SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SOUTHERN BRANCH, COMPLEX CIVIL LITIGATION

XIYA QIAN, Individually and on Behalf of All Others Similarly Situated

Plaintiff,

vs.

RYB EDUCATION, INC., CHIMIN CAO, YANLAI SHI, PING WEI, CREDIT SUISSE SECURITIES (USA) LLC, MORGAN STANLEY & CO. INTERNATIONAL PLC, CHINA INTERNATIONAL CAPITAL CORPORATION HONG KONG SECURITIES LIMITED, and BNP PARIBAS SECURITIES CORP.,

Defendants.

Case No. 17CIV05494
CLASS ACTION

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

ORDER GRANTING DEFENDANT RYB EDUCATION'S ALTERNATIVE MOTION TO STAY FOR *FORUM NON CONVENIENS* AND UNDERWRITER DEFENDANTS' JOINDERS

On August 3, 2018, a hearing was held in Department 2 of this Court before the Honorable Marie S. Weiner on: (1) Specially Appearing Defendant RYB Education, Inc.'s ("RYB Education") Motion to Quash Service of Summons for Lack of Personal Jurisdiction or, in the Alternative, to Dismiss or Stay on the Ground of Inconvenient Forum, filed June 4, 2018; (2) Specially Appearing Defendants Credit Suisse Securities (USA) LLC ("Credit Suisse"), China International Capital Corporation Hong Kong

Securities Limited ("CICC"), and BNP Paribas Securities Corp.'s ("BNPP") Motion to Quash Service of Summons for Lack of Personal Jurisdiction and Joinder in Specially Appearing Defendant RYB Education's Motion to Quash Service of Summons for Lack of Personal Jurisdiction or, in the Alternative, to Dismiss or Stay on the Ground of Inconvenient Forum or Pending Resolution of Parallel Federal Class Action, filed June 4, 2018; (3) Specially Appearing Defendant Morgan Stanley & Co. International plc's ("Morgan Stanley") Motion to Quash Service of Summons for Lack of Personal Jurisdiction and Joinder in Specially Appearing Defendant RYB Education's Motion to Quash Service of Summons for Lack of Personal Jurisdiction or, in the Alternative, to Dismiss or Stay on the Ground of Inconvenient Forum, filed July 2, 2018; and (4) Plaintiff Xiya Qian's Opposed Motion For Jurisdictional Discovery and Continuance to Oppose RYB Education, Credit Suisse, Morgan Stanley, CICC, and BNPP's Motions to Quash Service of Summons for Lack of Personal Jurisdiction, filed July 23, 2018.

Keith Lorenze of the Rosen Law Firm appeared on behalf of Plaintiff Xiya Qian; Virginia Milstead of Skadden, Arps, Slate, Meagher, & Flom LLP specially appeared on behalf of Defendant RYB Education, Inc.; and Matthew Close of O'Melveny & Myers LLP specially appeared on behalf of Defendants Credit Suisse, Morgan Stanley, CCIC, and BNPP (collectively "Underwriter Defendants").

Upon due consideration of the briefs and evidence presented, and the oral argument of counsel for the parties,

IT IS HEREBY ORDERED as follows:

1. Specially Appearing Defendant RYB Education, Inc.'s Alternative Motion to Stay on the Ground of Inconvenient Forum, filed June 4, 2018, seeking to have this

lawsuit adjudicated in New York, and the Underwriter Defendants' respective joinders, filed June 4 and July 2, 2018, are GRANTED. This action is STAYED, subject to application to lift the stay if these claims are not able to be adjudicated against all Defendants in New York.

2. Counsel for Plaintiff and for Defendant RYB Education shall file and serve a Status Report in this case *every six months* as to the status of adjudication of these claims in New York, and remember to provide a courtesy copy directly to Department 2.

3. Defendants' respective Motions to Quash for Lack of Personal Jurisdiction and Plaintiff Xiya Qian's Opposed Motion for Jurisdictional Discovery are deemed MOOT.

THE COURT FINDS as follows:

The court "has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case." (Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp. (2007) 549 U.S. 422, 425.) The Supreme Court found, where "[d]iscovery concerning personal jurisdiction would have burdened [the defendant] with expense and delay" and the court "would dismiss the case without reaching the merits" based on *forum non conveniens*, the "*forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less

burdensome course." (Id. at p. 435-436.) Although before Supreme Court was a federal case, the holding equally applies in state court, as follows:

Code of Civil Procedure section 410.30, subdivision (a) provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

"*Forum non conveniens* is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citation.]" (Stangvik v. Shiley Inc. (1991) 54 Cal.3d 744, 751.) "On a motion for *forum non conveniens*, the defendant, as the moving party, bears the burden of proof." (Ibid.)

> In determining whether to grant a motion based on *forum non conveniens*, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]

(Ibid.) Although a trial court has "authority to consider the *forum non conveniens* motion" at any time, that "does not mean that defendants can unreasonably delay bringing *forum non conveniens* motions with impunity; any delay would be relevant to whether the motion should be granted." (Britton v. Dallas Airmotive Inc. (2007) 153 Cal.App.4th 127, 135.) However, where there is a mandatory forum selection clause, "the test is

simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect." (Olinick v. BMG Entertainment (2006) 138 Cal.App.4th 1286, 1294 ("Olinick").) In this instance, Plaintiff's claims arising from the Registration Statement are subject to a forum selection clause with Defendant RYB Education.

> The deposit agreement and the ADRs will be interpreted in accordance with the laws of the State of New York. The rights of holders of Class A ordinary shares (including Class A ordinary shares represented by ADSs) is governed by the laws of the Cayman Islands.
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> By holding an ADS or an interest therein, you irrevocably agree that any legal suit, action or proceeding against or involving us or the Depositary, arising out of or based upon the deposit agreement, ADSs or ADRs, may only be instituted in a state or federal court in the City of New York, and you irrevocably waiver any objection to the laying of venue and irrevocably submit to the exclusive jurisdiction of such courts with respect to any such suit, action or proceeding.

(Milstead Dec., supra, at Ex. 1, p. 172 (bates no. Page 19). See also id. at Ex. 2, p. 44 – 45 (bates no. Page 82 – 83).) "[F]orum selection clauses are given effect in this state, absent a showing that enforcement would be unfair or unreasonable." (Furda v. Sup. Ct. (1984) 161 Cal.App.3d 418, 425.)

> Although not even a "mandatory" forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum, the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable. If there is no mandatory forum selection clause, a *forum non conveniens* motion requires the weighing of a gamut of factors of public and private convenience. However if there is a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect. Claims that the previously chosen forum is unfair or inconvenient are generally rejected. A court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience. Mere inconvenience or additional expense is not the test of unreasonableness of a mandatory forum selection clause.

(Olinick, supra, 138 Cal.App.4th at p. 1294 (internal citations, quotations omitted).)

In this instance, Plaintiff does not argue that this clause is unfair or unreasonable, which Plaintiff could not in good faith argue *given she first filed an action in federal court in New York*, Qian v. RYB Education, Inc., case no. 1:17-cv-09261-KPF (S.D.N.Y.) (See Milstead Dec. ISO RYB Education Motion to Quash, filed Jun. 4, 2018, ¶¶ 5 – 8, Ex. 4 – 7 ("RYB Motion"); Opp., filed Jun. 18, 2018, p. 9:19 – 11:3.) Rather, Plaintiff argues that the Deposit Agreement is not enforceable because it is neither dated nor executed. (Id. at p. 10:1-7.) However, the legal authority cited, Am. Depositary Receipts, Release No. 274 (May 23, 119), does not support Plaintiff's assertion that the deposit agreement must be executed by RYB Education, *inter alios*. Rather, the *registration statement* must be executed "by the issuer of the deposited securities, its principal officers, a majority of its board of directors and its authorized representative in the United States," and not the deposit agreement. (Id. at p. 10:4-6. See Reply ISO RYB Motion, filed Jul. 30, 2018, p. 8:25 - 9:8.)

Although Plaintiff is correct "that the forum selection clause is enforceable as to RYB [Education], the Deposit Agreement is not applicable to the Responding [Underwriter] Defendants," the Underwriter Defendants have consented to jurisdiction in New York by filing joinders to the RYB Motion. (Opp., filed Jun. 18, 2018, p. 10:8-17. See Joinders, filed June 4 and July 2, 2018.)

Furthermore, as to the first prong, the defendant demonstrates "suitability" if all of the Defendants are subject to the personal jurisdiction of the other (non-California) state and there is no bar under other state's statute of limitations. (Guimei v. General Elec. Co. (2009) 172 Cal.App.4th 689, 696.) Here, by its motion and the Underwriter Defendants' joinders, Defendant RYB Education has demonstrated all defendants have consented to

jurisdiction in New York in this case. As discussed *supra*, Plaintiff filed a similar action against RYB Education in federal court in New York.[1] (Milstead Dec. ISO RYB Motion, supra, at ¶¶ 5 – 8, Ex. 4 – 7.) Neither Plaintiff nor Defendants raise any issue with New York's statute of limitations and as these claims involve Securities Act violations, the statute of limitations is subject to federal law, and would be the same in New York as it is in California.

As to the second prong, the balance of interests weighs heavily in favor of adjudicating this lawsuit in New York. Both Defendants Credit Suisse and BNPP have headquarters in New York, the majority of employees involved in the IPO work in New York, and documents are located in New York, among other places, and not California (Alain Dec. ISO Underwriter's Motion to Quash, filed Jun. 4, 2018, ¶¶ 2, 6 – 8, 11 ; Xiaoyan Jiang Dec. ISO Underwriter's Motion to Quash, filed Jun. 4, 2018, ¶¶ 2, 6, 11.) Defendant RYB Education's registration signatories, including the individual defendants, are Chinese and/or Hong Kong residents, except for its U.S. representative, who is in New York." (Fang Dec. ISO RYB Motion, ¶ 21.) Defendants CCIC and Morgan Stanley are respectively incorporated and headquartered in Hong Kong and United Kingdom, but join this motion. (Zhiwei Jiang Dec. ISO Underwriter's Motion to Quash, filed Jun. 4, 2018, ¶ 2; Lau Dec. ISO Morgan Stanley's Motion to Quash, filed Jul. 2, 2018, ¶ 2.)

The only witness and documents located in California appear to be Plaintiff's, and it is clear that more of the available evidence will be located in New York and not California, and it will be substantially less time-consuming and expensive to litigate the

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[1] Plaintiff asserts that action was voluntarily dismissed on June 18, 2018. (Opp., filed Jul. 23, 2018, p. 2:7-11.)]

action in New York. Other than Plaintiff, none of Defendants or their employees are subject to trial subpoena in California. Accordingly, New York's interest in this action outweighs that of California.

In light of the breadth of jurisdictional discovery Plaintiff seeks in order to moves to oppose Defendants' motions to quash in conjunction with the strong factors supporting a finding of *forum non conveniens* (i.e., mandatory forum selection clause, Underwriter Defendants' joinders, and alternatively the factors analyzed supra), the court, in its discretion takes the less burdensome course of staying the case without reaching the merits based on *forum non conveniens*.

DATED: September 5, 2018

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

SERVICE LIST
Quian v. RYB Education, Class Action 17CIV05494
As of August 2018

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