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Case #21CV375169
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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12 CITIZEN POWER INITIATIVES FOR CHINA
13 and DOE PLAINTIFFS 1-6, the latter
14 individually and on behalf of all other similarly
15 situated,

16 Plaintiffs,

17 vs.

18 TENCENT AMERICA LLC and TENCENT
19 INTERNATIONAL SERVICE PTE. LTD.,

20 Defendants.

Case No. 21CV375169

**ORDER RE: MOTION TO COMPEL
ARBITRATION AND STAY
PROCEEDINGS**

21 The above-entitled matter came on for hearing on Wednesday, January 12, 2022, at 1:30
22 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and
23 considered the written submissions filed by the parties and issued a tentative ruling on Tuesday,
24 January 11, 2022. No party contested the tentative ruling; therefore, the court orders that the
25 tentative ruling be adopted as the order of the court, as follows:

26 **I. INTRODUCTION**

27 This is a putative class action. According to the allegations of the Complaint, filed on
28 January 8, 2021, the Doe plaintiffs in this case (collectively with Citizen Power Initiatives for
China, "Plaintiffs") are users of an app called WeChat. (Complaint, ¶¶ 14-19.) WeChat is a

1 messaging-and-payments mobile application offered by defendants Tencent America LLC and
2 Tencent International Service Pte. Ltd. (collectively, “Defendants”). (*Id.* at ¶ 1.) Plaintiffs allege
3 that WeChat holds an effective monopoly on how “the world that speaks Chinese” communicate
4 with each other electronically. (*Ibid.*)

5 Plaintiffs state that this case arises from Defendants’ practice of turning over private user
6 data and communications from California WeChat users to the government of the People’s
7 Republic of China. (Complaint, ¶ 2.) Plaintiffs also challenge provisions in Defendants’ terms
8 of service and privacy policy. (*Id.* at ¶ 3.)

9 The Complaint sets forth the following causes of action: (1) Declaratory and injunctive
10 relief that certain practices and contractual provisions are unlawful and unenforceable;
11 (2) Violations of the California constitutional right to privacy; (3) Violations of the California
12 constitutional right to free speech; (4) Violations of the California constitutional right to equal
13 protection; (5) Intrusion on seclusion; (6) Conversion and trespass to chattels; (7) Intentional
14 infliction of emotional distress; (8) Negligence; (9) Unjust enrichment; (10) Violations of the
15 California Unfair Competition Law; and (11) Violations of the California Invasion of Privacy
16 Act.

17 On May 19, 2021, Defendants filed a petition to compel arbitration before the American
18 Arbitration Association (“AAA”) under the Federal Arbitration Act and California law.
19 Plaintiffs opposed the motion. For the first time in reply, Defendants argued that the court
20 should compel arbitration *either* in California under California law and pursuant to the AAA
21 procedures *or* in Hong Kong under Hong Kong law and pursuant to the Hong Kong International
22 Arbitration Centre Administered Arbitration Rules.

23 The petition was originally set for hearing on July 21, 2021. At that time, the court asked
24 for supplemental briefing from the parties regarding the issue of whether an arbitrator, rather
25 than the court, should resolve arbitrability questions.

26 The matter then proceeded to hearing on August 25, 2021. The court subsequently took
27 the matter under submission. On September 14, 2021, while the matter was still under
28 submission and without seeking leave of court, Defendants filed a “Notice of Supplemental

1 Authority in Support of Defendants Tencent America LLC and Tencent International Serve Pte.
2 Ltd.’s Petition to Compel Arbitration and Stay Further Proceedings,” presenting additional
3 argument in support of Defendants’ petition. The court then vacated the submission and allowed
4 Plaintiffs five days to file a response.

5 On September 30, 2021, the court entered an order denying Defendants’ petition to
6 compel arbitration. The court held that the delegation clause did not clearly and unmistakably
7 delegate gateway questions of arbitrability to an arbitrator and therefore the court would decide
8 whether Plaintiffs could be compelled to arbitration. The court then determined that, as a matter
9 of due process, there was no request properly before the court to compel arbitration in Hong
10 Kong under Hong Kong law and pursuant to the Hong Kong International Arbitration Centre
11 Administered Arbitration Rules. Consequently, the court considered the petition only with
12 respect to the request for arbitration under the AAA rules. Finally, the court held that Plaintiffs
13 did not assent to the relevant arbitration clause.

14 On October 27, 2021, Defendants filed a Notice of Appeal of the court order denying
15 their petition to compel arbitration. That appeal (Sixth District Court of Appeal Case No.
16 H049519) is still pending.

17 That same day, Defendants filed the matter currently before the court: a second petition
18 to compel arbitration, seeking to compel arbitration in Hong Kong and to stay proceedings in this
19 court. Plaintiffs oppose the petition.

20 **II. DISCUSSION**

21 As a threshold matter, the court addresses the effect on this proceeding of the filing of the
22 Notice of Appeal.

23 Code of Civil Procedure section 916, subdivision (a) stays all further trial court
24 proceedings “upon the matters embraced” in or “affected” by the appeal. (*Varian Medical*
25 *Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*).)

26 In determining whether a proceeding is embraced in or affected by the appeal,
27 [courts] must consider the appeal and its possible outcomes in relation to the
28 proceeding and its possible results. “[W]hether a matter is ‘embraced’ in or

1 'affected' by a judgment [or order] within the meaning of [section 916] depends
2 on whether postjudgment [or postorder] proceedings on the matter would have
3 any effect on the 'effectiveness' of the appeal." [Citation.] "If so, the
4 proceedings are stayed; if not, the proceedings are permitted." [Citation.]

5 (*Varian, supra*, 35 Cal.4th at p. 189.)

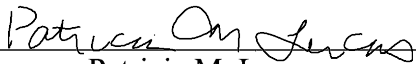
6 [A] proceeding affects the effectiveness of the appeal if the very purpose of the
7 appeal is to avoid the need for that proceeding. In that situation, the proceeding
8 itself is inherently inconsistent with a possible outcome on appeal and must
9 therefore be stayed under section 916, subdivision (a). Thus, an appeal from the
10 denial of a motion to compel arbitration automatically stays all further trial court
11 proceedings on the merits. [Citation.]

12 (*Varian, supra*, 35 Cal.4th at p. 190, citing *Prudential-Bache Securities, Inc. v. Superior Court*
13 (1988) 201 Cal.App.3d 924, 925-926 ["Bache appealed the order denying arbitration. *That*
14 *appeal affects the entire case.* Thus, further trial court proceedings are stayed under Code of
15 Civil Procedure section 916." (Emphasis added.); *Coast Plaza Doctors Hospital v. Blue Cross*
16 *of California* (2000) 83 Cal.App.4th 677, 683, fn. 4 ["[A]fter Blue Cross filed its notice of appeal
17 from the denial of its petition to compel arbitration, there was a *mandatory stay of all*
18 *proceedings* (Code Civ. Proc., § 916) that the trial court refused to lift and thereafter enforced
19 when Coast Plaza attempted to continue pursuit of third party discovery efforts despite the
20 stay."'] (Emphasis added).)

21 Here, Defendant's appeal of the September 30, 2021 order denying their petition to
22 compel arbitration affects the entire case. A possible result of the appeal is that Plaintiffs are
23 ordered to arbitrate the dispute in California under California law and pursuant to the AAA
24 procedures: a result irreconcilable with the order sought on the current petition which would
25 require Plaintiffs to arbitrate in Hong Kong under Hong Kong law and pursuant to the Hong
26 Kong International Arbitration Centre Administered Arbitration Rules. Moreover, the purpose
27 of the appeal is to avoid the need for further proceedings in the trial court. The petition to
28 compel arbitration currently before the court is hardly an ancillary or collateral matter. The

1 proceeding itself is inherently inconsistent with a possible outcome on appeal. Accordingly,
2 because it violates the stay imposed by virtue of Defendants' notice of appeal, Defendants'
3 second petition to compel arbitration is ordered OFF CALENDAR.

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5 Dated: January 12, 2022


6 Patricia M. Lucas
7 Judge of the Superior Court
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