]ny actual controversy that exists between Plaintiff and
13 Defendants exists in state court.” *Id.*

14 Photomedex contends that declaratory judgment is proper because an actual and
15 substantial controversy exists between the parties. Photomedex contends that a
16 “declaration that there was no malice involved in the underlying federal action would
17 effectively dispose of the entire controversy between the parties, because a finding of
18 malice is a prerequisite to obtaining any recovery for alleged malicious prosecution.”
19 *Opposition*, at 7. Photomedex asserts that an actual controversy ripe for adjudication exists
20 between the parties because the press release threatened a malicious prosecution lawsuit
21 and asserts that a declaratory judgment on the matter would be proper at this time.

22 The Declaratory Judgment Act states that “[i]n a case of actual controversy within
23 its jurisdiction . . . any court of the United States, upon the filing of an appropriate
24 pleading, may declare the rights and other legal relations of any interested party seeking
25 such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).
26 The Declaratory Judgment Act does not by itself confer subject matter jurisdiction on the

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28 ² On December 23, 2008, RA Medical, pursuant to Federal Rules of Evidence 201(c) and (d), filed a request for
judicial notice of the complaint for malicious prosecution filed in San Diego Superior Court, case no. 37-2008-00094953-
CU-CP-CTL. (Doc. # 5, Ex. A). The Court takes judicial notice of the document.

1 federal courts. *Sanford v. Memberworks, Inc.*, 2008 U.S. Dist. LEXIS 79189, at *6 (S.D.
2 Cal. Sept. 30, 2008) (citing *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir.
3 1985)). The party seeking relief under the Declaratory Judgment Act must demonstrate
4 constitutional standing under Article III of the United States Constitution because
5 declaratory judgment jurisdiction extends only to actual “cases or controversies.”
6 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). “If a case is not ripe for
7 review, then there is no case or controversy, and the court lacks subject-matter
8 jurisdiction.” *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (citing
9 *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994)). In determining whether a
10 case or controversy exists for declaratory judgment purposes, the Supreme Court noted that
11 “the question in each case is whether the facts alleged, under all circumstances, show that
12 there is a substantial controversy, between the parties having legal interests, of sufficient
13 immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland. Cas.*
14 *Co. V. Pacific Coal & Oil Co., et al.*, 312 U.S. 270, 273 (1941). “The purpose of the
15 Declaratory Judgment Act is to give litigants an early opportunity to resolve federal issues
16 to avoid ‘the threat of impending litigation.’” *Biodiversity Legal Found. v. Badgley*, 309
17 F.3d 1166, 1172 (9th Cir. 2002) (quoting *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401,
18 1405 (9th Cir. 1996)).

19 On October 30, 2008, RA Medical issued a press release announcing that the
20 company was filing a lawsuit for malicious prosecution against Photomedex based on the
21 underlying federal action. The following day RA Medical filed a lawsuit in state court for
22 malicious prosecution against Photomedex. Photomedex filed the Complaint for
23 Declaratory Judgment in response to the malicious prosecution lawsuit, requesting this
24 Court issue a declaration that Photomedex did not act maliciously in the underlying federal
25 action in order to avoid the threat of impending litigation aimed at damaging Photomedex’s
26 business. Viewing the facts in a light most favorable to the Plaintiff, the Complaint alleges
27 facts to support a substantial case or controversy between these two parties of sufficient
28 immediacy and reality to warrant declaratory relief.

1 **II. Motion to Dismiss for Failure to State a Claim**

2 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure
3 tests the legal sufficiency of the pleadings. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th
4 Cir. 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6)
5 where the factual allegations do not raise the “right of relief above the speculative level.”
6 *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not
7 be dismissed for failure to state a claim where the allegations plausibly show “that the
8 pleader is entitled to relief.” *See id.* (citing Fed. R. Civ. P. 8(a)(2)). In ruling on a motion
9 pursuant to Rule 12(b)(6), a court must construe the pleadings in the light most favorable to
10 the plaintiff, and must accept as true all material allegations in the complaint, as well as any
11 reasonable inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028
12 (9th Cir. 2003). However, legal conclusions need not be taken as true merely because they
13 are cast in the form of factual allegations. *Robertson v. Corrothers*, 812 F.2d 1173, 1177
14 (9th Cir. 1981). “Nor is the court required to accept as true allegations that are merely
15 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*
16 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (9th
17 Cir. 2001).

18 RA Medical contends that the Complaint should be dismissed pursuant to Rule
19 12(b)(6) of the Federal Rules of Civil Procedure. RA Medical contends that Photomedex
20 failed to state a claim upon which relief can be granted because Photomedex failed to
21 establish that an actual case or controversy has arisen in federal court and the allegations
22 fail to rise above mere conclusory statements. As noted above, the Supreme Court stated
23 that the court must determine whether a substantial controversy exists between the parties
24 of sufficient immediacy to warrant the issuance of a declaratory judgment. *Maryland. Cas.*
25 *Co.*, 312 U.S. at 273. The Complaint alleges that a declaration determining whether
26 Photomedex acted maliciously in the underlying federal action is appropriate to “extinguish
27 the continued threat of a malicious prosecution lawsuit by Ra Medical against Photomedex
28 and prevent avoidable damage to Photomedex’s business.” *Complaint*, p. 4. Viewing the


1 facts in a light most favorable to the Plaintiff, the Complaint alleges facts to support that a
2 substantial controversy exists between the parties and the allegations rise above a purely
3 speculative level to warrant declaratory relief.

4 **CONCLUSION**

5 The Court concludes that the jurisdictional prerequisites to hear a case under the
6 Declaratory Judgment Act have been satisfied. However, even where a suit “passes
7 constitutional and statutory muster, the district court must also be satisfied that entertaining
8 the action is appropriate. This determination is discretionary, for the Declaratory Judgment
9 Act is ‘deliberately cast in terms of permissive, rather than mandatory, authority.’” *Dizol*,
10 133 F.3d at 1223 (quoting *Pub. Serv. Comm’n of Utah v. Wycoff*, 344 U.S. 237, 250
11 (1952)). The parties shall address in writing whether the Court should abstain from
12 exercising its jurisdiction under the Declaratory Judgment Act pursuant to the *Brillhart*
13 factors and its progeny.

14 IT IS HEREBY ORDERED that the Motion to Dismiss (Doc. # 5) is denied. The
15 parties are ORDERED to file briefs addressing whether the court should abstain from
16 exercising its jurisdiction under the Declaratory Judgment Act within 30 days of the date of
17 this order.

18 DATED: April 29, 2009

19 
20 **WILLIAM Q. HAYES**
21 United States District Judge