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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WANG XIAONING, et al.,
Plaintiffs,
v.
YAHOO!, INC., et al.,
Defendants.

No. C 07-2151 CW

ORDER GRANTING IN
PART AND DENYING IN
PART PLAINTIFFS'
MOTION FOR INITIAL
AND JURISDICTIONAL
DISCOVERY

Plaintiffs move for an order permitting them to obtain initial and jurisdictional discovery in order to respond to the arguments made in Defendants' pending motions to dismiss. Defendants oppose Plaintiffs' motion. The matter was taken under submission on the papers. After considering all of the papers filed by the parties, the Court grants Plaintiffs' motion in part and denies it in part.

BACKGROUND

On April 18, 2007, Plaintiffs Wang Xiaoning, Shi Tao and Yu Ling filed the complaint in this action. Wang and Shi are citizens of the People's Republic of China (PRC) and are currently imprisoned in China. Yu, also a citizen of the PRC, is Wang's wife. Plaintiffs allege that Defendants Yahoo!, Inc. (Yahoo!) and Yahoo! Hong Kong, Ltd. (YHK) willfully provided Chinese officials

1 with access to private email records, copies of email messages, and
2 other information about Plaintiffs and the nature and content of
3 their electronic communications. These communications contained
4 pro-democracy literature. As a result of Defendants' turning over
5 this information, officials in the Chinese government allegedly
6 subjected Plaintiffs to torture, cruel and inhumane treatment,
7 arbitrary arrest and prolonged detention for exercising their right
8 to freedom of speech. Plaintiffs accuse Defendants of knowingly
9 and willfully aiding and abetting the commission of torture and
10 other major violations of international human rights law, thereby
11 causing Plaintiffs severe physical and mental suffering.

12 In addition to seeking to hold Defendants liable under the
13 Alien Tort Statute (ATS), the Torture Victims Protection Act (TVPA)
14 and the Communications Privacy Act (CPA), Plaintiffs also seek to
15 hold Defendants liable under California law. Specifically,
16 Plaintiffs assert causes of action for battery, assault, false
17 imprisonment, intentional infliction of emotional distress,
18 negligence and unfair business practices. Plaintiffs seek
19 compensatory and punitive damages, as well as declaratory and
20 injunctive relief.

21 On August 27, 2007, Yahoo! moved to dismiss the complaint
22 pursuant to Rules 12(b)(1), (6) and (7) of the Federal Rules of
23 Civil Procedure. In this motion, Yahoo! argued that Plaintiffs'
24 claims were not justiciable because of the act of state doctrine,
25 the political question doctrine, and principles of international
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1 comity.¹ Yahoo! also argued that, for a number of reasons, the
2 complaint did not state a claim under any of the asserted causes of
3 action. Finally, Yahoo! argued that Plaintiffs' claims were
4 subject to dismissal because they had not joined the PRC, a
5 necessary party. Yahoo!'s motion was supported by an appendix
6 containing a number of documents, including statements of Chinese
7 law.

8 Yahoo! moved separately to strike Plaintiffs' six state law
9 causes of action pursuant to California's anti-SLAPP statute. This
10 motion did not append or reference any documents or factual
11 declarations. Yahoo! also moved, in the event that its motions to
12 strike and dismiss are denied, for a more definite statement
13 pursuant to Rule 12(e).

14 YHK joined in Yahoo!'s motions to dismiss and strike, and also
15 moved independently to dismiss the claims against it under Rule
16 12(b)(2) for lack of personal jurisdiction.² YHK asserted that it
17 has insufficient contacts with California to support either general
18 or specific jurisdiction over it. In support of its motion, YHK
19 relied on the declaration of Alfred Po Tak Tsoi, its general
20 manager. The declaration contains numerous factual allegations

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22 ¹The asserted non-justiciability of Plaintiffs' claims is
23 presumably the basis of Yahoo!'s motion to dismiss under Rule
24 12(b)(1) for lack of subject matter jurisdiction.

25 ²In response to Defendants' request, the Court granted them an
26 extension of the page limit on their motion to dismiss.
27 Nonetheless, they appear to have evaded the Court's order that they
28 limit their motion to forty pages by filing four separate motions.
While no individual motion is longer than forty pages, the combined
length is sixty-eight pages. Defendants are advised not to use
similar tactics to avoid complying with the Court's orders in the
future.

1 concerning YHK's business operations and contacts with California,
2 and discusses the relationship between YHK and Yahoo!, its parent
3 company. Attached to the declaration are nine exhibits containing
4 documents dealing with YHK's operations and organizational
5 structure.

6 Plaintiffs now move to initiate what they characterize as
7 "limited initial and jurisdictional discovery." They claim that
8 such discovery is needed to enable them to respond fully to
9 Defendants' arguments.

10 DISCUSSION

11 I. Discovery in Connection with YHK's Motion Under Rule 12(b)(2)

12 Discovery going to the issue of whether the court has personal
13 jurisdiction over a defendant "should ordinarily be granted where
14 pertinent facts bearing on the question of jurisdiction are
15 controverted or where a more satisfactory showing of the facts is
16 necessary." Butchers Union Local No. 498 v. SDC Inv., Inc., 788
17 F.2d 535, 540 (9th Cir. 1986) (internal quotation marks omitted).
18 Here, YHK made a number of factual allegations in connection with
19 its motion to dismiss for lack of personal jurisdiction. It also
20 submitted documents to support its position. Given Plaintiffs'
21 limited access to information concerning YHK's contacts with
22 California absent the discovery process, it would be unfair to
23 require them to oppose YHK's motion without first having an
24 opportunity to determine the full extent of those contacts.

25 The Court is not persuaded by Defendants' argument that
26 Plaintiffs did not sufficiently plead YHK's California contacts in
27 their complaint. The cases Defendants cite in support of this
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1 argument are neither binding on the Court nor directly applicable
2 to the facts here. The complaint claims that YHK was Yahoo!'s
3 alter ego. It supports this claim with various allegations about
4 Yahoo!'s control over its subsidiary. While these facts may not
5 ultimately be borne out by the evidence, if they are supported by
6 information obtained during jurisdictional discovery, they could
7 justify the exercise of personal jurisdiction over YHK.

8 Accordingly, the Court concludes that Plaintiffs are entitled to
9 discovery on the narrow issue of the Court's personal jurisdiction
10 over YHK.

11 II. Discovery in Connection with Defendants' Motions under Rules
12 12(b)(1), (6) and (7) and the California anti-SLAPP Statute

13 Rule 12(b) provides that if, in connection with a motion to
14 dismiss for failure to state a claim, "matters outside the pleading
15 are presented and not excluded by the court, the motion shall be
16 treated as one for summary judgment and disposed of as provided in
17 Rule 56, and all parties shall be given reasonable opportunity to
18 present all material made pertinent to such a motion by Rule 56."

19 Plaintiffs argue that because Defendants appended supporting
20 documentation to their motion to dismiss under Rule 12(b)(6), the
21 Court should treat the motion as one for summary judgment. In
22 order to counter the factual assertions supported by the appended
23 documents, Plaintiffs contend, they must first be permitted to
24 obtain information through initial discovery.

25 Plaintiffs object in particular to Defendants' attaching
26 Chinese laws and administrative regulations to their motion to
27 dismiss. Defendants rely on these documents to support their

1 defense that they were compelled by Chinese law to disclose the
2 information about Plaintiffs' pro-democracy speech, and therefore
3 cannot be held liable. Plaintiffs argue that Chinese law, as
4 written, does not accurately reflect the government's actual
5 practices. Accordingly, they assert that they must be permitted to
6 determine how the law was applied in this instance by obtaining
7 discovery on communications between Defendants and the Chinese
8 government. This would allow Plaintiffs to determine whether
9 Defendants were actually compelled to disclose the information, a
10 fact which would bear on the validity of the compulsion defense.

11 Plaintiffs may be correct that the Chinese government does not
12 always adhere to the law as embodied in written statutes or the PRC
13 Constitution. Nonetheless, the discovery Plaintiffs seek is far
14 from "limited," as they make it out to be. To the contrary, it
15 goes to the heart of their factual case against Defendants. The
16 Court will not permit initial discovery on what are essentially the
17 merits of this case.

18 Because Defendants' motion to dismiss may dispose of this case
19 in its entirety without the need to consider the appended material
20 to which Plaintiffs object, it would be potentially wasteful for
21 the Court to grant the extensive discovery Plaintiffs seek. In
22 ruling on the motion to dismiss, the Court will accept the
23 allegations in the complaint as true. To the extent Defendants
24 attempt to introduce evidence of facts that supplement or dispute
25 the allegations in the complaint and that cannot be judicially
26 noticed, the Court will exclude the evidence rather than convert
27 the motion into one for summary judgment. Plaintiffs are free to
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1 argue in their opposition to Defendants' motion that a particular
2 ground for dismissal raises factual issues that cannot be resolved
3 at this early stage of the case. If the Court agrees, it will deny
4 the motion with respect to that ground.

5 Plaintiffs also argue that Defendants' motions under Rules
6 12(b)(1) and (7) and the California anti-SLAPP statute rely on
7 factual contentions not contained in the complaint. As with
8 Defendants' Rule 12(b)(6) motion, Plaintiffs maintain that they
9 cannot counter Defendants' arguments without first obtaining
10 discovery on Defendants' communications with the Chinese
11 government. Again, to the extent that these motions depend on
12 extrinsic evidence or supplemental allegations that may be
13 disputed, Plaintiffs may oppose them as premature. There may be no
14 need to delay the briefing and resolution of these motions.

15 CONCLUSION

16 For the foregoing reasons, the Court GRANTS IN PART and DENIES
17 IN PART Plaintiffs' motion for initial and jurisdictional discovery
18 (Docket No. 90).³ Plaintiffs may proceed with discovery on the
19 limited issue of the Court's personal jurisdiction over Yahoo! Hong
20 Kong. Based on the stipulation and Court order of September 20,
21 2007, Plaintiffs shall submit their opposition to Defendants'
22 motions to dismiss on grounds other than for a lack of personal
23 jurisdiction within fourteen days of this order; Defendants' reply
24 is due twenty-one days thereafter. Oral argument will be heard on

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26 ³Defendants' motion (Docket No. 107) to file a letter
27 concerning the Second Circuit's decision in Khulumani v. Barclay
28 Nat'l Bank, Ltd., 2007 U.S. App. LEXIS 24370, is DENIED as moot.
The Court did not rely on Khulumani in deciding this motion.

1 December 20, 2007 at 2:00 p.m.⁴ The case management conference
2 previously scheduled for November 1, 2007 will be held at that same
3 date and time. A hearing on YHK's motion to dismiss for lack of
4 personal jurisdiction will be held on January 31, 2008 at 2:00 p.m.
5 Opposition and reply briefs on that motion shall be filed in
6 accordance with the deadlines in the Local Rules.

7 IT IS SO ORDERED.

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9 Dated: 10/31/07



10 CLAUDIA WILKEN
11 United States District Judge

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United States District Court
For the Northern District of California

⁴The Court notes that the U.S. Department of State has requested that it have thirty days to submit its views after Plaintiffs submit their opposition to the pending motions to dismiss. The Court is hopeful that it will have the benefit of the State Department's position before the hearing.