

Matter of Qudian Securities Litig.
2018 NY Slip Op 32919(U)
November 14, 2018
Supreme Court, New York County
Docket Number: 651804/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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IN RE QUDIAN SECURITIES LITIGATION,

**DECISION AND ORDER
Index No.: 651804/2018**

Mot. Seq. No.: 001

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O. PETER SHERWOOD, J.:

This is a securities class action pursuant to the Securities Act of 1933, on behalf of all purchasers of Qudian American Depositary Shares (ADSs) in or traceable to defend Qudian Inc (Qudian)'s October 18, 2017, initial public offering (the IPO). Each ADS represents one Class A ordinary share in Qudian. The sections of the Securities Act which are implicated are sections 11, 12 (a) (2), and 15, which are included at 15 USC §§ 77k, 771 (a) (23), and 77o.

Plaintiffs allege the Registration Statement acknowledged the importance of protecting Qudian's customer information and preventing data breaches, but it failed to disclose a breach had already occurred, compromising almost a million accounts (Complaint, ¶ 35). Additionally, the Registration Statement failed to state the company was lending improperly, and engaged in risky lending, credit assessment, and loan collection practices including predatory lending, high-risk lending, and providing prohibited online loans to college students, as well as other business practices putting the company at risk (id., ¶¶ 36-37).

Defendants point out five nearly identical actions have been filed in the United States District Court for the Southern District of New York (SDNY) between December 12-19, 2017 (Memo at 3). They included all of the claims stated by plaintiffs, and also purport to be on behalf of the same nationwide class. Plaintiff's counsel here, Robbins Geller Rudman & Dowd, filed on of those cases, but lost its bid to be named lead counsel in the consolidated SDNY actions (*in re Qudian Inc. Securities Litigation*, Master File No. 1:17 -cv- 09741-RA [SDNY]) and is now

attempting its second bite at the apple. Other than some typos and other minor edits, the Complaint here is identical to the one filed by Robbins Geller in the SDNY action it started (*id.* at 4, 14-18). No special circumstances exist to support departure from the usual first-filed rule (*id.* at 18-19). The federal case is neither “vexatious, oppressive or instituted to obtain some unjust or inequitable advantage” nor forum shopping (*id.* at 18, quoting *Thor Gallery at Beach Place, LLC v Std. Parking Corp.*, 34 Misc 3d 1215 (A) [Sup Ct 2012] quoting *L-3 Comms. Corp. v SafeNet Inc.*, 45 AD 3d 1, 7-8 [1st Dept 2007]). Defendants re-emphasize that, plaintiff initiated one of the SDNY actions.

CPLR 3211 (a) (4) provides that a case may be dismissed if “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires” (CPLR 3211 (a) (4)). “Dismissal of the present action, *i.e.*, the New York action in which the CPLR 3211 (a) (4) motion is made, is only appropriate if the present action and the other action involve the same parties and the same cause of action. The present action and the other action involve the same parties and the same cause of action if the following elements of the two actions are substantially similar: (1) the parties: (2) the cause of action: and (3) the relief sought” (Civil Practice Law and Rules Rule 3211 Commentaries C3211:14, *see Cellino & Barnes, P.C. v Law Office of Christopher J. Cassar, P.C.*, 140 AD 3d 1732 [4th Dept 2016]). “If there is another action pending in any court within the United States that involves the same parties and the same cause of action as the present action, the court must consult the first-in-time rule, which provides that generally the action that was commenced first will be the one that is allowed to proceed. The general rule favoring the action that was commenced first is not ironclad; the presence of special circumstances permits a court to depart from the first-in-time rule and favor the later-commenced action” (Civil Practice Law and Rules Rule 3211 Commentaries c3211:14).

Here, there is another, earlier-filed, action pending in the SDNY. That action asserts the claims brought here. All of the defendants in this action are defendants in the SDNY action, and plaintiff does not deny it is a member of the putative class laid out by that complaint. As plaintiff argues, some of the specific misrepresentations alleged in this action are not specified as actionable misrepresentations in the SDNY action and the plaintiffs here are not named in that action. Until the class in the SDNY action is certified and the plaintiffs here opt in to that action, they are prospective class members in that action, no more (*see Alter v Oppenheimer & Co., Inc.*, 8 Misc 3d 1008 (a) [NY County Sup Ct 2005]).

CPLR 2201 provides that “the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” *Alter*, relied upon by the plaintiffs, notes that “[a] motion for stay of proceedings is primarily addressed to court’s discretion” (8 Misc 3d 1008 [A] *2). Further, as stated in *Alter*, when seeking a stay, “[i]t is not necessary that the parties in the state case and the federal action be identical or that the respective parties in each action assume identical positions (*id.* at *2). “thus, where a federal action was commenced first, and the state claims are encompassed within the federal action, a stay may be appropriate, even if there is only a “substantial identity” between the two actions” (*id.*, citing *Asher v Abbott Laboratories*, 307 AD 2d 211 [1st Dept 2003]).

A stay appropriate here. Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent of staying further proceedings in this action, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the class action determination of the court in *In re. Qudian Inc. Securities Litigation*, Master File No. 1:127-cv-09741-RE (SDNY); and it is further


ORDERED that the movant is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days from entry and the Clerk shall mark this matter stayed as herein provided; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]

This constitutes the decision and order of the court.

DATED: November 14, 2018

ENTER,



O. PETER SHERWOOD J.S.C.