



reasons: (i) ZBP was fraudulently joined and (ii) ZBP has not been properly served. [Dkt. #1 at ¶¶ 5-6]. The Court is presently unconvinced that these conditions exist and/or are sufficient to preclude the Court from considering the citizenship of ZBP.

First, while Defendants correctly point out in their Notice and Motion to Transfer that Defendant ZBP was not a signatory to the "Partnership Offering" document, this does not alone establish that ZBP was fraudulently joined. See [*id.* at ¶ 5; Dkt. #17-1 at 7]. Construing the Complaint and the agreement attached thereto in a light most favorable to the Plaintiff, as this Court must, ZBP appears to be a necessary or indispensable party to this action. Most significantly, Plaintiff seeks "[s]pecific performance of the contractual promises made to plaintiff," including delivery of "1% of the total issued and outstanding shares of [ZBP] . . . [a] declaratory judgment declaring that plaintiff owns 1% of the issued and outstanding stock of [ZBP] . . . [and] [a] permanent injunction requiring defendant [ZBP] to cause plaintiff's shares to be registered on the books of [ZBP] in China, and to grant to plaintiff full rights to participate in the initial public offering and all other rights appurtenant to his status as a shareholder." [Dkt. #1-1 Compl. at 35-36]. Should Plaintiff prevail and ZBP not be joined, as Defendants propose, it would appear that Plaintiff would not be able to obtain complete relief, since only ZBP would be able to provide Plaintiff with some or all of the contractual, injunctive, and declaratory relief he seeks. The allegations in the Complaint further buttress this conclusion, as the Complaint charges Defendants Beta Pharma and Zhang with a list of misrepresentations and omissions, including their failure to inform Plaintiff (i) that the "shares of ZBP" stock Plaintiff

was promised “were not transferrable or saleable to others[;]” (ii) that “unless Beta Pharma repurchased plaintiff’s shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP[;]” (iii) of “[Beta Pharma’s] knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by [Beta Pharma] to be registered in China[;]” and (iv) of “[Beta Pharma]’s knowledge that the ZBP board had ordered [Beta Pharma] to repurchase ZBP shares from investors at their current fair market value.” [*Id.* at ¶¶ 12f-g; 13(e)-(f)]. Taken together, these allegations suggest that authority over the possession of and rights accompanying ZBP’s shares rests with ZBP alone. Relatedly, ZBP would appear to be a necessary or indispensable party because if Plaintiff were to prevail, the relief Plaintiff seeks would directly affect ZBP’s rights and interests, in particular, its ability to own and disburse shares of its own company.

Such considerations necessarily implicate the questions of subject-matter jurisdiction, removal, and fraudulent joinder. As an initial matter, when removal is based upon diversity jurisdiction, “the party invoking diversity jurisdiction must demonstrate that complete diversity among the parties existed at the time removal was sought to federal court.” *Sherman v. A.J. Pegno Constr. Corp.*, 528 F. Supp. 2d 320, 326 (S.D.N.Y. 2007) (citing and quoting *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) and *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56-57 (2d Cir. 2006)). Federal courts have long held that parties who are necessary or indispensable and nondiverse destroy diversity jurisdiction. See, e.g., *Kristensen v. Dampierre*, No. 89 Civ. 6683 (CSH), 1990 WL 103957, at \*2 (S.D.N.Y. Jul. 19, 1990) (Haight, J.) (“Under Rule 19(b), an action must be

dismissed if a party who would deprive the court of jurisdiction is regarded as indispensable.”) (dismissing complaint for lack of subject-matter jurisdiction after concluding nondiverse party was “indispensable” since “complete relief can only be achieved by impleading [the non-diverse party]”).

Indeed, long ago, the United States Supreme Court, in *Crump v. Thurber*, 115 U.S. 56 (1885), addressed a case with strikingly similar facts to the present one and found that removal was improper and diversity jurisdiction lacking. There, the Court found that a defendant corporation, who was not a party to the agreement at issue but whose stock comprised the plaintiff’s compensation under that agreement, was “an indispensable party,” because the plaintiff sought to “be declared to be the owner of the shares . . . and be recognized as such on the books of the corporation,” which necessitated “a decree ordering the corporation . . . to issue to [plaintiff] certificates for the shares.” *Id.* at 60.

This principle governing subject-matter jurisdiction over necessary and indispensable parties applies with equal force to claims of fraudulent joinder. Courts in this Circuit hold that, in assessing fraudulent joinder, “a necessary or indispensable party to a lawsuit, even where no specific cause of action is asserted against it, should be considered for diversity of jurisdiction purposes if it is a real party to the controversy.” *Audi of Smithtown, Inc. v. Volkswagen of Am., Inc.*, No. 08-CV-1773 (JFB) (AKT), 2009 WL 385541, at \*4 (E.D.N.Y. Feb. 11, 2009) (citing and quoting *MasterCard Int’l Inc. v. Visa Int’l Serv. Ass’n, Inc.*, 471 F.3d 377, 384 (2d Cir. 2006) (“If the district court’s ruling that Visa is not a necessary and indispensable party is erroneous, then, because Visa’s joinder

would destroy diversity jurisdiction, the underlying action must be dismissed for lack of subject matter jurisdiction.”)); *CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, No. 13-cv-03929 (NSR), 2013 WL 6409487, at \*6 (S.D.N.Y. Dec. 6, 2013) (“[T]he question of whether Plaintiffs could state an action against [a non-diverse party] depends on whether [that party] was a necessary party under state law.”); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 888 (D. Conn. 1991) (“The citizenship of a defendant . . . who is a proper, even though not an indispensable, party must be considered when determining the existence of diversity.”) (finding no fraudulent joinder and remanding to Connecticut state court).

To determine whether a party is necessary or indispensable for fraudulent joinder purposes, “the Court looks to state law.” *Audi*, 2009 WL 385541, at \*5 n. 2. Consistent with federal law, under Connecticut law, a party whose presence is necessary for complete relief or whose interest will be affected by the litigation is considered a necessary or indispensable party. See *Sturman v. Socha*, 463 A.2d 527, 530 (Conn. 1983) (defining “[n]ecessary parties” as “persons having an interest in the controversy, and who ought be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it”); *Hilton v. City of New Haven*, 661 A.2d 973, 983 (Conn. 1995) (“Parties have been termed indispensable when their interest in the controversy is such that a final decree cannot be made without either affecting that interest or leaving the controversy in such condition that its final disposition may be inconsistent with equity and good conscience.”). Given the allegations in the Complaint and the

seemingly necessary and indispensable role of ZBP, Defendants' fraudulent joinder assertion, along with their broader claim of diversity jurisdiction, do not appear to be well-founded.

Defendants' second argument against consideration of ZBP's citizenship, improper service, also appears to fail. See [Dkt. #1 at ¶ 6]. It is hornbook law that non-service is insufficient to permit a court to overlook the presence of a non-diverse party. See, e.g., 14B Charles Alan Wright, Arthur R. Miller, Edward H. Copper, *Federal Practice and Procedure* § 3723 (4th ed. 2009) ("A party whose presence in the action would destroy diversity must be dropped formally, as a matter of record, to permit removal to federal court. It is insufficient, for example, that service of process simply has not been made on a non-diverse party."); Rene D. Harrod, *A Primer on Removal*, *Federal Lawyer*, 53-Oct Fed. Law. 20 (Oct. 2006) ("[A]n unserved nondiverse defendant will prevent removal if diversity is the only basis for federal jurisdiction."). Accordingly, federal courts consistently decline to overlook non-diverse defendants on the basis of improper service or non-service, as the Defendants urge the Court to do here. See *Worthy v. Schering Corp.*, 607 F. Supp. 653, 655 (E.D.N.Y. 1985) ("It is well established that an action based on state law cannot be removed to federal district court if any nondiverse defendant is joined in the complaint, even if the nondiverse defendant was never served."); *Burke v. Humana Ins. Co.*, 932 F. Supp. 274, 275 (M.D. Ala. 1996) (remanding case where removing party "contend[ed] that the court may ignore [the nondiverse party's] citizenship because he has not yet been properly served"); *Millet v. Atl. Richfield Cnty.*, No. 98-367-P-H, 1999 WL 33117145, at \*4-5 (D. Me. Apr. 2, 1999) (rejecting defendant's contention that court could not

consider citizenship of nondiverse defendant where plaintiff failed to comply with state procedural rules governing joinder).

In light of the above case law and the Court's stated concerns about subject matter jurisdiction, the Court Orders the parties to address the issue of whether, under *both* federal and Connecticut law, ZBP is a necessary or indispensable party, in accordance with the following briefing schedule: Defendants' Show Cause Response is due by 6/30/2015; Plaintiff's Opposition is due by 7/14/2015; Defendants' Reply is due by 7/21/2015; and Plaintiff's Surreply is due by 7/28/2015.

IT IS SO ORDERED.

/s/

Hon. Vanessa L. Bryant  
United States District Judge

Dated at Hartford, Connecticut: June 6, 2015