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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

Citizen Power Initiatives for China, and Doe Plaintiffs 1-6, the latter individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Tencent America LLC and Tencent International Service Pte. Ltd.,

Defendants.

Case No. 21CV375169

PLAINTIFFS' OPPOSITION TO TENCENT'S SECOND PETITION TO COMPEL ARBITRATION

Hon. Patricia M. Lucas
Department 3

Complaint Filed: January 8, 2021
Hearing Date: January 12, 2022
Trial Date: Not set

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I. INTRODUCTION

Tencent concedes that this Court should not compel arbitration in Hong Kong if it would contravene a fundamental policy of the United States. (Tencent's Second Petition to Compel Arbitration ("2nd Pet.") at p. 18; *Rhone Mediterranee Compagnia v. Lauro* (3d Cir. 1983) 712 F.2d 50, 53 ["an agreement to arbitrate is 'null and void' . . . when it contravenes fundamental policies of the forum state"]; *Oriental Commercial and Shipping v. Rosseel* (S.D.N.Y. 1985) 609 F. Supp. 75, 78 ["Under the Convention, an agreement to arbitrate is 'null and void' . . . when it contravenes fundamental policies of the forum nation."].)

Meanwhile, it cannot reasonably be disputed that a fundamental policy of the United States is that litigants are afforded fair hearings, including in the arbitration context. (*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 876 ["It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."] [cleaned up]; *R.R. Comm'n v. Pacific Gas Co.* (1938) 302 U.S. 388, 393 ["The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement."]; *Turner v. Wade* (1920) 254 U.S. 64, 70 [rejecting arbitration process because it "denies to the complaining taxpayer due process of law"]; *cf. Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 634, 637 [implicitly recognizing that an international arbitration should only be compelled if it satisfies due process via the retention of "competent, conscientious, and impartial arbitrators," and if "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"].)

Nor can it be disputed that another fundamental policy of the United States is that its own laws be followed. (*State Bank of Ohio v. Knoop* (1853) 57 U.S. 369, 392 ["Our prosperity, individually and nationally, depends upon a close adherence to the settled rules of law, and especially to the great fundamental law of the Union."].) In the arbitration context, that includes federal law providing that, as between courts and private arbitrators, public policy questions must be decided by the former. (*W.R. Grace Co. v. Rubber Workers* (1983) 461 U.S. 757, 766 [a "question of public policy is ultimately one for resolution by the courts."]; *G.B. Goldman v. United Paperworkers* (E.D. Pa. 1997) 957 F. Supp. 607, 617 ["Questions of public policy must ultimately be resolved by the courts, not the arbitrators."]; *Consol. R. Corp. v. Nat. R.R. Passenger Corp.* (D.D.C. 1987) 657 F. Supp. 405, 408 [declining to compel arbitration

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because "[t]he Supreme Court has expressly held that public policy is not a proper subject for arbitrators"].)

Here, compelling arbitration in Hong Kong would contravene both of these fundamental policies.

First, the idea that Plaintiffs could get a fair hearing of their allegations in Hong Kong, given recent developments there, does not pass the smell test. As discussed in more detail below, and as explained by Dr. Alvin Y.H. Cheung, a legal academic from Hong Kong with deep knowledge of that jurisdiction, the Chinese Communist Party-led ("CCP") People's Republic of China ("PRC," and together with the CCP, the "Party-state") has conducted a veritable takeover of Hong Kong's political and legal environment in recent years—and especially after it unilaterally imposed the Hong Kong National Security Law ("NSL")[1] on Hong Kong in June 2020.

As for Plaintiffs' allegations, they include, for example, that Tencent has been routing the private data of WeChat users in California—including message content and metadata such as GPS location—to the Party-state's security organs. (¶¶ 78-83.[2]) Needless to say—and as confirmed by Dr. Cheung—such allegations are likely to draw the negative attention of the Party-state. And given the Party-state's influence in Hong Kong, the notion that *any* institution based in Hong Kong can credibly, or even *safely*, oversee the investigation and adjudication of such allegations is far-fetched. This is particularly true following the NSL, which is so broad that the very *making* of these allegations, or assisting in uncovering evidence of them, might be construed as a violation of the NSL. As such, it is no understatement to say that the personal safety of Plaintiffs, their lawyers, and even of an arbitrator willing to rule in their favor, would be placed at risk if this case were arbitrated in Hong Kong. The possibility of a fair hearing of this particular case before any Hong Kong-based institution is therefore unlikely. That, in turn, compels denial of Tencent's petition.

Second, it would be unlawful and a violation of U.S. policy for a private foreign arbitrator to adjudicate Plaintiffs' public policy claims. Plaintiffs' complaint squarely makes public policy claims (as distinct from public policy arguments). For example, the complaint includes a claim that it violates public policy for Tencent to employ terms of service ("TOS") requiring certain would-be users physically located

[1] The full name of the law is the "Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region."

[2] Citations to "¶ __" are to paragraphs in the complaint.

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