

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG,
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,
AND ZHEJIANG BETA PHARMA
CO., LTD.,
Defendants.

No. 3:14-CV-1790 (VLB)

July 28, 2015

REPLY MEMORANDUM OF LAW IN FURTHER RESPONSE
TO ORDER TO SHOW CAUSE

Pursuant to the Court's June 16, 2015 Order to Show Cause ("OTSC") [D.E. #82], defendants Beta Pharma, Inc. ("Beta Pharma") and Don Zhang ("Zhang") (collectively "Defendants") hereby file this Reply Memorandum of Law in further support of their assertion that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).¹

I. UNDISPUTED FACTS AND LAW

In response to the Court's OTSC and Defendants' Memorandum of Law and supporting Declarations, Plaintiff Zhaoyin Wang ("Plaintiff") either does not dispute or agrees to the veracity of the following facts and the authority of the following points of law, all of which are material to the instant inquiry:

- Plaintiff is a citizen of Canada.

¹ Terms or abbreviations not defined herein have the same meaning that they had in Defendants' first brief in response to the OTSC.

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- ZJBP is now a joint stock company organized under the Company Law of the People's Republic of China ("PRC"). Plaintiff's Response to OTSC ("Pl.'s Br.") at 4 n.2.
- The laws of the PRC control the regulatory process that governs the transfer of ZJBP's stock from one shareholder to another individual. See Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); Krys v. Aaron, 2015 WL 2412448, at *10 (D.N.J. May 20, 2015); Kearney v. Dollar, 111 F. Supp. 738, 743-44 (D. Del. 1953).
- The Ministry of Commerce of the PRC must approve the transfer of shares from Beta Pharma to Plaintiff because Plaintiff is a foreign citizen. Pl.'s Br. at 23; Clarke Decl. at ¶ 5; Supplemental Declaration of Donald Clarke ("Clarke Supp'l Decl."), attached hereto, at ¶ 8.
- None of the parties, nor this Court, can compel the Ministry of Commerce of the PRC to approve a transfer of Beta Pharma's shares in ZJBP to Plaintiff because approval is within sole discretion of the Ministry of Commerce and because U.S. judgments are not enforceable in China. Pl.'s Br. at 23; Clarke Decl. at ¶ 5, 7; Clarke Supp'l Decl. at ¶ 9.
- The alleged Partnership Offering provides, in relevant part, that "upon certain point such as company go [sic] public, the transaction will be executed following the detailed procedure that will be described in [ZJBP's] stock ownership policy." Compl., Exh. A at ¶ 3 (emphasis added); Pl.'s Br. at 4.

- The initial public offering of ZJBP has not occurred, though an application for the IPO is pending. Pl.'s Br. at 6.
- The PRC has indefinitely suspended all new IPO's. Pl.'s Br. at 6.
- The only claim that Plaintiff alleges against ZJBP is set forth in Count Nine, which seeks a Declaratory Judgment and injunctive relief. Compl., Count Nine; Pl.'s Claim for Relief. Plaintiff seeks no money damages from ZJBP.

II. LEGAL ARGUMENT

A. Plaintiff Has Not Presented Any Evidence In Support Of His Arguments.

Throughout its Memorandum of Law, Plaintiff avers that the Court must accept his factual allegations as true. Pl.'s Br. at 7. Plaintiff is wrong. When examining its own subject matter jurisdiction and considering whether to remand the matter to state court, the Court cannot simply accept allegations of fact set forth in the Complaint as true, especially when Beta Pharma and Zhang have presented competent proof that contradicts Plaintiff's allegations. See United Food & Comm'l Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (citations and internal quotation marks omitted); Audi of Smithtown, Inc. v. Volkswagen of Am., Inc., 2009 WL 385541, at *3 (E.D.N.Y. Feb. 11, 2009); CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc., 2013 WL 6409487, at *4 (S.D.N.Y. Dec. 6, 2013) (citing Buildings and Const. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 150 (2d Cir. 2006)) (holding that "[t]he court

may look outside the pleadings to determine whether to apply the fraudulent joinder doctrine” and to examine its own subject matter jurisdiction).

Beta Pharma and Zhang have presented the Court with evidence that Plaintiff has not contradicted. In sum, the alleged Partnership Offering states on its face that it is between Beta Pharma and Plaintiff. ZJBP is not a party to the alleged agreement. Compl., Exh. A. Plaintiff is a Canadian citizen. Caldwell Decl., Exh. A at 14. ZJBP is a joint stock company, organized under the Company Law of the PRC. Clarke Decl. at ¶ 3; Clarke Supp’l Decl. at ¶ 2; Li Decl. at ¶ 3. ZJBP does not have any stock to transfer and has no reserved treasury stock. Clarke Decl. at ¶ 6 and Exh. B. There has been no IPO to date, and the PRC has suspended all new IPO’s indefinitely. ZJBP has never conducted any business in Connecticut, has never conducted scientific research, development, selling or marketing of drugs in Connecticut or the United States, never had any employees who worked in Connecticut or the United States. Zhang Supp’l Decl. at ¶ 7. ZJBP is not authorized to conduct business in the United States, nor are its drugs approved for use in the United States. Id. at ¶¶ 8-9. ZJBP is not a subsidiary of Beta Pharma. Id. at ¶ 10.

Because Plaintiff has not provided any evidence to contradict or undermine the competent evidence that Defendants have supplied, the Court must accept the veracity of that evidence.

B. Plaintiff’s Conclusory Statements Of Law Are Incorrect.

Under controlling law, ZJBP is not a necessary or indispensable party in this action. Plaintiff’s statements to the contrary are mistaken.

Just as the Court may not accept Plaintiff's contradicted allegations of fact as true when examining its subject matter jurisdiction, the Court is prohibited from simply accepting Plaintiff's conclusory statements of law. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"); Drumm v. Suny Geneseo Coll., 486 Fed. App'x 912, 913 (2d Cir. 2012) (citing Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011)) (holding that courts "are not . . . bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions" (internal quotation marks omitted)).

1. Plaintiff Applies the Wrong PRC Law.

Plaintiff seemingly agrees that the laws of PRC control because that is where ZJBP is incorporated. See Edgar, supra, 457 U.S. at 645; Krys, supra, 2015 WL 2412448, at *10 (holding that because the entity at issue was incorporated in the Cayman Islands, the laws of the Cayman Islands govern internal corporate affairs); Kearney, supra, 111 F. Supp. at 743-44 (holding that Delaware law governs the transfer of ownership of stock in a Delaware corporation). Plaintiff demonstrates his agreement by citing the laws of the PRC himself in support of his assertions.

Plaintiff, however, identifies the wrong PRC law as controlling. He argues that the Court should apply the "Chinese law applicable at the time of the relevant events" to the instant inquiry. Pl.'s Br. at 8. Because Plaintiff argues that the

alleged transfer of stock occurred in March 2010,² he asserts that the Court should look to the laws that govern transfer of equity in a Sino-Foreign Joint Venture.

Plaintiff's arguments miss the mark because as a matter of black letter law, federal courts examine their subject matter jurisdiction as of the date that the complaint was filed and as of the date that a notice of removal was filed, not on the date of the alleged underlying occurrences. See United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994) (citing 14A Wright & Miller § 3723, at 311–12) (noting that the “usual rule is that removability is determined from the record as of the time the petition for removal is filed but where basis of removal is diversity then diversity of citizenship must exist at time action was filed in state court as well as at time of removal”). There is no dispute that when Plaintiff filed the Complaint, and at the time of Defendants' removal of this action to federal court, ZJBP was a joint stock company. Clarke Supp'l Decl. at ¶ 2. Accordingly, the

² Defendants dispute Plaintiff's allegation. Rather, assuming that the Partnership Offering is enforceable (which Defendants contend it is not), if any transfer were to occur, the Partnership Offering clearly provides that the transaction would not occur until “upon certain point such as company go public,” or in other words, after the IPO. Here, the IPO has not occurred, and may never occur. For this reason and others, the conditions upon which the stock would have been transferred to Plaintiff never occurred, and Plaintiff has no right to the stock.

governing provisions are those of the PRC's Company Law that concerns joint stock companies. Id. at ¶ 3.

In addition, Plaintiff seeks prospective injunctive relief against ZJBP. Thus, regardless of the date of the alleged Partnership Offering, any transfer of stock that occurs as a result of this lawsuit must be accomplished in the future. As Donald Clarke, an expert in Chinese corporate law, aptly explains in his initial and Supplemental Declarations, ZJBP, as a Sino-Foreign Joint Venture, no longer exists. Because ZJBP is now a joint stock company, the PRC Company Law, not the Sino-Foreign Joint Venture Law, now governs the transfer of its stock. Clarke Decl. at ¶ 3; Clarke Suppl. Decl. at ¶ 3.

Plaintiff does not contest that under the PRC's Company Law, a joint stock company does not have the legal authority to block any transfer of its stock. Clarke Decl. at ¶ 4; Clarke Supp'l Decl. at ¶¶ 6, 7. Because ZJBP is a joint stock company, its shares are freely transferrable, and as such, it follows that ZJBP does not have the legal authority to block transfers of its stock to Plaintiff. Ibid.

2. ZJBP Is Not A Necessary And Indispensable Party

The Court issued the instant OTSC because it wanted information about whether ZJBP is necessary and indispensable. The Court noted in the OTSC that a party is necessary and indispensable and must be considered for diversity purposes when a claimant can only achieve "complete relief" if the party is included in the lawsuit. Kristensen v. Dampierre, 1990 WL 103957, *2 (S.D.N.Y. July 19, 1990); Sturman v. Socha, 191 Conn. 1, 6-7 (1983) (holding that parties are necessary and indispensable when their presence is necessary to "finally

determine the entire controversy, and do complete justice, by adjusting all the rights involved in it”); OTSC at 3-5. The Court also noted that if ZJBP has “authority over the possession and rights accompanying” its shares, and if ZJBP’s “ability to own and disburse shares of its own company” is affected, see OTSC at 3, then ZJBP is necessary and indispensable party. None of these requirements is met by ZJBP’s presence. Thus, ZJBP is not necessary and indispensable.

Here, Plaintiff seeks a Declaratory Judgment against ZJBP that he is the owner of 1% of its stock, and he asks the Court to grant injunctive relief against ZJBP “to cause [P]laintiff’s shares to be registered on the books of [ZJBP] in China, and to grant [P]laintiff full rights to participate in the initial public offering and all other rights appurtenant to his status as a shareholder.” Pl.’s Claim for Relief at ¶ 6. However, as a pre-condition of any transfer of stock to him, the Ministry of Commerce of the PRC must approve the transfer. Clarke Decl. at ¶ 5; Clarke Supp’l Decl. at ¶ 8; Li Decl. at ¶ 4. Plaintiff agrees. Pl.’s Br. at 23. Indeed, sole authority over possession and rights accompanying the transfer of ZJBP stock to Plaintiff rests with the Ministry of Commerce, which has not been named as a party in this litigation – nor could it have been. See Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 197 (2007); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495-96 (1983); Clarke Decl. at ¶ 5, 7; Clarke Supp’l Decl. at ¶ 8. Thus, Plaintiff cannot obtain complete relief from ZJBP because it is within the discretion of the Ministry of Commerce of the PRC alone to approve the injunctive relief Plaintiff seeks.

Moreover, provided that the Ministry of Commerce approves the transfer from Beta Pharma to Plaintiff, ZJBP does not have any authority to block it. Clarke Supp'l Decl. at ¶¶ 6-8. In addition, ZJBP's "ability to own and disburse shares of its own company" remains unaffected because it does not have any shares, nor has it reserved any treasury stock. Clarke Decl. at ¶ 6. Given these undisputed precepts, it is clear that ZJBP is not a necessary and indispensable party.

3. **Plaintiff's Attempt To Change The Theory Of His Case Is Futile and Unavailing.**

Plaintiff concedes that government approval is required for the transfer. Having been compelled to make that admission, and realizing that none of the Defendants are able to provide full and complete relief, i.e., the transfer of ZJBP stock, recognition on ZJBP's books and records of Plaintiff's alleged ownership interest, and the ability to participate in the IPO, Plaintiff shifts gears. Without seeking to amend the Complaint, Plaintiff now asks this Court for new relief: an order to the parties to apply to the Chinese government for the transfer or to allow the judgment to enter against ZJBP, even though the law does not provide Plaintiff with the means to enforce it. By doing so, Plaintiff effectively concedes that ZJBP lacks the legal authority to provide Plaintiff with full and complete relief. Thus, Plaintiff cannot cure this defect by amending his Complaint.

C. **The *Shao* Matter is Irrelevant**

In apparent recognition of the shortcomings in his legal arguments, Plaintiff cites the factual allegations in a completely different matter currently

pending in the District of Connecticut. See Shao, et al. v. Beta Pharma, No. 3:14-cv-01177 (CSH). Plaintiff argues that the Court should consider that ZJBP allegedly blocked the transfer of stock to others and extrapolate those allegations to the situation presented here. The unproven factual allegations in the Shao matter are irrelevant and should not be considered. Not only does the Shao matter involve completely different parties and circumstances, the Shao Plaintiffs' allegations are disputed and the matter remains ongoing.

Nevertheless, should the Court consider Plaintiff's argument, Defendants submit that it is without merit. In this respect, Plaintiff argues that ZJBP's decision in September 2012, when it was still a Sino-Foreign Joint Venture, to allegedly reject transfers to a group of persons including the plaintiffs in the Shao action (the "Shao Plaintiffs"), "demonstrates that the ZBP Board has itself asserted control over the ownership and transfer of ZBP shares." Pl.'s Br. at 9; Plaintiff's Supplemental Response to OTSC ("Pl.'s Supp'l Br.") at 1.

However, ZJBP's alleged decisions in September 2012 are irrelevant to the instant inquiry. Indeed, ZJBP has never taken any action with respect to Plaintiff's alleged ownership interest. As alleged in the Shao matter, at the September 2012 meeting of the Board of Directors of ZJBP, the ZJBP Board rejected the transfer of equity in ZJBP from Beta Pharma to the Shao Plaintiffs. Pl.'s Br. at 9-10. However, in September 2012, ZJBP was a Sino-Foreign Joint Venture. Thus, during the meeting, the Sino-Foreign Joint Venture Law governed the entity. As a result, ZJBP's Board may or may not have been a mere stakeholder under those circumstances as alleged by the Shao Plaintiffs.

Although ZJBP's shareholders and/or Board of Directors may or may not have had the authority in September 2012 to reject the transfer of stock to the Shao Plaintiffs, ZJBP is now a joint stock company. In its current form, ZJBP does not have the legal authority to block the transfer of stock from Beta Pharma to Plaintiff, if the Ministry of Commerce exercises its discretion to approve the transfer and if such transfer is accomplished in accord with PRC law. Thus, ZJBP can only be a stakeholder or nominal party in the instant dispute.

It should also be noted that although Plaintiff's counsel represents the Shao Plaintiffs, Plaintiff is not a party in that action. The Shao Plaintiffs also have not filed any claims against ZJBP in that lawsuit, though they seek recognition of the ownership of ZJBP stock. Defendants respectfully submit that the Court should take judicial notice of these points. Indeed, that failure undermines Plaintiff's current position that ZJBP is a necessary and indispensable party. To the extent that Plaintiff maintains his position, or if Court concludes ZJBP is a necessary and indispensable party, Defendants will seek immediate dismissal of the Shao lawsuit. Fed. R. Civ. P. 19.

III. CONCLUSION

For the foregoing reasons, Beta Pharma and Zhang respectfully request that the Court conclude that ZJBP is not a necessary and indispensable party, that ZJBP has been fraudulently joined, that this Court possesses subject matter jurisdiction over this action, and that this action will not be remanded to state court for lack of subject matter jurisdiction.

**DEFENDANTS BETA PHARMA, INC. AND
DON ZHANG,**

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2015 a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
Michael G. Caldwell (ct 26561)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG,
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,
AND ZHEJIANG BETA PHARMA
CO., LTD.,
Defendants.

No. 3:14-CV-1790 (VLB)

July 24, 2015

SUPPLEMENTAL DECLARATION OF DONALD C. CLARKE
PURSUANT TO 28 U.S.C. § 1746

I, DONALD C. CLARKE, say:

1. I provide this Supplemental Declaration to aid the Court in understanding the laws of the People's Republic of China (the "PRC").

2. Defendant Zhejiang Beta Pharma Co., Ltd. ("ZJBP") is currently a Joint Stock Company (*gufen youxian gongsi*) formed under the Company Law of the PRC.¹

3. Therefore, the Sino-Foreign Joint Venture Law of the PRC does not govern a transfer of shares in ZJBP. The Company Law of the PRC governs such a transfer.

4. If this Court concludes that Defendants must transfer ZJBP shares to Plaintiff, the transfer can be accomplished only in accordance with the laws of the

¹ See Declaration of Donald Clarke, dated July 7, 2015, in this case, Para. 3.

PRC that currently apply. Because ZJBP is a Joint Stock Company, any such transfer will be regulated by the Company Law of the PRC and applicable laws and regulations regarding foreign investment in China. The Sino-Foreign Joint Venture Law will not and cannot govern any such transfer because ZJBP is not a Sino-Foreign Joint Venture any more.

5. Although the laws that govern Sino-Foreign Joint Ventures provide that all of the equity holders of such an entity must approve any transfers of other equity holders' interests or else buy them out, the law that governs Joint Stock Companies—i.e., the Company Law of the PRC—differs.

6. Subject to certain holding periods for promoters and specific rules regarding foreign investment, equity shares in Joint Stock Companies in China are freely transferable in the same way that shares in any Delaware corporation listed on the New York Stock Exchange are freely transferable.

7. Joint Stock Companies do not have the legal authority or right to approve or block any transfer of shares from one shareholder to any other third party, and therefore ZJBP, as a Joint Stock Company, does not have the right to block the transfer of shares from Beta Pharma to Plaintiff, should this Court order the transfer.

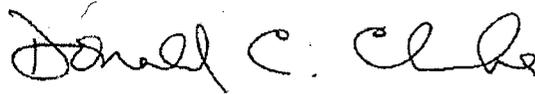
8. However, China's laws and regulations regarding foreign investment require the Ministry of Commerce to approve all transfers of shares in both Joint Stock Companies and Sino-Foreign Joint Ventures when the transfer is to a

foreign citizen.² It is within the discretion of the Ministry of Commerce to approve or reject any such transfer. This process is not simply ministerial, meaning that applications for transfers to foreign citizens are not automatically granted.

9. In addition, judgments of United States courts, whether federal or state, are not enforceable in China.³

Under 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 2015



Donald C. Clarke

² See *id.*, Para. 5.

³ See *id.*, Para. 7.