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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 AND
FINDINGS AND RECOMMENDATIONS

Defendant and counterclaimant, Dr. Zhixiang Hu, Ph.D., (“Dr. Hu”), is proceeding in this matter 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 Dr. Hu’s motion for leave for alternative service of process, plaintiff CSCP Dophen Corporation’s partial motion to dismiss Dr. Hu’s second amended counterclaim, and counter-defendant CSPC Pharmaceutical Group Limited’s motion to dismiss. (ECF Nos. 218, 227, 236.)

For the reasons explained below, Dr. Hu’s motion for leave for alternative service of process is granted. Also, the undersigned recommends that the motions to dismiss be granted without further leave to amend.

BACKGROUND

Plaintiff CSPC Dophen Corporation, (“CSPC Dophen”), commenced this action on September 11, 2017. (ECF No. 1.) Plaintiff filed a third amended complaint on May 7, 2019.

1 (ECF No. 190.) Therein, plaintiff alleges that CSPC Dophen is a pharmaceutical and
2 development company based in Sacramento, California. (Third Am. Compl. (ECF No. 190) at
3 2.¹) Plaintiff hired defendant Dr. Hu in October of 2011, as Director of CSPC Dophen’s Research
4 Laboratory. (Id. at 3.) Dr. Hu signed a Non-Disclosure Agreement and a Policy of Conflict of
5 Interest as part of that employment. (Id. at 3-4.)

6 However, on April 24, 2014, Dr. Hu incorporated a competing entity named Dophen
7 Biomed, Inc., with the same address as CSPC Dophen. (Id. at 4.) Dr. Hu also established a bank
8 account and deposited plaintiff’s money into that account. (Id. at 5.) And in April of 2017, Dr.
9 Hu filed an Investigational New Drug application with the Food and Drug Administration
10 (“FDA”) using plaintiff’s name without plaintiff’s consent. (Id.) Plaintiff terminated Dr. Hu’s
11 employment on July 21, 2017. (Id. at 6.)

12 Based on these allegations the third amended complaint asserts causes of action for breach
13 of contract, breach of the duty of loyalty, violation of the Defend Trade Secrets Act, 18 U.S.C. §
14 1832(a)(1), violation of the Lanham Act, 15 U.S.C. § 1125(a), conversion, violation of the
15 California Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502,
16 unfair competition, and defamation. (Id. at 7-16.)

17 On November 24, 2019, Dr. Hu filed a motion seeking leave for alternative service of
18 process on several counter defendants. (ECF No. 218.) On December 6, 2019, Dr. Hu filed a
19 motion for a seven-day extension of time to file a second amended counterclaim.² (ECF No.
20 223.) Dr. Hu filed a second amended counterclaim on December 10, 2019. (ECF No. 224.)

21 On December 23, 2019, plaintiff filed a partial motion to dismiss pursuant to Rule 12(6)
22 and to strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. (ECF No. 227.) On
23 January 10, 2020, Dr. Hu filed an opposition to the motion to dismiss and plaintiff filed an
24 opposition to Dr. Hu’s motion for leave for alternative service of process on the counter-

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

² Defendant’s motion is grant *nunc pro tunc*.

1 defendants. (ECF Nos. 230 & 231.) The parties filed replies on January 17, 2020. (ECF Nos.
2 232 & 234.)

3 On January 21, 2020, counter-defendant CSPC Pharmaceutical Group Limited, (“CSPC
4 Limited”), filed a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(2). (ECF No.
5 236.) Dr. Hu filed an opposition on February 28, 2020. (ECF No. 249.) CSPC Limited filed a
6 reply on March 6, 2020. (ECF No. 251.)

7 **STANDARDS**

8 **I. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(2)**

9 Federal Rule of Civil Procedure 12(b)(2) provides that “[a] defendant may move, prior to
10 trial, to dismiss the complaint for lack of personal jurisdiction.” Data Disc, Inc. v. Systems
11 Technology Associates, Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). “Where a defendant moves to
12 dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of
13 demonstrating that jurisdiction is appropriate.” Schwarzenegger v. Fred Martin Motor Co., 374
14 F.3d 797, 800 (9th Cir. 2004). However, “in the absence of an evidentiary hearing, the plaintiff
15 need only make a prima facie showing of jurisdictional facts.” Sher v. Johnson, 911 F.2d 1357,
16 1361 (9th Cir. 1990).

17 **II. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(6)**

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

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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).

9 While Rule 8(a) does not require detailed factual allegations, “it demands more than an
10 unadorned, the defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A
11 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
12 elements of a cause of action.” Twombly, 550 U.S. at 555; see also Iqbal, 556 U.S. at 676
13 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
14 statements, do not suffice.”). Moreover, it is inappropriate to assume that the nonmoving party
15 “can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways
16 that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of
17 Carpenters, 459 U.S. 519, 526 (1983).

18 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted
19 to consider material which is properly submitted as part of the counterclaim, documents that are
20 not physically attached if their authenticity is not contested and the defendant’s counterclaim
21 necessarily relies on them, and matters of public record. Lee v. City of Los Angeles, 250 F.3d
22 668, 688-89 (9th Cir. 2001).

23 **III. Legal Standards Applicable to Motions to Strike Pursuant to Rule 12(f)**

24 A motion to strike pursuant to Rule 12(f) allows a court to strike “from any pleading any
25 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
26 Civ. P. 12(f). “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and
27 money that must arise from litigating spurious issues by dispensing with those issues prior to
28 trial[.]” Whittlestone, Inc. v. Handi-Craft, Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting

1 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)), *rev'd on other grounds by Fogerty*
2 v. Fantasy, Inc., 510 U.S. 517, 114 (1994); see also Sidney-Vinsein v. A.H. Robins Co., 697 F.2d
3 880, 885 (9th Cir. 1983).

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

11 Ultimately, whether to grant a motion to strike applying these standards lies within the
12 sound discretion of the district court. Fantasy, Inc., 984 F.2d at 1527; see also California Dept. of
13 Toxic Substances Control v. Alco Pacific, Inc., 217 F.Supp.2d 1028, 1032-33 (C.D. Cal. 2002).³

14 ANALYSIS

15 I. Dr. Hu’s Motion for Alternative Service

16 Dr. Hu seeks permission for alternative service of process on counter-defendants Yingui
17 Li, Jinxu Wang, Jumin Sun, and Donghchen Cai who are alleged to reside in China.⁴ (Alt. Serv.
18 Mot. (ECF No. 218) at 3.) According to the second amended counterclaim, Yingui Li is “a
19 director of board of CSPC-Dohpen and officer of CSPC Limited.” (Sec. Am. Counterclaim (ECF
20 No. 224) at 2.) Jinxu Wang is “the Chief Executive Officer of CSPC-Dophen.” (Id. at 3.) Jumin
21 Sun “is the Chief Financial Officer of CSPC Limited[.]” (Id. at 3.) And Dongchen Cai “is the
22 Chairman of CSPC-Dophen, CSPC Holding Limited . . . and CSPC Limited.” (Id.) The motion

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25 ³ Rule 12(f) motions are generally viewed with disfavor and not ordinarily granted. Bureerong v.
26 Uvawas, 922 F.Supp. 1450, 1478 (C.D. Cal. 1996). A motion to strike should therefore not be
27 granted unless it is absolutely clear that the matter to be stricken could have no possible bearing
28 on the litigation. Lilley v. Charren, 936 F.Supp. 708, 713 (N.D. Cal. 1996).

⁴ The motion also sought alternative service on CSPC Limited, however, CSPC Limited has
appeared in this action and moved to dismiss, rendering the request moot.

1 seeks service “on counter defendants’ US Attorney” and is brought pursuant to Rule 4(f) of the
2 Federal Rules of Civil Procedure. (Alt. Serv. Mot. (ECF No. 218) at 2.)

3 Rule 4(f) of the Federal Rules of Civil Procedure provide the means
4 by which a plaintiff may serve an individual located outside of the
5 United States. See Fed. R. Civ. P. 4(f). Under Rule 4(f)(3), the court
6 can authorize service on a foreign individual “by other means not
7 prohibited by international agreement.” Fed. R. Civ. Pro. 4(f)(3).
Other than the requirement that the method of service not be
proscribed by international agreement, the rule imposes no limitation
on the court’s authority to authorize alternative means of service.

8 Brown v. China Integrated Energy, Inc., 285 F.R.D. 560, 563 (C.D. Cal. 2012). “In fact, as long
9 as court-directed and not prohibited by an international agreement, service of process ordered
10 under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country.”

11 Rio Properties, Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002). In this regard,
12 alternative service pursuant to Rule 4(f)(3) “is neither a ‘last resort’ nor ‘extraordinary relief’” but
13 “is merely one means among several which enables service of process on an international
14 defendant.” Id. at 1015.

15 Here, Dr. Hu alleges that the foreign counter-defendants “have kept their Chinese
16 addresses secret,” that the “Chinese government strictly prohibits any private investigation
17 service to obtain company/personal information” and that the Chinese government “would not
18 release such information to private parties, especially foreigners.” (Alt. Serv. Mot. (ECF No.
19 218) at 3.) In this regard, the undersigned finds that Dr. Hu has demonstrated an “inability to
20 serve an elusive international defendant.” Rio, 284 F.3d at 1016.

21 Plaintiff CSPC Dophen opposes Dr. Hu’s motion, arguing that the undersigned found in a
22 prior order that service on these counter-defendants pursuant to the Hauge Convention “is
23 mandatory.” (Pl.’s Opp.’n (ECF No. 231) at 3.) And that is true. See ECF No. 124 at 18.
24 However, that was in the context of analyzing the counter-defendants’ motion to dismiss due to
25 improper service of process where Dr. Hu had not sought leave for alternative service of process
26 pursuant to Rule 4(f)(3).

27 Dr. Hu now seeks leave for alternative service of process under Rule 4(f)(3). Plaintiff
28 “has not shown that service under Rule 4(f)(3) would violate an international agreement, and the

1 Hague Convention is certainly no bar.” Xilinx, Inc. v. Godo Kaisha IP Bridge 1, 246 F.Supp.3d
2 1260, 1264 (N.D. Cal. 2017) (citing Richmond Techs., Inc. v. Aumtech Bus. Sols., No. 11-cv-
3 02460-LHK, 2011 WL 2607158, at *12 (N.D. Cal. July 1, 2011) (“numerous courts have
4 authorized alternative service under Rule 4(f)(3) even where the Hague Convention applies”));
5 see also Brown, 285 F.R.D. at 565 (“These courts rejected contentions similar to those made by
6 China Integrated, i.e., that the Hague Convention provided the only means to effect service on a
7 defendant residing in China.”).

8 However,

9 [e]ven if facially permitted by Rule 4(f)(3), a method of service of
10 process must also comport with constitutional notions of due process.
11 To meet this requirement, the method of service crafted by the
12 district court must be “reasonably calculated, under all the
 circumstances, to apprise interested parties of the pendency of the
 action and afford them an opportunity to present their objections.”

13 Rio, 284 F.3d at 1016-17 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306,
14 314 (1950)).

15 Here, Dr. Hu seeks to effect service “on counter defendants’ US attorney,” counsel for the
16 plaintiff CSPC Dophen. (Alt. Serv. Mot. (ECF No. 218) at 3.) Plaintiff’s counsel has filed a
17 declaration stating that they are not “authorized to accept service on behalf of” the counter-
18 defendants. (Wilson Decl. (ECF No. 23101) at 2.) However, “[c]ourts in the Ninth Circuit have
19 ordered service through United States-based counsel even when counsel has refused to accept
20 service on the ground that they do not represent the international defendants.” Products and
21 Ventures International v. Axus Stationary (Shanghai) Ltd., CASE NO. 16-cv-0669 YGR, 2017
22 WL 1378532, at *4 (N.D. Cal. Apr. 11, 2017).

23 Regardless of whether counsel is authorized to accept service on behalf of the counter-
24 defendants, in this action counsel for plaintiff has also repeatedly appeared on behalf of the
25 counter-defendants. (See ECF Nos. 27, 95, 96, 154, 236.) In this regard, plaintiff’s counsel has
26 also served as the foreign counter-defendants’ United States-based counsel. “Service upon a
27 foreign defendant’s United States-based counsel is a common form of service ordered under Rule

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1 4(f)(3).” Richmond Technologies, Inc. v. Aumtech Business Solutions, No. 11-2559 MMM
2 (PLAx), 2011 WL 2607158, at *13 (N.D. Cal. July 17, 2011).

3 Accordingly, for the reasons stated above, Dr. Hu’s motion for alternative service of
4 process will be granted.

5 **II. Plaintiff’s Motion to Dismiss**

6 Plaintiff’s motion to dismiss seeks an order dismissing Dr. Hu’s second amended
7 counterclaims for defamation, declaratory relief regarding membership interest, grand
8 larceny/theft by conversion, fraud and intentional misrepresentation, fraud in the offer of
9 securities in interstate transactions, fraud in connection with the sale of securities, and retaliation.
10 (Pl.’s MTD (ECF No. 227) at 14-27.) Plaintiff’s motion also seeks an order striking the second
11 amended counterclaim’s request for punitive damages. (Id. at 28.)

12 **A. Defamation (Third Cause of Action)**

13 In order to allege a prima facie claim for defamation, a party must allege facts that
14 establish the existence of “(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged,
15 and that (e) has a natural tendency to injure or that causes special damage.” Taus v. Loftus, 40
16 Cal.4th 683, 720 (Cal. 2007). Publication is communication of the allegedly defamatory
17 statement “to a third person who understands its defamatory meaning as applied to the [defamed
18 party].” Shively v. Bozanich, 31 Cal.4th 1230, 1242 (Cal. 2003).

19 Here, the second amended counterclaim for defamation simply alleges that “at various
20 times” plaintiff and “its representatives defamed” Dr. Hu “by writing to government agency NIH,
21 emailing and calling Dr. Hu’s collaborators, and distributing false statements . . . concerning Dr.
22 Hu’s alleged theft of CSPC-Dophen[’s] funds and assets among other false and defamatory
23 statements.” (Sec. Am. CC (ECF No. 224) at 28.) Elsewhere in the second amended
24 counterclaim, Dr. Hu alleges that plaintiff “disparaged Dr. Hu of stealing company funds and
25 creating a sham company in their communication to Dr. Hu’s collaborators,” asked entities “not
26 to do business with Dr. Hu,” and “instructed its employee . . . to distribute defamatory statement
27 in Dr. Hu’s hometown, that Dr. Hu was fired” by plaintiff. (Id. at 21.)

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1 These allegations lack the necessary specificity. In this regard, none of these allegations
2 clearly allege: (1) what allegedly defamatory statement was made; (2) when it was made; (3) to
3 whom it was made; and (4) that the statement had a natural tendency to injure of cause special
4 damages. Accordingly, plaintiff’s motion to dismiss this counterclaim should be granted.

5 **B. Declaratory Relief (Fifth Cause of Action)**

6 A claim for

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

13 Public Service Mut. Ins. Co. v. Liberty Surplus Ins. Corp., 51 F.Supp.3d 937, 950 (E.D. Cal.
14 2014) (citations and quotations omitted); see also Britz Fertilizers, Inc. v. Bayer Corp., 665
15 F.Supp.2d 1142, 1173 (E.D. Cal. 2009).

16 Here, Dr. Hu seeks declaratory relief concerning the “rights to an ownership interest in
17 CSPC Limited pursuant to the transfer of funds from Dr. Hu to CSPC Limited, and the ownership
18 in CSPC-Dophen as promised[.]” (Sec. Am. CC (ECF No. 224) at 30.) However, as noted
19 above, “declaratory relief is intended to offer guidance in shaping future conduct so as to avoid
20 breach of a party’s obligations.” Public Service Mut. Ins. Co., 51 F.Supp.3d at 950. Where, as
21 here, the alleged wrongful conduct has already occurred, or “matured,” a claim for declaratory
22 relief is “superfluous.” (Id.)

23 Moreover, the second amended counterclaim asserts several counterclaims against
24 plaintiff for money and for which plaintiff has not sought dismissal. Specifically, plaintiff has not
25 sought dismissal of the second amended counterclaim’s causes of action for breach of contract,
26 violation of California Business & Professions Code § 17200, *et seq.*, failure to pay wages and
27 other benefits, and breach of fiduciary duty. A declaratory relief claim would be a superfluous

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1 cause of action for the determination of identical issues subsumed within these remaining causes
2 of action.

3 Accordingly, plaintiff's motion to dismiss this counterclaim should also be granted.

4 **C. Grand Larceny/Theft by Conversion (Seventh Cause of Action)**

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

13 Here, the second amended counterclaim alleges that "Dr. Jinxu Wang, as CEO of CSPC-
14 Dophen, offered Dr. Hu to purchase 500,000 IPO incentive stock shares of CSPC Limited." (Sec.
15 Am. CC (ECF No. 224) at 32.) "CSPC Limited's Chief Financial Officer Jumin Sun [later]
16 informed Dr. Hu that the funds had been received by CSPC Limited" but Jumin Sun "did not
17 issue any documents[.]" (Id.)

18 However, absent from these assertions is an allegation that plaintiff CSPC Dophen
19 possessed any money belonging to Dr. Hu. And, as alleged by the second amended counterclaim,
20 counter-defendant CSPC Limited is a Chinese Corporation, while plaintiff CSPC Dophen is a
21 separate entity incorporated in New Jersey. (Id. at 2.) And Jumin Sun "is the Chief Financial
22 Officer of CSPC Limited" not plaintiff CSPC Dophen. (Id. at 3.)

23 Accordingly, plaintiff's motion to dismiss this claim should be granted.

24 **D. Claims of Fraud and Intentional Misrepresentation (Eighth Cause of Action);**
25 **Fraud in the Offer of Securities (Ninth Cause of Action); and Fraud in**
26 **Connection with the Sale of Securities (Tenth Cause of Action)**

27 Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity

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1 the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions
2 of a person’s mind may be alleged generally.”⁵ Fed. R. Civ. P 9(b).

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

10 Circumstances that must be stated with particularity pursuant to Rule 9(b) include the
11 “time, place, and specific content of the false representations as well as the identities of the
12 parties to the misrepresentations.” Sanford v. Memberworks, Inc., 625 F.3d 550, 558 (9th Cir.
13 2010) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)). Likewise,
14 “[u]nder California law, the ‘indispensable elements of a fraud claim include a false
15 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.’”
16 Vess v. Ciba—Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (quoting Moore v.
17 Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)).

18 Here, none of these fraud-based causes of action allege with any specificity a claim upon
19 which relief can be granted. In this regard, although the cause of action for fraud and intentional
20 misrepresentation is asserted against “Counter-Defendants,” there are no allegations of
21 wrongdoing asserted against CSPC Dophen. (Sec. Am. CC (ECF No. 224) at 33.) Instead, the

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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 Puri v. Khalsa, 674 Fed. Appx. 679, 689 (9th Cir. 2017) (“The negligent
27 misrepresentation claim thus fails under Rule 9(b) as to each defendant.”); Kelley v. Rambus,
28 Inc., 384 Fed. Appx. 570, 573 (9th Cir. 2010) (“Kelley’s state law claims for common law fraud
and negligent misrepresentation fail to meet the heightened 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 allegations of wrongdoing involve counter-defendants Yingui Li, Jinxu Wang, Jumin Sun, and
2 Dongchen Cai. (Id.)

3 The claim for violation of 15 U.S.C. § 17(a) of the Securities Act—fraud in the offer of
4 securities in interstate transactions—merely alleges in a vague and conclusory manner that CPSC
5 Dophen offered “stock to Dr. Hu for purchase . . . with scienter to defraud[.]” (Sec. Am. CC.
6 (ECF No. 224) at 34.) Moreover, there is no “private right of action under section 17(a).” In re
7 Washington Public Power Supply System Securities Litigation, 823 F.2d 1349, 1355 (9th Cir.
8 1987).

9 Finally, in support of the claim for fraud in connection with the sale of securities, the
10 second amended counterclaim simply alleges that CSPC Dophen engaged in a “concerted effort”
11 to sell “stock shares to Dr. Hu . . . with scienter to defraud[.]” (Sec. Am. CC. (ECF No. 224) at
12 35.) Absent from these allegations, however, is any specificity as to time, place, and/or specific
13 content of allegedly false allegations. See generally City of Dearborn Heights Act 345 Police &
14 Fire Retirement System v. Align Technology, Inc., 856 F.3d 605, 619 (9th Cir. 2017) (“a plaintiff
15 must ‘state with particularity facts giving rise to a strong inference that the defendant acted with
16 the required state of mind’”).

17 Accordingly, plaintiff’s motion to dismiss these counterclaims should be granted.

18 **E. Retaliation in Violation of Title VII of the Civil Rights Act (Eleventh Cause of**
19 **Action)**

20 Title VII prohibits retaliation by an employer “against an employee for making a charge
21 or otherwise participating in a Title VII proceeding.” Nilsson v. City of Mesa, 503 F.3d 947, 953
22 (9th Cir. 2007). Under § 704 of the Civil Rights Act of 1964, it is unlawful

23 for an employer to discriminate against any of his employees . . .
24 because [the employee] has opposed any practice made an unlawful
25 employment practice by [Title VII], or because [the employee] has
made a charge, testified, assisted, or participated in any manner in an
investigation, proceeding, or hearing under [Title VII].

26 42 U.S.C. § 2000e–3 (2000). To make out a prima facie case of retaliation under Title VII, a
27 plaintiff must allege facts demonstrating that “(1) she engaged in a protected activity, (2) she
28 suffered an adverse employment action, and (3) there was a causal link between her activity and

1 the employment decision.” Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1065-66 (9th Cir.
2 2003) (quoting Raad v. Fairbanks North Star Borough Sch. Dist., 323 F.3d 1185, 1196-97 (9th
3 Cir. 2003)); see also Strother v. Southern California Permanente Medical Group, 79 F.3d 859,
4 868 (9th Cir. 1996) (setting out same three elements for FEHA retaliation claim).

5 Plaintiff asserts that this counterclaim should be dismissed because Dr. Hu failed to allege
6 that he first exhausted his administrative remedies and fails to allege participation in a protected
7 activity. (Pl.’s MTD (ECF No. 227) at 27-28.) “In order to bring a Title VII claim in district
8 court, a plaintiff must first exhaust her administrative remedies.” Sommatino v. U.S., 255 F.3d
9 704, 707 (9th Cir. 2001). A plaintiff exhausts their “administrative remedies by filing a charge
10 with the EEOC or an equivalent state agency, like the DFEH, and receiving a right-to-sue letter.”
11 Scott v. Gino Morena Enterprises, LLC, 888 F.3d 1101, 1106 (9th Cir. 2018).

12 Here, Dr. Hu admits that this “claim was put under the wrong law per his former
13 attorney,” and instead should have been a “Retaliatory Discrimination Actions Under the
14 Whistleblower Protection Provisions of the Federal False Claims Act[.]” (Def.’s Opp.’n (ECF
15 No. 230) at 9.) That, however, is not the claim that was asserted. Accordingly, plaintiff’s motion
16 to dismiss this counter claim should also be granted.

17 **F. Punitive Damages**

18 The undersigned previously struck a prayer for punitive damages as it pertained to
19 counterclaims for breach of contract, failure to pay wages and other benefits, and violation of
20 Business & Professions Code § 17200, *et. seq.* (ECF No. 124 at 11.) Dr. Hu has again asserted a
21 request for punitive damages without any explanation of why punitive damages are available in
22 this action.⁶ See Berkla v. Corel Corp., 302 F.3d 909, 917 (9th Cir. 2002) (“punitive damages,
23 which are designed to punish and deter wrongful conduct, are not available in breach of contract
24 actions”); In re Wal-Mart Stores, Inc. Wage and Hour Litigation, 505 F.Supp.2d 609, 620 (N.D.

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

1 Cal. 2007) (“it is settled law that punitive damages are not available under section 17200”);
2 Czechowski v. Tandy Corp., 731 F. Supp. 406, 410 (N.D. Cal. 1990) (availability of “statutory
3 penalties precludes an award of punitive damages” for failure to pay wages).

4 Accordingly, the undersigned finds that plaintiff’s motion to strike this portion of the
5 second amended counterclaim should be granted.

6 **G. Further Leave to Amend**

7 For the reasons stated above, the undersigned will recommend that plaintiff’s partial
8 motion to dismiss and to strike be granted. The undersigned has carefully considered whether Dr.
9 Hu may further amend his pleading to state a claim upon which relief could be granted. “Valid
10 reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility.”
11 California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir.
12 1988); see also Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293
13 (9th Cir. 1983) (holding that while leave to amend shall be freely given, the court does not have
14 to allow futile amendments). In light of the deficiencies noted above, and Dr. Hu’s repeated
15 inability to successfully amend, the undersigned finds that granting further leave to amend would
16 be futile.

17 **III. Counter-Defendant CSPC Limited’s Motion to Dismiss**

18 Counter-defendant CSPC Limited moves to dismiss Dr. Hu’s second amended
19 counterclaim based on a lack of personal jurisdiction pursuant to Rule 12(b)(2). (ECF No. 236.)
20 Dr. Hu bears the burden of establishing that jurisdiction is proper, although he need only make a
21 prima facie showing of jurisdictional facts to withstand the motion to dismiss. Brayton Purcell
22 LLP v. Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010).

23 “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction
24 over persons.” Daimler AG v. Bauman, 571 U.S. 117, 125 (2014). “Because California’s long-
25 arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional
26 analyses under state law and federal due process are the same.” Schwarzenegger v. Fred Martin
27 Motor Co., 374 F.3d 797, 800-01 (9th Cir. 2004). “For a court to exercise personal jurisdiction
28 over a nonresident defendant consistent with due process, that defendant must have ‘certain

1 minimum contacts' with the relevant forum 'such that the maintenance of the suit does not offend
2 'traditional notions of fair play and substantial justice.'" Mavrix Photo, Inc. v. Brand
3 Technologies, Inc., 647 F.3d 1218, 1223 (9th Cir. 2011) (quoting International Shoe Co. v.
4 Washington, 326 U.S. 310, 316 (1945)).

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

13 Specific personal jurisdiction is found where "[a] nonresident defendant's discrete,
14 isolated contacts with the forum support jurisdiction on a cause of action arising directly out of its
15 forum contacts[.]" CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1075 (9th Cir.
16 2011). "[T]hat is, jurisdiction [is] based on the relationship between the defendant's forum
17 contacts and plaintiff's claims." Menken v. Emm, 503 F.3d 1050, 1057 (9th Cir. 2007). "The
18 inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant
19 'focuses on the relationship among the defendant, the forum, and the litigation.'" Walden v.
20 Fiore, 134 S. Ct. 1115, 1121 (2014) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775
21 (1984)) (internal quotation marks omitted). However, "the 'primary concern' is 'the burden on
22 the defendant.'" Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco
23 County, 137 S. Ct. 1773, 1780 (2017) (quoting World-Wide Volkswagen Corp. v. Woodson, 444
24 U.S. 286, 292 (1980)).

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

- 27 (1) The non-resident defendant must purposefully direct his activities
28 or consummate some transaction with the forum or resident thereof;
or perform some act by which he purposefully avails himself of the

1 privilege of conducting activities in the forum, thereby invoking the
2 benefits and protections of its laws;

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

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

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

8 As was true of the first amended counterclaim, the second amended counterclaim fails to
9 allege any jurisdictional facts that could support either general or specific personal jurisdiction.
10 To the contrary, the second amended counterclaim alleges that CSPC Limited "is a Chinese
11 Corporation organized under the laws of Hong Kong, with its office in Hong Kong, and
12 headquarters in China." (Sec. Am. CC (ECF No. 224) at 2.)

13 The second amended counterclaim does makes various vague and conclusory allegations
14 with respect to CSPC Limited. For example, it alleges that CSPC Limited paid half of Dr. Hu's
15 salary. (Id. at 8.) "Reimbursed the spending each month[.]" (Id. at 10.) And that in
16 "June 2017, CSPC Limited's four executives . . . came to CSPC Dophen to force Dr. Hu to
17 transfer DP303c from Dophen Biomed to CSPC Limited." (Id. at 18.) Moreover, "CSPC-
18 Dophen is merely Atler ego of CSPC Limited." (Id. at 2.)

19 However, "[t]he existence of a parent-subsiidiary relationship is insufficient, on its own, to
20 justify imputing one entity's contacts with a forum state to another for the purpose of establishing
21 personal jurisdiction." Ranza v. Nike, Inc., 793 F.3d 1059, 1070 (9th Cir. 2015). "A basic tenet
22 of American corporate law is that the corporation and its shareholders are distinct entities." Dole
23 Food Co. v. Patrickson, 538 U.S. 468, 474 (2003).

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

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

13 Here, CPSC Limited has asserted and provided a declaration in support of the following:

14 CPSC Limited is a foreign Corporation organized under the laws of
15 Hong Kong with its principal place of business in Hong Kong. CPSC
16 Limited does not own or lease any real estate in California or
17 otherwise maintain an office in the state. CPSC Limited has no
18 mailing address or a designated agent for service of process in
19 California. CPSC Limited does not conduct business in California.
20 CPSC Limited has never applied for or held a business license from
21 the State of California. CPSC Limited has never employed any
22 employees in California. CPSC Limited has no bank accounts in the
23 state and does not pay California state taxes. CPSC Limited has a
24 subsidiary named CPSC Dophen Corporation (“CPSC Dophen”).
25 CPSC Limited and CPSC Dophen are separate entities. They are
26 individually formed entities with different boards of directors. They
27 maintain separate bank accounts, funds, and assets. They also
28 maintain separate corporate records. CPSC Limited has never paid
salaries to CPSC Dophen’s employees, including Sean Hu. CPSC
Limited does not control CPSC Dophen’s HR function or payroll.
CPSC Limited does not share employees or offices with CPSC
Dophen.

(CPSC Limited’s MTD (ECF No. 236) at 9-10) (citations omitted).

25 Dr. Hu’s opposition disputes these assertions but does so through vague and conclusory
26 allegations. For example, the opposition asserts that there “was no corporate formality at CPSC
27 Dophen but fraud.” (Dr. Hu’s Opp.’n (ECF No. 249) at 6). That there was “Commingled
28 Finance and Assets Among CPSC Limited and Its Subsidiaries.” (Id. at 7.) And that “CPSC

1 Dophen is an Alter Ego of CSPC Limited.” (Id. at 8.) To the extent these vague and conclusory
2 allegations are supported, they are supported by citation to the second amended counterclaim or
3 to evidence that is entirely unclear, such as emails, some of which are written in Chinese, Wechat
4 message screen shots, and purchasing records, the import of which are entirely unclear. (ECF
5 Nos. 97 & 99.)

6 Under these circumstances, the undersigned cannot find that Dr. Hu has made a prima
7 facie showing that jurisdiction over CSPC Limited is proper. Accordingly, CSPC Limited’s
8 motion to dismiss should be granted.

9 CONCLUSION

10 Accordingly, IT IS HEREBY ORDERED that:

11 1. Defendant’s November 14, 2019, motion for alternative service of process (ECF No.
12 218) is granted;

13 2. Within twenty-eight days of the date of this order defendant shall serve process on the
14 counter defendants’ United States based counsel/plaintiff’s counsel pursuant to Fed. R. Civ. P.
15 4(f)(3); and

16 3. Defendant’s December 6, 2019, motion for a seven-day extension of time (ECF No.
17 223) is granted *nunc pro tunc*.

18 Also, IT IS HEREBY RECOMMENDED that:

19 1. CSPC Dophen’s December 23, 2019 motion to dismiss (ECF No. 227) be granted as
20 articulated above;

21 2. CSPC Limited’s January 21, 2020 motion to dismiss (ECF No. 236) be granted and
22 CSPC Limited be dismissed from this action; and

23 3. Defendant not be granted further leave to amend.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after
26 being served with these findings and recommendations, any party may file written objections with
27 the court and serve a copy on all parties. Such a document should be captioned “Objections to
28 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served

1 and filed within fourteen days after service of the objections. The parties are advised that failure
2 to file objections within the specified time may waive the right to appeal the District Court's
3 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 Dated: July 20, 2020

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7 DEBORAH BARNES
8 UNITED STATES MAGISTRATE JUDGE
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