SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ACCESS AMERICA FUND, LP, TAYLOR INTERNATIONAL FUND, LTD., JAYHAWK PRIVATE EQUITY FUND II, L.P., SILVER ROCK II, LTD, MAGEE-WOLFSON, LLC, FENG BAI, EOS HOLDINGS LLC, NOEL ROBYN, STEVE MAZUR, RL CAPITAL PARTNERS L.P., NAMTOR GROWTH FUND LP, JON GUNDLACH, ANTHONY POLAK, JAMIE POLAK, RONALD LAZAR, DOMACO VENTURE CAPITAL FUND, MID-OCEAN CONSULTING LTD, TRILLION GROWTH CHINA LP, MATT HAYDEN, GREG GLYMAN, KARLSON KA, TSON PO, SIMON YICK, CHARLES SHEARER, J. EUSTACE WOLFINGTON, MARY MARGARET TRUST, JENNIFER SPINNEY AS EXECUTOR FOR D. SPINNEY, MARISA A. MAGEE, JON WOLFSON, JUSTIN WOLFSON, JW ASSET MANAGEMENT LLC, JW GP LLC, JW PARTNERS LP, LESLIE WHEELER, BHARAT SAHGAL, ROBERT KIRKLAND, MARY BETH SHEA, LUCIANO BRUNO, WILLIAM ROSEN, CMT INVESTMENTS LLC, WARBURG OPPORTUNISTIC TRADING FUND LP, ROBERT SHEARER, RICHARD SHEARER, DAVID OFMAN, MERRY LEE CARNALL, THOMAS E. NOLAN,

Plaintiffs,

-against-

ORIENTAL DRAGON CORPORATION f/k/a EMERALD ACQUISITION CORPORATION,

Defendant.

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Index No.: 652110/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

By order dated October 31, 2016, the court denied, without prejudice, plaintiffs' motion for a default judgment. *See* Dkt. 47 (the Prior Decision).[1] The Prior Decision sets forth the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system. Capitalized terms not defined herein

underlying facts and legal standard, which are not repeated here. In short, this case concerns plaintiffs' investment in Oriental, a Chinese company that "went dark" after failing to comply with its contractual obligation to file the necessary registration statements with the SEC to conduct an initial public offering (IPO). Prior Decision at 2-3; *see Seiden v Kaneko*, 2017 WL 1093937, at *1 (Del Ch 2017) ("After accepting a capital infusion from United States-based investors through a private placement, [the Company], a Delaware holding company that owned a non-public, China-based operating company, 'went dark' leaving its investors scrambling to recover their money. Unfortunately, this is a scenario that has been played out all too frequently in this court."), *aff'd*, 177 A3d 69 (Del 2017).

On November 22, 2016, plaintiffs again moved for a default judgment against Oriental,[2] but withdrew their motion after Oriental appeared by counsel, Wong, Wong & Associates (WWA). *See* Dkt. 108. Oriental filed an answer to the complaint on March 31, 2017. *See* Dkt. 111. Although a discovery schedule was set at a May 23, 2017 preliminary conference (*see* Dkt. 112), Oriental refused to comply with its ESI obligations. Multiple compliance conferences were held to no avail. On November 14, 2017, WWA moved to be relieved as Oriental's counsel. *See* Dkt. 120 at 5 ("Unfortunately, [Oriental] does not intend to comply with ESI discovery and this Court's Directives."). On November 21, 2017, plaintiffs cross-moved to strike Oriental's answer due to its discovery violations. By order dated November 28, 2017, the court granted WWA's motion to withdraw and conditionally granted plaintiffs' cross-motion to strike. *See* Dkt. 152. The court stayed the action for 30 days, and held that Oriental's answer

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have the same meaning as in the Prior Decision.

[2] It should be noted that on August 2, 2017, plaintiffs withdrew their fraud claims. *See* Dkt. 114.

would be stricken if it did not appear by counsel on January 10, 2018 and, by that date, comply with the court's prior discovery orders. *See id.* at 2.

Oriental defaulted. *See* Dkt. 154. It neither appeared nor complied with the court's prior discovery orders. *See id.* On January 29, 2018, plaintiffs filed the instant motion for a default judgment against Oriental. In conformity with the Prior Decision [*see id.* at 6], plaintiffs made an election of remedies and only seek judgment on their first cause of action for breach of contract. As previously discussed, plaintiffs are entitled to a default judgment on their claim that Oriental breached the Subscription Agreement, a claim governed by Delaware law. *See id.* at 3-5. With respect to damages, plaintiffs cite to similar Delaware cases where, as here, a Chinese company went dark instead of complying with its contractual registration obligations and damages were based upon the fair market value of the shares. *See* Dkt. 157 at 9-10.

Oriental's SEC filing obligations under the Subscription Agreement demonstrate that the expected liquid value of the shares on a publicity traded United States stock market is precisely what the parties bargained for. When Oriental "went dark" in China, plaintiffs' shares became illiquid, likely to trade for a severe discount (if not pennies on the dollar) on the secondary market absent some indication that Oriental was not, in fact, defrauding its investors. Losing the bargained-for liquidity, therefore, was the expected consequence of Oriental's breach. Plaintiffs should be able to reap the benefit of their bargain in damages – the liquidated value of their shares had the IPO occurred.

However, actual market activity to determine value is lacking here. Plaintiffs, therefore, seek damages based upon the company's book value.[3] Oriental's total equity at the time of closing was $59,878,376; dividing that amount by the total outstanding shares, 27,497,171, the original book value equals $2.18. *See id.* This amount is less than the $3 per share paid by plaintiffs. Based on the most recent financial information provided to plaintiffs – a June 20, 2015 balance sheet (Dkt. 170) – Oriental's total equity was $260,615,445 (after converting from Chinese Renminbi to U.S. Dollars), which, divided by the 27,523,171 total outstanding shares, comes to a book value of $9.47 per share. Plaintiffs currently collectively own 4,957,567 shares, which, at this valuation, would be worth $46,948,159.49, a return of more than 300% on plaintiffs' original investment. Despite this remarkable gain, plaintiffs ask the court to add a premium commensurate with what they paid relative to Oriental's original book value ($3.00/$2.18), which would result in a $13.04 per share valuation. Plaintiffs cite no authority for this request, which far exceeds their original bargained-for return or fair market value. The court sees no logic in awarding this premium.

Similarly, the court rejects plaintiffs' calculation of pre-judgment interest under Delaware law. CPLR 5001 & 5004 apply in this court. Ordinarily, 9% interest would run from the earliest date of breach, December 20, 2010, which is the last time Oriental sought to comply with the Subscription Agreement's requirement to file registration statements with the SEC. However,

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[3] On this limited record, where Oriental defaulted after failing to produce complete discovery of its financial condition, the court sees no other way to determine the value of plaintiffs' shares. The court will not endeavor, *sua sponte*, to independently model the company's value based on financials in the record. *See Veriton Partners Mater Fund Ltd. v Aruba Networks, Inc.*, 2018 WL 922139, at *2 (Del Ch 2018), citing *Dell, Inc. v Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A3d 1, 35 (Del 2017) (noting "the hazards that always come when a law-trained judge is forced to make a point estimate of fair value.").

since the share valuation is based on the premise that, by 2015, the company more than tripled in value since plaintiffs' 2009 investment, interest should run from the as-of valuation date – June 20, 2015.[4]

Finally, the court cannot direct the entry of judgment until plaintiffs submit a proposed order that sets forth the amount owed to each plaintiff based on the above damages ruling. *See* Dkt. 171 (breakdown of share ownership). Their proposed order improperly directs the entry of a single judgment (Dkt. 182),[5] instead of separate amounts for each plaintiff. *See, e.g., Wimbledon Financing Master Fund, Ltd. v Bergstein*, Index No. 150584/2016, Dkt. 766 at 22-23 (example of proper ordering language). Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment against defendant Oriental Dragon Corporation is granted on plaintiffs' first cause of action for breach of contract in the aggregate amount of $46,948,159.49, which shall be calculated for each individual plaintiff, plus 9% pre-judgment interest from June 20, 2015 to the date judgment is entered; and it is further

ORDERED that all of plaintiffs' other causes of actions are dismissed; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, plaintiffs shall e-file and fax to Chambers a proposed order directing the entry of judgment in favor of each plaintiff in conformity with the court's directives herein; and it is further

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[4] For instance, had plaintiffs been made whole earlier, they would not have realized this rate of return. It makes no sense to recover both appreciation value and pre-judgment interest.

[5] The new proposed order should be accompanied by a chart substantially similar to that filed at Dkt. 172, except that it should use the $9.47 per-share valuation.

ORDERED that within 3 days of the entry of this order on NYSCEF, plaintiffs shall serve a copy of this order on defendant along with notice of entry by overnight mail.

Dated: April 10, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C