UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV11-02769 JAK (SSx)	Date	June 19, 2013
Title	Dan Katz v. China Century Dragon Media, Inc. et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFFS' MOTION FOR ENTRY OF PRELIMINARILY APPROVING SETTLEMENT AND ESTABLISHING NOTICE PROCEDURES; PLAINTIFFS' APPLICATION FOR DEFAULT JUDGMENT AGAINST DEFENDANT CHINA CENTURY DRAGON MEDIA, INC. (DKT. 203, 204)**

I. Background

Plaintiffs filed this class action on behalf of those who, between February 7, 2011 and March 21, 2011, purchased common stock of China Century Dragon Media, Inc., ("China Century"). In their Second Amended Complaint (the "SAC"), Plaintiffs alleged violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 771, and 77o, through claimed false and misleading statements about the financial condition of China Century just prior to its Initial Public Offering ("IPO"). Plaintiffs named as defendants several parties involved in the operation of China Century or with the IPO. The SAC survived motions to dismiss made by various defendants. Although China Century appeared in this action, its counsel has since withdrawn, and it has made no response to the SAC. On April 3, 2012, the Clerk of the Court entered a default against China Century.

On December 20, 2012, the Court granted a motion for class certification (Dkt. 186) in which the following class was defined:

> all persons or entities that purchased or otherwise acquired China Century Dragon Media, Inc. ("CDM" or the "Company") common stock in the Company's public offering (the "Offering") on February 7, 2011 or purchased or otherwise acquired CDM stock in the aftermarket pursuant and/or traceable to the Company's registration statement and public offering prospectus issued in connection with the Offering during the period from February 7, 2011 through March 21, 2011 (the "Class Period"). Excluded from the Class are Defendants, the present and former officers and directors of CDM and any subsidiary thereof, members of their immediate families and their legal representations, heirs, successors or assign and any entity in which defendants have or had a controlling interest, those who purchased shares from Joseph Gunnar & Co., LLC, and those who purchased and sold shares during the Class Period who did not incur any loss.

Dkt. 186.

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Subsequent to the class certification, Plaintiffs engaged in extensive negotiation with the following defendants: I-Bankers Securities, Inc., Aegis Capital Corporation, Joseph Gunnar & Co., WestPark Capital Financial Services, LLC, David De Campo, and MaloneBailey LLP (the "Settling Defendants"). Dkt. 205. This included a full-day mediation conference before Judge Edward Infante. *Id.* Through this process, Plaintiffs reached a global settlement agreement with these defendants. By this motion, these parties seek preliminary approval of the settlement. Plaintiffs have also moved for the entry of a default judgment against China Century.

For the reasons stated in this Order, the Motion for Preliminary Approval and the Application for the Entry of Default Judgment are GRANTED.

II. Preliminary Approval of Settlement

A. Settlement Terms

Plaintiffs propose a gross settlement amount of approximately $778,333.33 (the "Settlement Amount"), which constitutes approximately 12.3% of the maximum estimated damages of $6.3 million. Dkt. 205. Under the terms of the parties' settlement agreement, this amount is to be allocated among the Settling Defendants as follows:

I-Bankers Securities, Inc.	$45,833.00
Aegis Capital Corporation	$25,000.00
Joseph Gunnar & Co.	$45,833.00
WestPark Capital Financial Services, LLC	$83,334.00
David De Campo	$60,000.00
MaloneBailey LLP	$583,333.33
Total	**$778,333.33**

The foregoing amounts are fixed, except that the settlement amount with MaloneBailey will be "a fund in the amount of 1/3 of the amount remaining on the insurance policy applicable to this claim (the other 2/3 will be used to pay settlements of the Other Actions)." Dkt. 204. There will be a "Settlement Holdback" of approximately $65,000 that will be applied to any further defense fees incurred by MaloneBailey in the approval process. *Id.* Once all litigation is complete, any amount remaining from the "Settlement Holdback" will be distributed to the Settlement Class. *Id.*

Plaintiffs state that, as part of the final approval process, their counsel intends to submit an application for attorneys' fees and expenses. This application will include: (i) a request for an award of attorneys' fees of up to one-third of the Settlement Amount; (ii) reimbursement of litigation costs and expenses, plus interest; and (iii) an incentive award to the named plaintiffs to reimburse them for their time devoted to, and expenses incurred in connection with, this matter. Dkt. 204-1 and 204-2. The Notice of Pendency and Settlement of Class Action (the "Notice") provides that Plaintiffs' Counsel will request a fee of $200,000, or 25.7% of the Settlement Amount. Dkt. 204, Exh. A-1. The Notice also states that litigation expenses will be "no more than $70,000" and that the awards for the lead plaintiff and class representatives will not

exceed $3,000 per person. *Id.* There is one lead plaintiff (Katz) and two other named plaintiffs (Van Nuis and Shapiro). Thus, the proposed settlement agreement provides for a total of $9,000 in incentive awards.

The following is a summary of the proposed allocation of the settlement amount:

Gross Settlement Amount	$778,333.33
Attorneys' fees	($200,000.00)
Litigation expenses	($70,000.00)
Awards for Katz, Van Nuis, and Shapiro	($9,000.00)
Net Settlement Amount	$499,333.33

The net settlement will result in an approximate recovery for class members of $0.06 per share of China Century stock. The actual recovery may vary depending on the number of shareholders who file claims and the exact amounts of fees, expenses, and awards that are deducted. Based on the allegations of the SAC, the largest per share recovery that could result were the matter tried successfully would be approximately $5.249 per share. That figure is the difference between the price for stock issued in China Century's IPO on February 7, 2011 ($5.250) and the closing share price on January 6, 2012, the filing date of this lawsuit ($0.001).

This proposed settlement does not resolve claims against defendants China Century Dragon Media, Inc., HaiMing Fu, Dapeng Yuan, HuiHua Li, Zhifeng Yan, Yue Lu, or Fang Yuan.

B. Application of Standard to Settlement Terms

1. The Standard for Preliminary Approval

Fed. R. Civ. Proc. 23(e) requires a two-step process in considering the approval of a class action settlement. First, the Court must determine whether the proposed settlement warrants preliminary approval. Preliminary approval is appropriate where the proposed settlement is within the range of what might be found fair, reasonable and adequate. *See Acosta v. Trans Union*, 243 F.R.D. 377, 386 (C.D. Cal. 2007). Following preliminary approval, notification to class members, and the compilation of information as to any objections by class members, in the second step of the process, the Court is to make a determination whether final approval of the settlement should be granted. A variety of factors apply to evaluating the fairness of a proposed class action settlement. In the Ninth Circuit, the following eight, non-exclusive factors may be considered:

1) the strength of the plaintiff's case;
2) the risk, expense, complexity, and likely duration of further litigation;
3) the risk of maintaining class action status throughout the trial;
4) the amount offered in settlement;
5) the extent of discovery completed and the stage of the proceedings;
6) the experience and view of counsel;

7) the presence of a governmental participant; and
8) the reaction of the class members to the proposed settlement.

See Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998). Each factor does not necessarily apply to every class action settlement. In determining whether preliminary approval is warranted, the Court need only decide whether the proposed settlement has the potential to be deemed fair, reasonable and adequate in the final approval process.

2. Application of the Standard

Plaintiffs argue that the settlement is fair, reasonable and adequate. Defendants do not oppose preliminary approval.

The Court has considered the preliminary settlement in light of the factors above, including an analysis of the strength of the Plaintiffs' case, the likely risks of further litigation, the amount offered in settlement, the use of an experienced neutral in the parties' arm's length negotiations and the experience of plaintiffs' counsel. There were extensive negotiations. There were significant risks presented by continued litigation both as to achieving success on the claims and locating funds available to pay a judgment were one entered. The negotiations involved experienced and sophisticated counsel. Dkt. 205. Taking all of this information into account, and applying it to the applicable evaluation factors, the Court has determined that preliminary approval of the settlement should be GRANTED. The Court also finds that further information shall be presented in connection with the anticipated motion for final settlement approval regarding the amount of time and effort expended by the lead plaintiff and class representatives, as well as further information about the appropriateness of the fee award sought by class counsel.

III. Default Judgment

A. The Standard for Default Judgment

Local Rule 55-1 requires that a party moving for default judgment submit a declaration or include information with respect to the following: (1) when and against which party default has been entered; (2) the pleading as to which default has been entered; (3) whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative; (4) whether the Servicemembers Civil Relief Act, 50 App. U.S.C. § 521, applies; and (5) whether notice has been served on the defaulting party, if required by Federal Rule of Civil Procedure Rule 55(b)(2). Local Rule 55-2 allows a party seeking unliquidated damages by default to submit evidence of such damages by declaration.

"The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). Therefore, for the purposes of this Motion, the Court accepts as true the allegations in the SAC.

Once the foregoing procedural elements have been satisfied, whether to enter a default judgment is within the sound discretion of the trial court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising such discretion, the Ninth Circuit has directed district courts to consider the following seven factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong public policy favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

B. Applying the Standard: Procedural Requirements

Plaintiffs have complied with the procedural requirements for entry of default judgment. Plaintiffs state that default was entered by the Clerk of the Court against China Century on April 3, 2012. Dkt. 203; *see* Entry of Default, Dkt. 150. Plaintiffs have declared that China Century is not an active servicemember. Dkt. 203-1. Although Plaintiffs have not stated in their application for default judgment that China Century is neither an infant nor incompetent, they did include a statement to that effect in their original Request for Clerk to Enter Default. Dkt. 138. Further, as a corporation, China Century cannot be either an infant or an incompetent. Finally, Plaintiffs state that notice has been served on China Century. Dkt. 203. For these reasons, Plaintiffs have met all of the procedural requirements for their application for default judgment.

C. Applying the *Eitel* Factors

1. Possibility of Prejudice

Plaintiffs will suffer prejudice if no default judgment is entered because Plaintiffs will be left without a remedy other than what has been achieved through their proposed settlement with other defendants. *See Philip Morris USA, Inc. v. Castwold Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003); *PepsiCo v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). China Century withdrew from participation in the litigation after the SAC was filed. Dkt. 203. As a result, Plaintiffs cannot litigate this case against China Century. *Id.* Thus, a default judgment is their only recourse. This factor is mitigated somewhat, because Plaintiffs have litigated with other defendants with whom they have reached a settlement. That issue is considered below in connection with the consideration of certain other *Eitel* factors. In sum this factor favors the entry of a default judgment.

2. The Merits of Plaintiffs' Substantive Claim and the Sufficiency of the Complaint

The SAC has merit. Plaintiffs survived two motions to dismiss under the pleading requirements of Rule 9(b) and the Private Securities Litigation Reform Act. Dkt. 203. Therefore, the Court already has determined the sufficiency of the complaint as to the other defendants in the case, making it likely that the complaint is sufficient against China Century as well. Because China Century never opposed the SAC, the allegations in the SAC must be taken as admitted as to China Century. *See PepsiCo*, 238 F. Supp. 2d at 1175. Therefore, these two factors favor entry of default judgment.

3. The Amount of Money at Stake

Under the fourth *Eitel* factor, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo*, 238 F. Supp. 2d at 1176. When the money at stake in the litigation is substantial or unreasonable, default judgment is discouraged. *See Eitel*, 782 F.2d at 1472. However, where the sum of money at stake is tailored to the specific misconduct of the defendant, default judgment may be appropriate. *See Board of Trustees of the Sheet Metal Workers Health Care Plan v. Superhall Mech., Inc.*, No. C–10–2212 EMC, 2011 WL 2600898, *2 (N.D. Cal. June, 30 2011).

Here, the amount of money sought is based on a statutory measure of damages. *See* Declaration of Howard Mulcahey, Dkt. 203-2. Plaintiffs allege that the requested amount of $6.299 million is less than that sought in many class actions based on allegations of securities fraud. Dkt. 203. Although the amount sought is substantial, it is within reasonable bounds and is easily calculated using the statutory measure of damages.

However, recovery of the full amount may be unreasonable because, through the settlement with the remaining defendants, Plaintiffs are likely to recover a portion of their claimed losses. There should not be a duplicative recovery. This issue is addressed further in the discussion below.

4. Possibility of Dispute Concerning Material Facts

Upon entry of default, all facts pleaded in the complaint are taken as true, except those relating to damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). The SAC alleged sufficient facts to survive a motion to dismiss. Dkt. 203. Although China Century may dispute some or all of the factual allegations in the SAC, it has withdrawn from its prior participation in this litigation. Moreover, it never responded to the SAC and, therefore, has not disputed its material factual allegations. This factor does not weigh against granting default judgment.

5. Whether Default Was Due to Excusable Neglect

China Century previously appeared and presented a defense in this litigation. Dkt. 203; *see* Dkt. 48. However, although China Century was served with the SAC, it failed to respond. Having defending the suit as to the first two complaints, there is no basis to find that China Century should be excused from the consequences of its decision to abandon its defense following the filing of the SAC. China Century was also served with the Request for Entry of Default, as well as with this Application for Default Judgment. Dkt. 138 and 203. Therefore, China Century's failure to respond to the SAC is not the result of excusable neglect. This factor favors entry of default judgment.

6. Policy Favoring a Decision on the Merits

China Century's failure to retain new counsel after its original counsel withdrew from the case and failure to respond to the SAC preclude Plaintiffs from seeking a decision on the merits. Although there is a strong policy that favors a decision on the merits, that is precluded here due to the conduct of China Century.

PepsiCo, 238 F. Supp. 2d at 1177. Therefore, this factor does not weigh against the entry of default judgment.

7. Conclusion

For the foregoing reasons, it has been shown that the *Eitel* factors favor entry of default judgment.

D. The Amount of the Default Judgment

"A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. Proc. 54(c). In this motion, Plaintiffs seek $6.299 million, plus allowable costs and post-judgment interest. Dkt. 203. This amount is the maximum amount of damages that are sought through the SAC.

An award of damages through a default judgment must be based on evidence. Although upon default the factual allegations of a complaint are taken as true, allegations relating to the amount of damages suffered are not. *See Pope v. United States*, 323 U.S. 1 (1944). Under Fed. R. Evid. 702, expert testimony is appropriate evidence where "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is appropriate evidence in cases involving securities fraud; it is a complex area with which a factfinder may be unfamiliar. However, a hearing on damages is not necessary where the amount claimed is "liquidated or capable of ascertainment from definite figures." *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323-24 (7th Cir. 1983).

Plaintiffs argue that the amount of damages is "capable of ascertainment" and, therefore, a hearing is not necessary because evidence has been submitted through an expert declaration. Dkt 203. They argue that the amount can be ascertained because Section 11(e) of the 1933 Act, 15 U.S.C. § 77k(e), provides for a statutory measure of damages. Dkt. 203. Thus, Section 11(e) permits Plaintiffs to "recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought . . ." 15 U.S.C. § 77k(e). This is the measure used by Plaintiffs' expert to calculate damages of $6,298,800. Dkt. 203-2. The price for the stock issued in the IPO was $5.250 per share. *Id.* As of January 6, 2012, when this litigation began, the price per share was $0.001. *Id.* This results in a maximum damages per share of $5.249, *i.e.,* the difference between the offering price and the price per share on the date of filing this lawsuit. *Id.* There were 1,200,000 shares issued in the IPO. *Id.* Therefore, the statutory damages can be calculated by multiplying 1,200,000 shares by $5.249. This results in a damages calculation of $6,298,800.

Because Plaintiffs have entered a settlement agreement with the remaining defendants in this action, they may not recover this entire amount from China Century. To permit such an award would result in a duplicative recovery. Thus, at a minimum, the settlement amount that is to be received from the Settling Defendants -- $778,333.33 -- must be considered in determining the amount of the damages that should be awarded against China Century. Plaintiffs conceded this at oral argument. With this adjustment, the maximum available recovery from China Century is $5,520,466.67, assuming the settlement with the Settling Defendants is approved and paid.

The Court has considered the percentage of the potential recovery that Plaintiffs accepted in the settlement agreement reached with other defendants. It represents less than 13% of the total potential recovery. The Court also has considered the respective roles that each defendant played in connection with the alleged wrongdoing as set forth in the SAC. China Century is alleged to have played a very significant role in the alleged misconduct. Taking all of this into account, the Court finds, in the exercise of its discretion and in light of all of the proffered evidence, that an appropriate award against China Century is $4.7 million. This amount reflects both the offset for the settlement amount, as well as a further reduction based on the amounts Plaintiffs accepted in their settlements with the Settling Defendants. These settlement amounts reflect Plaintiffs' recognition that there is uncertainty as to the amount that would be recovered were this matter to proceed through trial.

IV. Conclusion

For the foregoing reasons, the parties Motion for Preliminary Approval is GRANTED, and Plaintiffs' Motion for the Entry of Default Judgment as to China Century is GRANTED IN PART. Judgment in the amount of $4.7 Million shall be entered. Plaintiffs shall submit a proposed judgment in this amount within 10 days of the entry of this Order.

IT IS SO ORDERED.

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