

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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EROS INTERNATIONAL PLC,	:
	:
Plaintiff,	:
	:
-against-	:
	:
MANGROVE PARTNERS, NATHANIEL H.	: Index No. 653096/2017
AUGUST, KNIGHT ASSETS & CO., LLP, AKSHAY	:
S. NAHETA, MANUEL P. ASENSIO, ASENSIO &	: Hon. Joel M. Cohen
COMPANY, INC., MILL ROCK ADVISORS, INC.,	:
GEOINVESTING, LLC, CHRISTOPHER IRONS,	:
DANIEL E. DAVID, FG ALPHA MANAGEMENT,	:
LLC, FG ALPHA ADVISORS, FG ALPHA, L.P.,	:
CLARITYSPRING INC., CLARITYSPRING	:
SECURITIES LLC, NATHAN Z. ANDERSON AND	:
JOHN DOES	:
NOS. 1-30,	:
	:
Defendants.	:
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**AFFIRMATION OF STEPHEN W. TOUNTAS IN
SUPPORT OF EROS’ MEMORANDUM OF LAW IN ADVANCE OF THE
TRAVERSE HEARING, AND IN SUPPORT OF ITS MOTION FOR DEFAULT**

STEPHEN W. TOUNTAS, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under penalty of perjury:

1. I am a member of the law firm Kasowitz Benson Torres LLP, attorneys for Plaintiff Eros International Plc (“Plaintiff” or “Eros”). I submit this affirmation in support of Eros’ Traverse hearing brief.
2. I expect to testify regarding the sufficiency of service upon defendant Manuel P. Asensio (“Asensio”).
3. Attached hereto as **Exhibit A** is a true and correct copy of an Affidavit of Service

signed on October 4, 2017, which was also filed in this action at Dkt. Nos. 20 and 101.

4. Attached hereto as **Exhibit B** is a true and correct copy of an Affidavit of Service signed on October 4, 2017, which was also filed in this action at Dkt. Nos. 19 and 102.

5. Attached hereto as **Exhibit C** is a true and correct copy of a tweet published by Asensio on October 5, 2017 in reply to Alpha Exposure's tweets, which was originally filed as Exhibit P to the December 1, 2017 Bowe Affirmation at Dkt. No. 116.

6. Attached hereto as **Exhibit D** is a true and correct copy of an email Asensio sent to Michael J. Bowe on November 20, 2017, which was originally filed as Exhibit F to the December 1, 2017 Bowe Affirmation at Dkt. No. 106.

7. Attached hereto as **Exhibit E** is a true and correct copy of an email I sent to Asensio on November 22, 2017, which was originally filed as Exhibit G to the December 1, 2017 Bowe Affirmation at Dkt. No. 107.

8. Attached hereto as **Exhibit F** is a true and correct copy of an email Asensio sent to me on November 22, 2017, which was originally filed as Exhibit H to the December 1, 2017 Bowe Affirmation at Dkt. No. 108.

9. Attached hereto as **Exhibit G** is a true and correct copy of an email Michael J. Bowe sent to Asensio on November 24, 2017, which was originally filed as Exhibit I to the December 1, 2017 Bowe Affirmation at Dkt. No. 109.

10. Attached hereto as **Exhibit H** is a true and correct copy of an email I sent to Asensio on November 24, 2017, which was originally filed as Exhibit J to the December 1, 2017 Bowe Affirmation at Dkt. No. 110.

11. Attached hereto as **Exhibit I** is a true and correct copy of an email Asensio sent to me on November 25, 2017, which was originally filed as Exhibit K to the December 1, 2017

Bowe Affirmation at Dkt. No. 111.

12. Attached hereto as **Exhibit J** is a true and correct copy of an email Asensio sent to me on November 28, 2017, which was originally filed as Exhibit L to the December 1, 2017 Bowe Affirmation at Dkt. No. 112.

13. Attached hereto as **Exhibit K** is a true and correct copy of an email Mitchell Cantor sent to Michael Bowe on November 29, 2017, which was originally filed as Exhibit M to the December 1, 2017 Bowe Affirmation at Dkt. No. 113.

14. Attached hereto as **Exhibit L** is a true and correct copy of the order to show cause on Eros' motion for a default judgments against Asensio, Asensio & Company, Inc. and Mill Rock Advisors, Inc. (the "Default Motion"), so-ordered by the Court on December 5, 2017 and entered on December 6, 2017 at Dkt. No. 122.

15. Attached hereto as **Exhibit M** is a true and correct copy of an email Mitchell Cantor sent to me on January 5, 2018.

16. Attached hereto as **Exhibit N** is a true and correct copy of an email I sent to Mitchell Cantor on January 9, 2018.

17. Attached hereto as **Exhibit O** is a true and correct copy of an email Mitchell Cantor sent to me on January 10, 2018, attaching a draft first stipulation to extend the Default Motion briefing schedule (the "First Stipulation").

18. Attached hereto as **Exhibit P** is a true and correct copy of an email I sent to Mitchell Cantor on January 12, 2018, attaching a countersigned version of the draft First Stipulation.

19. Attached hereto as **Exhibit Q** is a true and correct copy of the fully executed First Stipulation, filed at Dkt. No. 124.

20. Attached hereto as **Exhibit R** is a true and correct copy of an email Mitchell Cantor sent to me on January 19, 2018.

21. Attached hereto as **Exhibit S** is a true and correct copy of an email I sent to Mitchell Cantor on January 19, 2018.

22. Attached hereto as **Exhibit T** is a true and correct copy of an email Mitchell Cantor sent to me on January 19, 2018, attaching a draft second stipulation to extend the Default Motion briefing schedule (the “Second Stipulation”).

23. Attached hereto as **Exhibit U** is a true and correct copy of an email I sent to Mitchell Cantor on January 22, 2018, attaching a countersigned version of the draft Second Stipulation.

24. Attached hereto as **Exhibit V** is a true and correct copy of the fully executed Second Stipulation, filed at Dkt. No. 127.

25. Attached hereto as **Exhibit W** is a true and correct copy of an email Mitchell Cantor sent to me on February 13, 2018.

26. Attached hereto as **Exhibit X** is a true and correct copy of an email I sent to Mitchell Cantor on February 13, 2018.

27. Attached hereto as **Exhibit Y** is a true and correct copy of an email Mitchell Cantor sent to me on February 13, 2018, attaching a draft third stipulation to extend the Default Motion briefing schedule (the “Third Stipulation”).

28. Attached hereto as **Exhibit Z** is a true and correct copy of an email I sent to Mitchell Cantor on February 13, 2018, attaching a countersigned version of the draft Third Stipulation.

29. Attached hereto as **Exhibit AA** is a true and correct copy of the fully executed Third Stipulation.

30. Attached hereto as **Exhibit BB** is a true and correct copy of the transcript for the February 14, 2018 hearing on Eros' Default Motion, among other motions then pending.

31. Attached hereto as **Exhibit CC** is a true and correct copy of the letter I sent to Mitchell Cantor on April 5, 2019.

32. Attached hereto as **Exhibit DD** is a true and correct copy of the letter Mitchell Cantor sent to me on April 12, 2019, purporting to be a "request pursuant to CPLR 3101(a)."

33. Attached hereto as **Exhibit EE** is a true and correct copy of the letter A. Macdonald Caputo Jr. sent to Mitchell Cantor on April 15, 2019, attaching Responses and Objections to Asensio's "request pursuant to CPLR 3101(a)."

34. Attached hereto as **Exhibit FF** is a true and correct copy of the cover email A. Macdonald Caputo Jr. sent to Mitchell Cantor on April 18, 2019, which provided two witness affidavits along with the evidence on which Eros intends to rely at the traverse hearing.

35. Attached hereto as **Exhibit GG** is a true and correct copy of Eros' Second Set of Requests for Production directed to Asensio.

36. Attached hereto as **Exhibit HH** is a true and correct copy of Eros' Second Set of Requests to Admit directed to Asensio.

37. Attached hereto as **Exhibit II** is a true and correct copy of a Letter to the Honorable Ronnie Abrams filed by Asensio on February 12, 2019 in the action *Asensio et al. v. DiFiore et al.*, No. 1:18-cv-10933-RA, Dkt. No. 41 (S.D.N.Y.).

38. Attached hereto as **Exhibit JJ** is a true and correct copy of Exhibits 1-3 to a Letter to the Honorable Ronnie Abrams filed by Asensio on February 13, 2019 in the action *Asensio et al. v. DiFiore et al.*, No. 1:18-cv-10933-RA, Dkt. No. 43 (S.D.N.Y.).

39. Attached hereto as **Exhibit KK** is a true and correct copy of a Letter to the Honorable Ronnie Abrams filed by Asensio on June 5, 2019 in the action *Asensio et al. v. DiFiore et al.*, No. 1:18-cv-10933-RA, Dkt. No. 92 (S.D.N.Y.).

40. At my direction, my Firm's managing attorney's office caused a process server who I later learned to be Corey Guskin to attempt in-person service of Asensio at his residence at 400 East 54th Street, Apartment 29B, New York, NY 10022, five separate times between Friday September 29, 2017 and Monday, October 2, 2017. *See Exhibit A, supra.*

41. Specifically, Mr. Guskin attempted in-person service at i) 7:18 PM on Friday, October 29; ii) 8:45 AM on Saturday, October 30; iii) 5:15 PM on Saturday, October 30; iv) 10:30 AM on Monday, October 2; and v) 6:41 PM on Monday October 2. *Id.*

42. My understanding is that Mr. Guskin was unable to successfully accomplish in-person service on any of these occasions, presumably because Mr. Asensio was either not home or did not answer his door during any of these attempts at in-person service. *Id.*

43. My understanding is that following his fifth attempt at in-person service at 6:17 PM on Monday, October 2, 2017, Mr. Guskin affixed a true and correct copy of the Summons, Supplemental Summons, Complaint, and Notice of Commencement to Asensio's door. *Id.*

44. Thereafter, out of an abundance of caution, I requested that an attempt to serve Asensio in person be made one last time on Tuesday, October 3, 2017 at 12:56 PM. *See Exhibit B, supra.*

45. I was informed by Richard LaRosa that during this last attempt, Mr. Guskin was denied access to Asensio's apartment door by the building doorman.

46. My understanding is that upon being denied access to Asensio's apartment door, Mr. Guskin left a true and correct copy of the Summons, Supplemental Summons, Complaint, and Notice of Commencement with Asensio's building doorman. *Id.*

47. My understanding is that on October 4, 2017 Mr. Guskin mailed a true and correct copy of the Summons, Supplemental Summons, Complaint, and Notice of Commencement to Asensio's residence at 400 East 54th Street, Apartment 29-B, New York, NY 10022. *See Exhibits A & B, supra.*

48. On October 10, 2017, Eros filed two affidavits of service sworn to by Mr. Guskin, confirming service of process on Mr. Asensio. *See Exhibits A & B, supra.*

49. On November 20, 2017, Asensio emailed Michael J. Bowe, stating "I have not been served and have no knowledge, personal or constructive, of EROS' action or any attempt of service other than the attached [affidavits of service]." *See Exhibit D, supra.*

50. Two days later, on November 22, 2018, I offered Asensio until December 7, 2017 to respond to the Complaint – a week longer than the extension to which Eros consented with the other defendants. *See Exhibit E, supra.*

51. An hour later, Asensio flatly rejected this offer without basis, and made no counterproposal. *See Exhibit F, supra.*

52. Two days later, Mr. Bowe informed Asensio of Eros' intention to file the Default Motion. *See Exhibit G, supra.*

53. Later that day, I provided Asensio with yet another opportunity to work out an extension on his time to answer, which Asensio subsequently rejected. *See Exhibit H, supra.*

54. On November 29, 2017, Mitchell Cantor emailed counsel for Eros to inquire about stipulating to an extension of Asensio's time to answer the Complaint, though he noted expressly that his "retention . . . has not yet been confirmed." *See* Exhibit K, *supra*.

55. Almost immediately after Eros filed the Default Motion, Eros entered into settlement negotiations with Asensio.

56. The parties were unable, however, to come to terms by January 10, 2018 – the deadline for Asensio's opposition to the Default Motion.

57. On January 5, 2018, Mr. Cantor requested that Eros consent to an extension of the Asensio Defendants' time to oppose the Default Motion. *See* Exhibit M, *supra*.

58. On January 9, 2018, counsel for Eros agreed. *See* Exhibit N, *supra*.

59. On January 10, 2018, Mr. Cantor circulated a draft of the First Stipulation. *See* Exhibit O, *supra*.

60. Counsel for Eros countersigned and returned the First Stipulation to Mr. Cantor at 12:13 PM on January 12, 2018, who filed it at 1:14 PM on January 12, 2018. *See* Exhibits P & Q, *supra*.

61. Justice Bransten never so-ordered First Stipulation.

62. On January 19, 2018, Mr. Cantor requested that Eros grant a second extension of the Asensio Defendants' time to oppose the Default Motion. *See* Exhibit R, *supra*.

63. On January 19, 2018, counsel for Eros agreed. *See* Exhibit S, *supra*.

64. On January 19, 2018, Mr. Cantor circulated a draft of the Second Stipulation. *See* Exhibit T, *supra*.

65. Counsel for Eros countersigned and returned the Second Stipulation to Mr. Cantor at 12:59 PM on January 22, 2018, who filed it at 1:36 PM on January 22, 2018. *See* Exhibits

U & V, *supra*.

66. Justice Bransten never so-ordered the Second Stipulation.

67. On February 13, 2018 – mere *days* before the February 14, 2018 hearing scheduled by Justice Bransten to determine the motion for default – counsel for Asensio requested that Eros grant a *third* extension of the Asensio Defendants’ time to oppose. *See* Exhibit W, *supra*.

68. On February 13, 2018, counsel for Eros agreed. *See* Exhibit X, *supra*.

69. At 5:58 PM on February 13, 2018, Mr. Cantor circulated a draft of the Third Stipulation. *See* Exhibit Y, *supra*.

70. Counsel for Eros countersigned and returned the Third Stipulation to Mr. Cantor at 7:16 PM on February 13, 2018. *See* Exhibit Z, *supra*.

71. Mr. Cantor, however, failed to file the Third Stipulation until 11:22 AM on February 14, 2018 – over an hour *after* the February 14 Hearing had commenced. *See* Exhibit AA, *supra*.

72. Once set by Justice Bransten, the February 14 Hearing was never rescheduled, notwithstanding the parties’ various stipulations of extension, which were never so-ordered.

73. Nor was the Default Motion ever removed from the Court’s publically available motions calendar, which expressly set the Default Motion for hearing at 10 AM on February 14, 2018. *See* Exhibit BB, *supra*.

74. Nevertheless, neither Mr. Cantor nor Asensio attended the February 14 Hearing.

75. At the hearing, Justice Bransten did not hold oral argument regarding this motion sequence, and entered default judgment against Asensio & Company and Mill Rock Advisors (the “Corporate Defendants”) and held the default motion as to defendant Asensio in abeyance

pending a traverse hearing. *See id.*

76. Thereafter, on or about July 12, 2018, Eros entered into a confidential settlement agreement with Asensio.

77. Pursuant to the terms of the Settlement Agreement, Asensio was required to produce over 100 emails and 23 phone records – minimum benchmarks that ***Mr. Asensio and his counsel unilaterally*** calculated and offered to Eros based on their own purported diligence.

78. On or about July 16, 2018, Mr. Asensio made a production in connection with the Settlement Agreement that utterly failed to comply with its terms, as Mr. Asensio admitted in a sworn affidavit. *See* Dkt. No. 374.

79. Thereafter, Eros provided Mr. Asensio with multiple opportunities to cure his breach of the Settlement Agreement.

80. Ultimately, however, due to Mr. Asensio's steadfast refusal to meet his obligations, Eros terminated the Settlement Agreement on July 26, 2018.

81. Eventually, a traverse hearing was scheduled for April 11, 2019. On April 4, 2019, only one week prior to the original hearing date, the Corporate Defendants filed a motion to vacate the default entered against them.

82. Eros responded to this motion the very next day by sending a letter to Mr. Cantor detailing the legal and factual misrepresentations contained in the motion, and requesting that it be withdrawn immediately. *See* Exhibit CC, *supra*.

83. Based on this exchange, the Court held a conference on April 10, 2019, at which, among other things, the Court adjourned the previously scheduled traverse hearing and directed Asensio to promptly propose new dates for a traverse hearing.

84. Thereafter, the parties engaged in extensive correspondence.

85. Specifically, on April 12, counsel for Asensio sent counsel for Eros an email purporting to be a “request pursuant to CPLR 3101(a),” seeking discovery pertaining to the traverse hearing, but did not propose any potential dates. *See* Exhibit DD, *supra*.

86. The next business day, on Monday, April 15, Eros provided Mr. Cantor with Responses and Objections to Mr. Asensio’s “request pursuant to CPLR 3101” and notified him that, despite being under absolutely no obligation to do so, by no later than April 18, Eros would serve him with copies of affidavits of the witnesses Eros intends to call at the traverse hearing, accompanied by the evidence on which Eros intends to rely. *See* Exhibit EE, *supra*.


87. On April 18, Eros provided Mr. Cantor with two witness affidavits attaching the evidence on which Eros intends to rely. *See* Exhibit FF, *supra*.

88. On May 20, Eros served Asensio with limited discovery requests consisting of document requests and notices to admit. *See* Exhibits GG & HH, *supra*.

89. To date, the Asensio Defendants have never attempted to answer the complaint, move to dismiss the action, or oppose the Default Motion.

90. When Kasowitz reached out to Mr. Guskin regarding his potential testimony at this hearing, he informed us that he was retired, and permanently relocated to the country of Ecuador. He also expressly refused to travel to New York to testify in connection with this matter.

Dated: New York, New York
June 6, 2019

By: 

Stephen W. Tountas