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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CSPC DOPHEN CORPORATION,
Plaintiff,
v.
ZHIXIANG HU,
Defendant.

No. 2:17-cv-1895 MCE DB PS

ORDER

Defendant and counterclaimant, Dr. Zhixiang Hu, Ph.D., is proceeding in this action pro se. (ECF No. 68.) Accordingly, this action has been referred to the undersigned pursuant to Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Pending before the undersigned are defendant’s motion to disqualify plaintiff’s counsel, plaintiff’s partial motion to dismiss and strike defendant’s amended counterclaim, and motions to dismiss for lack of personal jurisdiction and insufficient service of process filed by counter-defendants CSPC Pharmaceutical Group Limited, Yingui Li, Jinxu Wang, Jumin Sun, and Dongchen Cai.

For the reasons explained below, defendant’s motion to disqualify is denied, the motions to dismiss filed by plaintiff and counter-defendants are granted, and defendant is granted leave to file a second amended counterclaim and effect proper service.

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1 BACKGROUND

2 Plaintiff CSPC Dophen Corporation (“CSPC Dophen”) commenced this action on
3 September 11, 2017. (ECF No. 1.) Plaintiff filed an amended complaint on October 13, 2017.
4 (ECF No. 14.) According to the amended complaint, plaintiff is a pharmaceutical and
5 development company based in Sacramento, California. (Am. Compl. (ECF No. 14) at 2.¹)
6 Plaintiff hired defendant, Dr. Sean Hu, in October of 2011, as Director of CSPC Dophen’s
7 Research Laboratory. (Id. at 3.)

8 The amended complaint alleges that on April 24, 2014, defendant incorporated a
9 competing entity named Dophen Biomed, Inc., with the same address as CSPC Dophen, and took
10 trade secrets and personal property belonging to plaintiff. (Id. at 4.) The amended complaint
11 alleges causes of action for breach of contract, breach of the duty of loyalty, violation of the
12 Defend Trade Secrets Act, 18 U.S.C. § 1832(a)(1), violation of the Lanham Act, 15 U.S.C. §
13 1125(a), conversion, violation of the California Comprehensive Computer Data Access and Fraud
14 Act, California Penal Code § 502, and unfair competition. (Id. at 6-13.) On November 1, 2017,
15 defendant filed an answer to the amended complaint, along with counterclaims.² (ECF No. 22.)
16 Defendant filed an amended counterclaim on December 6, 2017. (ECF No. 39.)

17 On May 30, 2018, plaintiff filed a motion to dismiss and a motion to strike defendant’s
18 amended counterclaim. (ECF No. 70.) Defendant filed an opposition on June 14, 2018. (ECF
19 No. 74.) On June 22, 2018, plaintiff filed a reply. (ECF No. 79.) On June 26, 2018, the
20 undersigned took the motion to dismiss under submission. (ECF No. 81.)

21 On July 13, 2018, defendant filed a motion to disqualify plaintiff’s counsel. (ECF No.
22 84.) Plaintiff filed an opposition on July 27, 2018. (ECF No. 87.) Defendant filed a reply on
23 August 3, 2018. (ECF No. 91.) On August 6, 2018, the undersigned took the motion to
24 disqualify under submission. (ECF No. 92.)

25 ¹ Page number citations such as this one are to the page number reflected on the court’s CM/ECF
26 system and not to page numbers assigned by the parties.

27 ² At that time, defendant was proceeding through counsel. On May 29, 2018, a motion to
28 withdraw as defendant’s counsel was granted and the matter was referred to the undersigned
pursuant to Local Rule 302(c)(21). (ECF No. 68.)

1 On August 13, 2018, counter-defendant CSPC Pharmaceutical Group Limited filed a
2 motion to dismiss Dr. Hu’s counterclaims for lack of personal jurisdiction and insufficient service
3 of process. (ECF No. 95.) Counter-defendants Yingui Li, Jinxu Wang, Jumin Sun, and
4 Dongchen Cai filed the same motion on August 16, 2018. (ECF No. 96.) Counterclaimant Dr.
5 Hu filed oppositions on August 31, 2018. (ECF Nos. 97 & 99.) Counter-defendants filed replies
6 on September 7, 2018. (ECF Nos. 100 & 101.) On September 10, 2018, the undersigned took
7 counter-defendants’ motions to dismiss under submission. (ECF No. 102.)

8 ANALYSIS

9 I. Defendant’s Motion to Disqualify Plaintiff’s Counsel

10 Defendant’s motion argues that the law firm representing plaintiff—Morrison & Foerster
11 LLP—previously represented plaintiff, “obtained confidential information” as a result of that
12 representation, and now “stands in the middle of the dispute” between the firm’s current client
13 and a former client. (Def.’s Mot. Disq. (ECF No. 84-1) at 2.) Defendant contends that attorneys
14 with Morrison & Foerster “have become witnesses in this current litigation[.]” (*Id.*)
15 Accordingly, defendant’s motion seeks to have “Morrison [&] Foerster . . . removed from this
16 litigation in order to protect the confidential and privileged information with their client, Dr. Hu
17 and Dophen Biomed Inc.” (*Id.*)

18 The court applies “state law in determining matters of disqualification[.]” In re County of
19 Los Angeles, 223 F.3d 990, 995 (9th Cir. 2000). “The authority of a trial court to disqualify an
20 attorney derives from the power inherent in every court to control in furtherance of justice, the
21 conduct of its ministerial officers.” City & Cnty. of S.F. v. Cobra Solutions, Inc., 38 Cal.4th 839,
22 846 (Cal. 2006) (citation and quotations omitted). However, “disqualification, as a prophylactic
23 device for protecting the attorney-client relationship, is a drastic measure which courts should
24 hesitate to impose except when absolutely necessary.” Freeman v. Chicago Musical Instrument
25 Co., 689 F.2d 715, 721 (7th Cir. 1982). Nevertheless, “the paramount concern must be the
26 preservation of public trust both in the scrupulous administration of justice and in the integrity of
27 the bar.” State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 72 Cal.App.4th 1422, 1428 (1999).

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1 Defendant's motion relies on California Rule of Professional Conduct 3-310(E), which
2 provides that "[a] member shall not, without the informed written consent of the client or former
3 client, accept employment adverse to the client or former client where, by reason of the
4 representation of the client or former client, the member has obtained confidential information
5 material to the employment." In this regard, "[w]here an attorney successively represents clients
6 with adverse interests, and where the subjects of the two representations are substantially related,
7 the need to protect the first client's confidential information requires that the attorney be
8 disqualified from the second representation." People ex rel. Dept. of Corporations v. Speedee
9 Oil Change Systems, Inc., 20 Cal.4th 1135, 1146 (Cal. 1999); see also Trone v. Smith, 621 F.2d
10 994, 998 (9th Cir. 1980) ("The relevant test for disqualification is whether the former
11 representation is 'substantially related' to the current representation.").

12 Here, attorneys with Morrison & Foerster never represented the defendant, thus the
13 defendant is not a former client of Morrison & Foerster. Defendant's motion argues that "[o]n
14 March 29, 2013, Morrison Foerster sent [defendant] Dr. Hu an engagement letter outlining the
15 terms of Morrison Foerster's performance of legal services on behalf of Dophen Biomedical and
16 [defendant] Dr. Hu." (Def.'s Mot. Disq. (ECF No. 84-1) at 4.) The March 29, 2013 engagement
17 letter, however, states only that "Morrison & Foerster LLP . . . has been engaged to represent
18 Dophen Biomedical[.]"³ (Def.'s Mot. Disq., Ex. 10 (ECF No. 84-12) at 2.) The letter does not
19 state that Morrison & Foerster would represent the defendant, Dr. Hu.

20 Although Dr. Hu signed the engagement letter, he did so as "Director" so that the
21 engagement could be "APPROVED AND AGREED TO" by "DOPHEN BIOMEDICAL." (Id.
22 at 5.) And, the engagement letter explicitly states that Morrison & Foerster's engagement was
23 "solely with the individuals specifically identified as clients in [the] letter" and that Morrison &
24 Foerster did "not represent any other individuals or entities not named as clients" in the letter.
25 (Id. at 4.) The only client identified in the letter is Dophen Biomedical. (Id. at 2.)

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28 ³ Defendant's business entity "Dophen Biomed Inc.," was not created until April 21, 2014.
(Def.'s Mot. Disq. (ECF No. 84-1) at 5; Xiong Decl. (ECF No. 84-37) at 2.)

1 Moreover, the scope of Morrison & Foerster’s engagement concerned only “advice on
2 patent prosecution.” (Id.) It is not clear that patent prosecution is substantially related to the
3 claims at issue here, i.e., breach of contract, trade secrets, unfair competition, etc. See Jessen v.
4 Hartford Casualty Ins. Co., 111 Cal.App.4th 698, 713 (2003) (“successive representations will be
5 ‘substantially related’ when the evidence before the trial court supports a rational conclusion that
6 information material to the evaluation, prosecution, settlement or accomplishment of the former
7 representation given its factual and legal issues is also material to the evaluation, prosecution,
8 settlement or accomplishment of the current representation given its factual and legal issues”).

9 Accordingly, for the reasons stated above, defendant’s motion to disqualify plaintiff’s
10 counsel is denied.

11 **II. Plaintiff’s Partial Motion to Dismiss**

12 As noted above, on December 6, 2017, defendant filed an amended counterclaim. (ECF
13 No. 39.) The amended counterclaim contains eleven discrete counterclaims. (Id. at 10-22.)
14 Plaintiff’s motion seeks dismissals of six of those amended counterclaims pursuant to Rule
15 12(b)(6) of the Federal Rules of Civil Procedure (“Rule”). (Pl.’s MTD (ECF No. 70) at 2.)
16 Plaintiff’s motion also seeks to strike the amended counterclaim’s request for punitive damages
17 with respect to some of those counterclaims pursuant to Rule 12(f). (Id. at 8.)

18 **A. Standards**

19 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
20 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.
21 1983). “The rule applies equally to a counterclaim.” Hana Financial, Inc. v. Hana Bank, 500
22 F.Supp.2d 1228, 1232 (C.D. Cal. 2007). “Dismissal can be based on the lack of a cognizable
23 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri
24 v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). A party is required to allege “enough
25 facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.
26 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
27 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
28 alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

1 In determining whether a counterclaim states a claim on which relief may be granted, the
2 court accepts as true the allegations in the counterclaim and construes the allegations in the light
3 most favorable to the nonmoving party. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984);
4 Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se pleadings are held
5 to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S.
6 519, 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the
7 form of factual allegations. United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
8 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than
9 an unadorned, the defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A
10 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
11 elements of a cause of action.” Twombly, 550 U.S. at 555; see also Iqbal, 556 U.S. at 676
12 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
13 statements, do not suffice.”). Moreover, it is inappropriate to assume that the nonmoving party
14 “can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways
15 that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of
16 Carpenters, 459 U.S. 519, 526 (1983).

17 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted
18 to consider material which is properly submitted as part of the counterclaim, documents that are
19 not physically attached if their authenticity is not contested and the defendant’s counterclaim
20 necessarily relies on them, and matters of public record. Lee v. City of Los Angeles, 250 F.3d
21 668, 688-89 (9th Cir. 2001).

22 A motion to strike pursuant to Rule 12(f) allows a court to strike “from any pleading any
23 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
24 Civ. P. 12(f). “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and
25 money that must arise from litigating spurious issues by dispensing with those issues prior to
26 trial[.]” Whittlestone, Inc. v. Handi-Craft, Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting
27 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)), *rev’d on other grounds by Fogerty*

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1 v. Fantasy, Inc., 510 U.S. 517, 114 (1994); see also Sidney-Vinsein v. A.H. Robins Co., 697 F.2d
2 880, 885 (9th Cir. 1983).

3 A motion to strike is well-taken when “it is clear that the matter to be stricken could have
4 no possible bearing on the subject matter of litigation.” LeDuc v. Kentucky Central Life Ins. Co.,
5 814 F.Supp. 820, 830 (N.D. Cal. 1992). Impertinent allegations are those that are not responsive
6 or relevant to issues involved in the action and which could not be admitted as evidence in the
7 litigation. Fantasy, Inc., 984 F.2d at 1527. “Scandalous” within the meaning of Rule 12(f)
8 includes allegations that cast a cruelly derogatory light on a party or other person. Talbot v.
9 Robert Mathews Distributing Co., 961 F.2d 654, 665 (7th Cir. 1992).

10 Ultimately, whether to grant a motion to strike applying these standards lies within the
11 sound discretion of the district court. Fantasy, Inc., 984 F.2d at 1527; see also California Dept. of
12 Toxic Substances Control v. Alco Pacific, Inc., 217 F.Supp.2d 1028, 1032-33 (C.D. Cal. 2002).⁴

13 **B. Third Amended Counterclaim—Defamation**

14 Plaintiff seeks dismissal of defendant’s third amended counterclaim for defamation on the
15 grounds that defendant “has failed to plead nearly all the required elements[.]” (Pl.’s MTD (ECF
16 No. 70) at 21.) In order to allege a prima facie claim for defamation, a party must allege facts that
17 establish the existence of “(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged,
18 and that (e) has a natural tendency to injure or that causes special damage.” Taus v. Loftus, 40
19 Cal.4th 683, 720 (Cal. 2007). Publication is communication of the allegedly defamatory
20 statement “to a third person who understands its defamatory meaning as applied to the [defamed
21 party].” Shively v. Bozanich, 31 Cal.4th 1230, 1242 (Cal. 2003).

22 Here, defendant’s counterclaim alleges simply that “at various times” plaintiff, plaintiff’s
23 employees, and plaintiff’s representatives defamed defendant “by publishing statements
24 concerning [defendant’s] alleged theft of CSPC funds and assets, among other false and
25 defamatory statements.” (Def.’s Am. CC (ECF No. 39) at 11-12.) Defendant’s counterclaim

26 ⁴ Rule 12(f) motions are generally viewed with disfavor and not ordinarily granted. Bureerong v.
27 Uvawas, 922 F.Supp. 1450, 1478 (C.D. Cal. 1996). A motion to strike should therefore not be
28 granted unless it is absolutely clear that the matter to be stricken could have no possible bearing
on the litigation. Lilley v. Charren, 936 F.Supp. 708, 713 (N.D. Cal. 1996).

1 lacks any further specificity. Thus, it is entirely unclear: (1) what allegedly defamatory statement
2 was made; (2) when it was made; (3) to whom it was made; and (4) that the statement had a
3 natural tendency to injure or cause special damages.

4 Accordingly, plaintiff's motion to dismiss is granted as to this counterclaim. For the
5 reasons explained below, defendant is granted leave to amend this counterclaim.

6 **C. Fifth Amended Counterclaim—Conversion—and Eleventh Amended**
7 **Counterclaim—Money Had and Received**

8 Plaintiff also seeks dismissal of defendant's fifth amended counterclaim, for conversion,
9 and eleventh amended counterclaim, for money had and received. Plaintiff argues that these
10 claims "are based on the same facts" and "cannot state a cause of action against CSPC Dophen, as
11 opposed to [counter-defendant] CSPC Limited." (Pl.'s MTD (ECF No. 70) at 11-12.)

12 "To state a [counterclaim] for conversion under California law, a [defendant] must
13 establish: (1) the [defendant's] ownership or right to possession of a certain piece of property; (2)
14 the [plaintiff's] conversion of the property by a wrongful act or disposition of property rights; and
15 (3) damages." Firoozye v. Earthlink Network, 153 F.Supp.2d 1115, 1129 (N.D. Cal. 2001). "A
16 [counterclaim] is stated for money had and received if the [plaintiff] is indebted to the [defendant]
17 in a certain sum for money had and received by the [plaintiff] for the use of the [defendant]."
18 Murphy v. American General Life Ins. Co., 74 F.Supp.3d 1267, 1280 (C.D. Cal. 2015) (quoting
19 Gutierrez v. Girardi, 194 Cal.App.4th 925, 937 (2011)).

20 Here, Dr. Hu's counterclaims allege that "[o]n or about September 17, 2013," Dr. Hu
21 wired money "to a bank specified by [counter-defendant] Jumin Sun, with the intent of
22 purchasing CSPC Limited Stock." (Def.'s Am. CC (ECF No. 39) at 14, 22.) Jumin Sun
23 informed Dr. Hu "that the funds had been received by CSPC Limited" but, nevertheless, CSPC
24 Limited "refused to acknowledge [Dr. Hu's] ownership interest in CSPC Limited[.]" (Id.)

25 However, according to the amended counterclaim, counter-defendant CSPC Limited is a
26 Hong Kong company, while plaintiff CSPC Dophen is a New Jersey Corporation. (Id. at 2.) And
27 Jumin Sun "is the Chief Financial Officer of CSPC Limited[.]" (Id. at 3.) It is unclear what
28 allegedly wrongful action plaintiff CSPC Dophen engaged in. Thus, the amended counterclaim

1 fails to allege a claim for conversion or money had and received against plaintiff CSPC Dophen.
2 Plaintiff's motion to dismiss is, therefore, also granted as to these counterclaims. Defendant is
3 also granted leave to amend with respect to these counterclaims.

4 **D. Seventh Amended Counterclaim—Fraud—and Eighth Amended**
5 **Counterclaim—Negligent Misrepresentation**

6 Plaintiff's motion to dismiss argues that these amended counterclaims are "nearly
7 identical" and both fail to satisfy the specificity required by Rule 9(b). (Pl.'s MTD (ECF No. 70)
8 at 13-14.) Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with
9 particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and
10 other conditions of a person's mind may be alleged generally."⁵ Fed. R. Civ. P 9(b).

11 "Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct
12 against which they must defend, but also 'to deter the filing of complaints as a pretext for the
13 discovery of unknown wrongs, to protect [defendants] from the harm that comes from being
14 subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the
15 parties and society enormous social and economic costs absent some factual basis.'" Bly–Magee
16 v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (quoting In re Stac Elec. Sec. Litig., 89 F.3d
17 1399, 1405 (9th Cir. 1996)).

18 Circumstances that must be stated with particularity pursuant to Rule 9(b) include the
19 "time, place, and specific content of the false representations as well as the identities of the
20 parties to the misrepresentations." Sanford v. Memberworks, Inc., 625 F.3d 550, 558 (9th Cir.
21 2010) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)). Likewise,
22 "[u]nder California law, the 'indispensable elements of a fraud claim include a false

23 ⁵ "[T]he Ninth Circuit 'has not yet decided' the issue of whether negligent misrepresentation
24 claims are subjected to Rule 9(b)." Petersen v. Allstate Indem. Co., 281 F.R.D. 413, 416 (C.D.
25 Cal. 2012) (quoting Anschutz Corp. v. Merrill Lynch & Co., 785 F.Supp.2d 799, 823 (N.D. Cal.
26 2011). But see Kelley v. Rambus, Inc., 384 Fed. Appx. 570, 573 (9th Cir. 2010) ("Kelley's state
27 law claims for common law fraud and negligent misrepresentation fail to meet the heightened
28 pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure."). However, the
undersigned "agrees with the line of cases that hold that negligent misrepresentation is a species
of fraud, and, hence, must be plead in accordance with Rule 9(b)." Gilmore v. Wells Fargo Bank
N.A., 75 F.Supp.3d 1255, 1270 (N.D. Cal. 2014).

1 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”
2 Vess v. Ciba—Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (quoting Moore v.
3 Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)).

4 Here, these amended counterclaims are asserted against “all Counter-Defendants.” (Def.’s
5 Am. CC (ECF No. 39) at 17-18.) And the allegations offered in support of these claims assert
6 simply that the “Counter-Defendants made numerous representations” to Dr. Hu “concerning: (a)
7 financial funding of the joint venture; (b) issuance of shares in CSPC Limited; (c) intent to market
8 the products developed; and the (sic) (d) the consent to the formation of Dophen Biomed, Ind.”
9 (Id. at 17-18.) These allegations, however, fail to contain evidentiary facts such as the time,
10 place, persons, statements and explanations of why the allegedly misleading statements are
11 misleading. The allegations also fail to identify which alleged counter-defendant engaged in what
12 alleged wrongful conduct.

13 Accordingly, plaintiff’s motion to dismiss these counterclaims is granted. Defendant is
14 also granted leave to amend these counterclaims.

15 **E. Tenth Amended Counterclaim—Declaratory Relief**

16 Plaintiff next seeks dismissal of defendant’s tenth amended counterclaim for declaratory
17 relief. (Pl.’s MTD (ECF No. 70) at 22-24.) A claim for

18 . . . declaratory relief operates prospectively to declare future rights,
19 rather than to redress past wrongs. If a party has a fully matured
20 cause of action for money, the party must seek the remedy of
21 damages, and not pursue a declaratory relief claim. This is because
22 declaratory relief is intended to offer guidance in shaping future
23 conduct so as to avoid breach of a party’s obligations. If that conduct
24 has already matured, no such opportunity is present. Consequently,
25 where a party can allege a substantive cause of action, a declaratory
26 relief claim should not be used as a superfluous second cause of
27 action for the determination of identical issues subsumed within the
28 first.

24 Public Service Mut. Ins. Co. v. Liberty Surplus Ins. Corp., 51 F.Supp.3d 937, 950 (E.D. Cal.
25 2014) (citations and quotations omitted); see also Britz Fertilizers, Inc. v. Bayer Corp., 665
26 F.Supp.2d 1142, 1173 (E.D. Cal. 2009).

27 Here, defendant has asserted several counterclaims against plaintiff for money and for
28 which plaintiff has not sought dismissal. Specifically, even after granting plaintiff’s motion to

1 dismiss, defendant’s counterclaims for breach of contract, failure to pay wages and other benefits,
2 breach of fiduciary duty, and violation of California Business & Professions Code § 17200, *et*
3 *seq.*, will remain.

4 Moreover, it appears that the allegations of defendant’s counterclaim for declaratory relief
5 concern past wrongs such as whether Dr. Hu obtained an ownership in CSPC Limited, whether
6 Dr. Hu had a right to form Dophen Biomed, Inc., and whether the parties formed a joint venture.
7 (Def.’s CC (ECF No. 39) at 21-22.) As noted above, “declaratory relief is intended to offer
8 guidance in shaping future conduct so as to avoid breach of a party’s obligations.” Public Service
9 Mut. Ins. Co., 51 F.Supp.3d at 950. Where, as here, the alleged wrongful conduct has already
10 occurred, or “matured,” a claim for declaratory relief is “superfluous.” (Id.)

11 Accordingly, plaintiff’s motion to dismiss this counterclaim will also be granted.
12 Defendant, however, is also granted leave to amend this counterclaim.

13 **F. Punitive Damages**

14 Plaintiff seeks to strike defendant’s prayer for punitive damages as it pertains to the
15 counterclaims for breach of contract, failure to pay wages and other benefits, and violation of
16 Business & Professions Code § 17200, *et. seq.* (Pl.’s MTD (ECF No. 70) at 25.) Plaintiff’s
17 motion must be granted as defendant cannot obtain punitive damages pursuant to any of those
18 claims.⁶ See Berkla v. Corel Corp., 302 F.3d 909, 917 (9th Cir. 2002) (“punitive damages, which
19 are designed to punish and deter wrongful conduct, are not available in breach of contract
20 actions”); In re Wal-Mart Stores, Inc. Wage and Hour Litigation, 505 F.Supp.2d 609, 620 (N.D.
21 Cal. 2007) (“it is settled law that punitive damages are not available under section 17200”);
22 Czechowski v. Tandy Corp., 731 F. Supp. 406, 410 (N.D. Cal. 1990) (availability of “statutory
23 penalties precludes an award of punitive damages” for failure to pay wages).

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26 ⁶ “Although punitive damages are generally not allowed for breach of contract claims, where the
27 gravamen of the action is not a breach of contract as such, but rather is the fraud inherent in the
28 breach, exemplary damages may be awarded.” Bowman v. Associates Home Equity Service, No.
CIV-S-06-0463 DFL EFB PS, 2008 WL 906276, at *5 (E.D. Cal. Mar. 31, 2008). Here,
however, the undersigned has already dismissed defendant’s fraud counterclaim.

1 Accordingly, plaintiff’s motion to strike this portion of defendant’s amended counterclaim
2 is granted and defendant is also granted leave to amend.

3 **G. Leave to Amend**

4 For the reasons stated above, plaintiff’s motion to dismiss will be granted. Accordingly,
5 the following counterclaims found in the amended counterclaim will be dismissed—the third
6 cause of action for defamation, fifth cause of action for conversion, seventh cause of action for
7 fraud and intentional misrepresentation, eighth cause of action for negligent misrepresentation,
8 tenth cause of action for declaratory relief, and eleventh cause of action for money had and
9 received. Additionally, the amended counterclaim’s prayer for punitive damages as it pertains to
10 the first cause of action for breach of contract, second cause of action for failure to pay wages and
11 other benefits, and ninth cause of action for violation of Business & Professions Code § 17200, *et*.
12 *seq.* will be stricken.

13 The undersigned has carefully considered whether Dr. Hu could further amend the
14 counterclaim to correct the defects noted above. “Valid reasons for denying leave to amend
15 include undue delay, bad faith, prejudice, and futility.” California Architectural Bldg. Prod. v.
16 Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988); *see also* Klamath-Lake Pharm. Ass’n
17 v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to
18 amend shall be freely given, the court does not have to allow futile amendments).

19 However, when evaluating the failure to state a claim, the pleading of a pro se party may
20 be dismissed “only where ‘it appears beyond doubt that the [party] can prove no set of facts in
21 support of his claim which would entitle him to relief.’” Franklin v. Murphy, 745 F.2d 1221,
22 1228 (9th Cir. 1984) (quoting Haines v. Kerner, 404 U.S. 519, 521 (1972); *see also* Weilburg v.
23 Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007) (“Dismissal of a pro se complaint without leave to
24 amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be
25 cured by amendment.”) (quoting Schucker v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir.
26 1988)).

27 Here, the undersigned cannot yet say that granting Dr. Hu further leave to amend would
28 be futile. Dr. Hu will, therefore, be granted leave to file a second amended counterclaim.

1 Defendant is cautioned, however, that if defendant elects to file a second amended counterclaim
2 “the tenet that a court must accept as true all of the allegations contained in a [pleading] is
3 inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action,
4 supported by mere conclusory statements, do not suffice.” Ashcroft, 556 U.S. at 678. “While
5 legal conclusions can provide the [claim’s] framework, they must be supported by factual
6 allegations.” Id. at 679. Those facts must be sufficient to push the claims “across the line from
7 conceivable to plausible[.]” Id. at 680 (quoting Twombly, 550 U.S. at 557).

8 Defendant is also reminded that the court cannot refer to a prior pleading in order to make
9 an amended pleading complete. Local Rule 220 requires that any amended counterclaim be
10 complete in itself without reference to prior pleadings. The second amended counterclaim will
11 supersede the amended counterclaim, just as the amended counterclaim superseded the original
12 counterclaim. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Thus, in an amended
13 counterclaim, just as if it were the initial counterclaim filed in the case, each counter-defendant
14 must be listed in the caption and identified in the body of the counterclaim, and each claim and
15 the involvement of each counter-defendant must be sufficiently alleged. Any amended
16 counterclaim which defendant may elect to file must also include concise but complete factual
17 allegations describing the conduct and events which underlie defendant’s claims.

18 **III. Counter-Defendants’ Motions to Dismiss**

19 **A. Personal Jurisdiction**

20 Counter-defendant CSPC Pharmaceutical Group Limited (“CSPC Limited”) and counter-
21 defendants Yingui Li, Jinxu Wang, Jumin Sun, and Dongchen Cai (“individual counter-
22 defendants”), move to dismiss counterclaimant Dr. Hu’s amended counterclaim based on a lack
23 of personal jurisdiction pursuant to Rule 12(b)(2). (ECF Nos. 95 & 96.) Dr. Hu bears the burden
24 of establishing that jurisdiction is proper, although he need only make a prima facie showing of
25 jurisdictional facts to withstand the motion to dismiss. Brayton Purcell LLP v. Recordon &
26 Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010).

27 “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction
28 over persons.” Daimler AG v. Bauman, 571 U.S. 117, 125 (2014). “Because California’s long-

1 arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional
2 analyses under state law and federal due process are the same.” Schwarzenegger v. Fred Martin
3 Motor Co., 374 F.3d 797, 800-01 (9th Cir. 2004). “For a court to exercise personal jurisdiction
4 over a nonresident defendant consistent with due process, that defendant must have ‘certain
5 minimum contacts’ with the relevant forum ‘such that the maintenance of the suit does not offend
6 ‘traditional notions of fair play and substantial justice.’” Mavrix Photo, Inc. v. Brand
7 Technologies, Inc., 647 F.3d 1218, 1223 (9th Cir. 2011) (quoting International Shoe Co. v.
8 Washington, 326 U.S. 310, 316 (1945)).

9 Federal courts may exercise either general or specific personal jurisdiction. General
10 personal jurisdiction is found where the nonresident defendant’s “affiliations with the State are so
11 ‘continuous and systematic’ as to render them essentially at home in the forum State.” Goodyear
12 Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). “To determine whether a
13 nonresident defendant’s contacts are sufficiently substantial, continuous, and systematic, we
14 consider their ‘longevity, continuity, volume, economic impact, physical presence, and
15 integration into the state’s regulatory or economic markets.’” Mavrix Photo, Inc., 647 F.3d at
16 1224 (quoting Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1172 (9th Cir. 2006)).

17 Specific personal jurisdiction is found where “[a] nonresident defendant’s discrete,
18 isolated contacts with the forum support jurisdiction on a cause of action arising directly out of its
19 forum contacts[.]” CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1075 (9th Cir.
20 2011). “[T]hat is, jurisdiction [is] based on the relationship between the defendant’s forum
21 contacts and plaintiff’s claims.” Menken v. Emm, 503 F.3d 1050, 1057 (9th Cir. 2007). “The
22 inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant
23 ‘focuses on the relationship among the defendant, the forum, and the litigation.’” Walden v.
24 Fiore, 134 S. Ct. 1115, 1121 (2014) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775
25 (1984)) (internal quotation marks omitted). However, “the ‘primary concern’ is ‘the burden on
26 the defendant.’” Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco
27 County, 137 S. Ct. 1773, 1780 (2017) (quoting World-Wide Volkswagen Corp. v. Woodson, 444
28 U.S. 286, 292 (1980)).

1 A three-part test has been developed by the Ninth Circuit to analyze an assertion of
2 specific personal jurisdiction:

3 (1) The non-resident defendant must purposefully direct his activities
4 or consummate some transaction with the forum or resident thereof;
5 or perform some act by which he purposefully avails himself of the
6 privilege of conducting activities in the forum, thereby invoking the
7 benefits and protections of its laws;

8 (2) the claim must be one which arises out of or relates to the
9 defendant's forum-related activities; and

10 (3) the exercise of jurisdiction must comport with fair play and
11 substantial justice, i.e. it must be reasonable.

12 Schwarzenegger, 374 F.3d at 802 (quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)).

13 Here, Dr. Hu's amended counterclaim fails to allege any jurisdictional facts that could
14 support either general or specific personal jurisdiction. To the contrary, the amended
15 counterclaim alleges that counter-defendant CSPC Limited "is a foreign Corporation organized
16 under the laws of Hong Kong, with its principal place of business" in Hong Kong." (Def.'s Am.
17 CC (ECF No. 39) at 2-3.) And each of the individual counter-defendants allegedly reside in
18 China. (Id. at 3.)

19 Moreover, the amended counterclaims asserted against either counter-defendant CSPC
20 Limited or the individual counter-defendants are defamation, breach of fiduciary duty,
21 conversion, fraud, negligent misrepresentation, violation of California Business & Professions
22 Code § 17200, declaratory relief, and money had and received. (Def.'s Am. CC (ECF No. 39) at
23 10-22.) The amended counterclaim, however, fails to explain how any of these claims arise out
24 of or relate to the counter-defendants' forum-related activities.

25 Dr. Hu's opposition to counter-defendant CSPC Limited's motion to dismiss relies
26 heavily on the argument that counter-defendant CSPC Limited is the parent company of plaintiff
27 CSPC-Dophen. (Def.'s Opp.'n (ECF No. 97) at 5.) However, "[t]he existence of a parent-
28 subsidiary relationship is insufficient, on its own, to justify imputing one entity's contacts with a
forum state to another for the purpose of establishing personal jurisdiction." Ranza v. Nike, Inc.,
793 F.3d 1059, 1070 (9th Cir. 2015). "A basic tenet of American corporate law is that the

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1 corporation and its shareholders are distinct entities.” Dole Food Co. v. Patrickson, 538 U.S. 468,
2 474 (2003).

3 Imputed general jurisdiction over a foreign defendant that has an in-state affiliate may be
4 found upon satisfaction of the alter ego test. “To satisfy the alter ego test, a plaintiff must make
5 out a prima facie case (1) that there is such unity of interest and ownership that the separate
6 personalities of the two entities no longer exist and (2) that failure to disregard their separate
7 identities would result in fraud or injustice.” Ranza, 793 F.3d at 1071 (quotation omitted).

8 “The ‘unity of interest and ownership’ prong of this test requires ‘a showing that the
9 parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of
10 the former.’” Id. (quoting Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)). “This test
11 envisions pervasive control over the subsidiary, such as when a parent corporation ‘dictates every
12 facet of the subsidiary’s business — from broad policy decisions to routine matters of day-today
13 operation.’” Id. (quoting Unocal, 248 F.3d at 926). “Total ownership and shared management
14 personnel are alone insufficient to establish the requisite level of control.” Id. (citing Harris
15 Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003)). “[A]
16 plaintiff does not meet the ‘unity of interest and ownership’ prong when the evidence shows only
17 ‘an active parent corporation involved directly in decision-making about its subsidiaries’
18 holdings,’ but each entity ‘observes all of the corporate formalities necessary to maintain
19 corporate separateness.’” Id. (internal brackets omitted) (quoting Unocal, 248 F.3d at 928).

20 Dr. Hu’s opposition to the individual counter-defendants’ motion to dismiss relies on the
21 argument that that three of those counter-defendants were employees of plaintiff CSPC-Dophen.
22 (Def.’s Opp.’n (ECF No. 99) at 2.) However, “[u]nder the fiduciary shield doctrine, a person’s
23 mere association with a corporation that causes injury in the forum state is not sufficient in itself
24 to permit that forum to assert jurisdiction over the person. Rather, there must be a reason for the
25 court to disregard the corporate form.” Davis v. Metro Productions, Inc., 885 F.2d 515, 520 (9th
26 Cir. 1989) (citations omitted). In this regard, Dr. Hu “has the burden of establishing that the
27 individual defendant personally directed the activities toward the forum state giving rise to the

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1 complaint.” Indiana Plumbing Supply, Inc. v. Standard of Lynn, Inc., 880 F. Supp. 743, 750
2 (C.D. Cal. 1995).

3 In short,

4 jurisdiction over an employee does not automatically follow from
5 jurisdiction over the corporation which employs him; nor does
6 jurisdiction over a parent corporation automatically establish
7 jurisdiction over a wholly owned subsidiary. Each defendant’s
8 contacts with the forum State must be assessed individually.

9 Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984).

10 Here, the amend counterclaim’s allegations fail to provide sufficient facts with respect to
11 each counter-defendant’s contacts with California. Accordingly, counter-defendants’ motions to
12 dismiss for lack of personal jurisdiction will be granted. However, because the undersigned
13 cannot say that granting Dr. Hu leave to amend would be futile, Dr. Hu will also be granted leave
14 to amend his counterclaims to address personal jurisdiction.

15 **B. Service of Process**

16 Counter defendants also seeks dismissal due to insufficient service of process. (ECF Nos.
17 95 & 96.) Pursuant to Rule 12(b)(5), a defendant may move to dismiss the action where the
18 plaintiff has failed to effect proper service of process in compliance with the requirements set
19 forth under Rule 4 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(5). If the court
20 determines that the plaintiff has not properly served the defendant in accordance with Rule 4, the
21 court has discretion to either dismiss the action for failure to effect proper service, or instead
22 merely quash the ineffective service that has been made on the defendant in order to provide the
23 plaintiff with the opportunity to properly serve the defendant. See Marshall v. Warwick, 155 F.3d
24 1027, 1032 (8th Cir. 1998) (“[D]ismissal [is not] invariably required where service is ineffective:
25 under such circumstances, the [district] court has discretion to either dismiss the action, or quash
26 service but retain the case”).

27 “[S]ervice of summons is the procedure by which a court having venue and jurisdiction of
28 the subject matter of the suit asserts jurisdiction over the person of the party served.” Mississippi
Publishing Corp. v. Murphree, 326 U.S. 438, 444-45 (1946). “Before a federal court may
exercise personal jurisdiction over a defendant, the procedural requirement of service of summons

1 must be satisfied.” Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104
2 (1987).

3 Moreover, although a defendant’s appearance to attack sufficiency of service is an
4 admission that the defendant has actual knowledge of the lawsuit, actual knowledge does not
5 substitute for proper service of process. See Omni Capital Int’l v. Rudolf Wolff & Co., 484 U.S.
6 97, 104 (1987) (“[B]efore a court may exercise personal jurisdiction over a defendant, there must
7 be more than notice to the defendant and a constitutionally sufficient relationship between the
8 defendant and the forum.”); Worrell v. B.F. Goodrich Co., 845 F.2d 840, 841 (9th Cir. 1988)
9 (service fails unless defendant returns acknowledgment form); accord Grand Entm’t Group, Ltd.
10 v. Star Media Sales, Inc., 988 F.2d 476, 492 (3d Cir. 1993) (“Notice to a defendant that he has
11 been sued does not cure defective service, and an appearance for the limited purpose of objecting
12 to service does not waive the technicalities of the rule”); Jackson v. Hayakawa, 682 F.2d 1344,
13 1347 (9th Cir. 1982) (“Neither actual notice . . . nor simply naming the person in the caption of
14 the complaint . . . will subject defendants to personal jurisdiction if service was not made in
15 substantial compliance with Rule 4.”).

16 When a defendant challenges service, the plaintiff bears the burden of establishing the
17 validity of service as governed by Rule 4 of the Federal Rules of Civil Procedure. See
18 Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). Pursuant to Rule 4(f)(1) a party may be
19 served in a foreign country “by an internationally agreed means of service that is reasonably
20 calculated to give notice, such as those authorized by the Hague Convention[.]” Fed. R. Civ. P
21 4(f)(1). “Service pursuant to the Hague Convention is mandatory when serving a foreign
22 defendant in a signatory country” and the United States and China are both signatories of the
23 Hague Convention. Hyundai Merchant Marine Co. Ltd. v. Grand China Shipping (Hong Kong)
24 Co. Ltd., 878 F.Supp.2d 1252, 1261 (S.D. Ala. 2012).

25 Here, Dr. Hu attempted service of process on counter-defendant CSPC Limited by way of
26 personal service. (ECF No. 86-1.) And service of process on the individual counter-defendants
27 was attempted via email. (ECF No. 86-2.) Such methods of service are not permissible here.⁷

28 ⁷ It appears Dr. Hu’s ability to effect proper service may be limited to use of the mail. See

1 See HCT Packaging Inc. v. TM International Trading Limited, Case No. CV 13-8443 RGK
2 (SHx), 2014 WL 12696776, at *6 (C.D. Cal. Mar. 10, 2014) (“personal service is insufficient” in
3 Hong Kong).

4 Accordingly, defendants’ motion to dismiss for insufficient service of process will also be
5 granted. However, the court finds good cause to grant Dr. Hu leave to effect proper service.

6 CONCLUSION

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Defendant’s July 13, 2018 motion to disqualify (ECF No. 84) is denied;
9 2. Plaintiff’s May 30, 2018 partial motion to dismiss (ECF No. 70) is granted;
10 3. Counter-Defendant CSPC Limited’s August 13, 2018 motion to dismiss (ECF No. 95)
11 is granted;

12 4. Counter-defendants Yingui Li, Jinxu Wang, Jumin Sun, and Dongchen Cai’s August
13 16, 2018 motion to dismiss (ECF No. 96) is granted;

14 5. The amended counterclaims of defamation, conversion, fraud and intentional
15 misrepresentation, negligent misrepresentation, declaratory relief, and money had and received
16 are dismissed against plaintiff CSPC Dophen;


17 6. The amended counterclaims’ prayer for punitive damages with respect to the
18 counterclaims of breach of contract, failure to pay wages and other benefits, and violation of
19 California Business & Professions Code § 17200, is stricken as to plaintiff CSPC Dophen;

20 7. Defendant is granted leave to file a second amended counterclaim and to effect proper
21 service within twenty-eight days of the date of this order. However, defendant is not required to
22 file a second amended counterclaim, or attempt to effect proper service, and may stand on the
23 remaining claims of the amended counterclaim—breach of contract, failure to pay wages and
24 other benefits, breach of fiduciary duty, and violation of California Business & Professions Code

25 generally In re Coudert Brothers LLP, No. 16-CV-8237 (KMK), 2017 WL 1944162, at *12 (S.D.
26 N.Y. May 10, 2017) (“Court concludes that service could have been effected here by service via
27 mail in accordance with the law of Hong Kong”); TracFone Wireless, Inc. v. Bequator Corp.,
28 Ltd., 717 F.Supp.2d 1307, 1309 (S.D. Fla. 2010) (“Hong Kong does not object to judicial
documents being sent by postal channels pursuant to Article 10(a)”; Denlinger v. Chinadotcom
Corp., 110 Cal.App.4th 1396, 1404 (2003) (“We think the view that article 10(a) allows service
of process by mail represents the better position.”).

1 § 17200—asserted against plaintiff CSPC Dophen. In the event that defendant does not file a
2 timely second amended counterclaim, the court will construe defendant’s election as consent to
3 the dismissal of all other counter-defendants and all other claims without prejudice.

4 Dated: November 26, 2018

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7 DEBORAH BARNES
8 UNITED STATES MAGISTRATE JUDGE
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