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

EROS INTERNATIONAL PLC, Plaintiff, -against- MANGROVE PARTNERS, NATHANIEL H. AUGUST, KNIGHT ASSETS & CO., LLP, AKSHAY S. NAHETA, MANUEL P. ASENSIO, ASENSIO & 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.	Index No. 653096/2017 Hon. Joel M. Cohen

PLAINTIFF'S MEMORANDUM OF LAW IN ADVANCE OF THE TRAVERSE HEARING, AND IN SUPPORT OF ITS MOTION FOR DEFAULT

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Plaintiff Eros International Plc ("Eros" or "Plaintiff") respectfully submits this memorandum of law in advance of the traverse hearing scheduled for June 13, 2019, and in support of its motion for default judgment against Manuel P. Asensio.[1]

PRELIMINARY STATEMENT

As a matter of irrefutable fact and law, Mr. Asensio was properly served in this case pursuant to two separate, independently sufficient methods contemplated by the CPLR. Further, and in any event, Asensio has long since waived his right to object to the sufficiency of service through his own conduct.

As detailed below, between Friday, September 29, 2017 and Monday, October 2, 2017, Eros' process server attempted to serve Mr. Asensio no fewer than ***five times***, at various times of day. On the last of these attempts, Eros' process server affixed a true and correct copy of Eros' pleadings to the door of Mr. Asensio's residence. The very next day, Eros' process server attempted in-person service a ***sixth*** time, and, upon being denied access to Mr. Asensio's residence, left a copy of Eros' papers with Mr. Asensio's concierge. A day later, Eros' process server mailed true and correct copies of Eros' pleadings to Mr. Asensio at his home. Six days later, Eros' process server filed two affidavits of service, reciting the above details, and confirming service of process on Mr. Asensio. Besides conclusory claims that he has "not been served," Mr. Asensio has ***never contested a single fact*** related to his service.

But even ignoring, *arguendo*, that Eros did properly effectuate service as a matter of both fact and law, Mr. Asensio has waived any right to challenge the sufficiency of his service.

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[1] Submitted herewith is the 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, sworn to on June 6, 2019 (the "Tountas Aff."). Citations herein to the exhibits attached to the Tountas Aff. shall appear as "Tountas Aff. Ex. __." Also submitted herewith is the Affidavit of Richard LaRosa In Support Of Eros' Memorandum Of Law In Advance Of The Traverse Hearing, And In Support Of Its Motion For Default, sworn to on June 6, 2019 (the "LaRosa Aff."). Citations herein to the exhibits attached to the LaRosa Aff. shall appear as "LaRosa Aff. Ex. __."

Indeed, on December 3, 2017, Mr. Asensio's counsel – Mitchell Cantor, Esq. – entered a formal appearance on behalf of the Asensio Defendants. Statutory law in New York makes clear that "***an appearance of the defendant is equivalent to personal service*** of the summons upon him, unless an objection to jurisdiction . . . is asserted ***by motion or in the answer*** as provided in rule 3211." CPLR 320(b) (emphasis added). Here, nearly two years into this lawsuit, Mr. Asensio has ***never filed*** an answer or motion to dismiss – much less challenged the propriety of service. Accordingly, even if Eros' service of Mr. Asensio was deficient (which it was not), Mr. Asensio has waived any objection he may have once had.

For these reasons, the Court should find that Mr. Asensio's service was adequate and proper. Further, because Justice Bransten held an entry of default against Mr. Asensio in abeyance pending the outcome of this traverse hearing, upon determining that service of Mr. Asensio was proper, the Court should renew and grant Eros' pending motion for default against Mr. Asensio, and enter a default judgment against him.

STATEMENT OF FACTS

A. Eros Properly Serves Asensio Pursuant to Both CPLR 308(2) and (4)

On September 29, 2017, Eros filed a supplemental summons[2] with complaint (the "Complaint") against Asensio & Company Inc., Mill Rock Advisors, Inc. (the "Corporate Defendants") and Asensio ("Asensio," and together with the Corporate Defendants, the "Asensio Defendants").[3] Thereafter, Eros' process server, Corey Guskin, served Asensio via two separate and independently sufficient methods of service under the CPLR.

[2] Eros' original summons with notice was filed on June 6, 2017.

[3] Because the sole issue before the Court at the traverse hearing concerns the sufficiency of service of the Complaint on Asensio (and not the substance of Eros' claims against Asensio), Eros respectfully directs the Court's attention to its Amended Complaint (ECF No. 163) for detailed allegations against Asensio.

First, Eros attempted 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, without being denied access to the residence. (Tountas Aff. Ex. A, ¶¶ 40-43.) 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.[4] (*Id.* ¶ 41.) Asensio was either not home, or did not answer his door during any of these attempts at in-person service. (*Id.* ¶ 42.) Following his fifth attempt at in-person service at 6:41 PM on Monday, October 2, 2017, Mr. Guskin, who at this point was still permitted access to the door of Asensio's residence, affixed a true and correct copy of the Summons, Supplemental Summons, Complaint, and Notice of Commencement to Asensio's door. (*Id*. ¶ 43.)

Second, out of an abundance of caution, Mr. Guskin attempted to serve Asensio in person one last time on Tuesday, October 3, 2017 at 12:56 PM. (Tountas Aff. Ex. B, ¶¶ 44-47.) This time, however, Mr. Guskin was denied access to Asensio's apartment door by the building concierge. (*Id.* ¶ 45; LaRosa Aff. Exs. D & E, ¶ 9.) Accordingly, 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 concierge. (Tountas Aff. ¶ 46.)

Thereafter, 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 29B, New York, NY 10022. (Tountas Aff. Exs. A & B, ¶ 47.)

[4] N.Y. General Business Law § 11 prohibits service of process on Sundays.

Finally, on October 10, 2017, Eros filed two affidavits of service sworn to by Mr. Guskin, confirming service of process on Asensio. (*Id.* ¶ 48.) Pursuant to both CPLR 308(2) and (4), service of process on Asensio was "complete ten days after" Eros' filing of Mr. Guskin's affidavits of service. Accordingly, on October 20, 2017, Eros successfully completed service of process on Asensio[5] pursuant to not only one, but two separate and independently sufficient mechanisms under the CPLR. *See* CPLR 308(4) ("nail and mail" service) and CPLR 308(2) (substituted service on a person of suitable age at place of residence).[6]

B. The Asensio Defendants Fail to Answer

Pursuant to CPLR 320(a), Asensio had 30 days from October 20, 2017 (the date on which service was complete) – or until November 20, 2017 – to serve "an answer or a notice of appearance, or . . . mak[e] a motion [to] extend . . . the time to answer." To date, however, Asensio has *never* filed an answer, a motion to dismiss, or any form of motion for extension of his time to answer. Instead, on November 20, 2017, Asensio emailed Eros' counsel, 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]."[7] (*See* Tountas Aff. Ex. D, ¶ 49.)

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[5] In addition to serving Asensio in his individual capacity, Eros also served the Corporate Defendants. Specifically, on October 2, 2017, a process server submitted two true and correct copies of the Summons, Supplemental Summons, Complaint and Notice of Commencement to the New York Secretary of State. (ECF Nos. 21, 22.)

[6] Kasowitz last worked with Mr. Guskin on or around April 10, 2018**.** (LaRosa Aff. ¶ 12.) 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. (Tountas Aff. ¶ 90.) He also expressly refused to travel to New York to testify in connection with this matter. (*Id*.)

[7] Although Asensio's knowledge (regardless of whether actual or constructive) is legally irrelevant to the sufficiency of service, *see Macchia v. Russo*, 67 N.Y.2d 592, 595 (1986), Asensio's claimed lack of awareness is contravened by his own conduct immediately following service. Specifically, on October 5, 2017, Asensio replied to a string of tweets by Mangrove about this lawsuit, demonstrating specific knowledge of allegations against Mangrove, which was served with the exact same Complaint Asensio was served with, and in which he was also named as a defendant. (*See* Tountas Aff. Ex. C.)

Two days later, on November 22, 2017, Eros 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* Tountas Aff. Ex. E, ¶ 50.) An hour later, Asensio flatly rejected this offer without basis, and made no counterproposal. (*See* Tountas Aff. Ex. F, ¶ 51.) Two days later, counsel for Eros informed Asensio of its intention to move for default judgment. (*See* Tountas Aff. Ex. G, ¶ 52.) Later that day, counsel for Eros provided Asensio with yet another opportunity to work out an extension on his time to answer (*see* Tountas Aff. Ex. H, ¶ 53), which Asensio subsequently rejected (*see id.* Exs. I & J).

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. (*See* Tountas Aff. Ex. K, ¶ 54.) Mr. Cantor noted expressly, however, that his "retention . . . has not yet been confirmed." (*Id*.)

C. Eros Moves for Default, and Asensio Concedes Service

Due to Asensio's unreasonable and dilatory conduct, his failure to comply with basic New York civil procedure, and his total lack of cooperation, on December 1, 2017, Eros moved for default judgment (the "Default Motion") against the Asensio Defendants by order to show cause. (ECF Nos. 98-116.)

Two days later, on December 3, 2017, Mitchell Cantor, filed a notice of appearance on behalf of Asensio. (ECF. No. 117.) Following Mr. Cantor's appearance, Asensio ***never*** filed an answer or a motion to dismiss in this action, and thus ***never*** interposed an affirmative defense or otherwise raised an objection contesting the sufficiency of service. Consequently, and as a

matter of well-settled New York law, Mr. Cantor's appearance amounted to a concession of proper service on Asensio.[8]

Notwithstanding Mr. Cantor's appearance, the Asensio Defendants never opposed the Default Motion. Instead, on December 3, 2017, they submitted a three-page affidavit from Asensio devoid of specific objections to either the sufficiency of service or the Court's exercise of jurisdiction, and which, in any event, was largely non-responsive to the Default Motion. (*See* ECF. No. 118.) Three days later, on December 6, 2017, Justice Bransten granted Eros' order to show cause and set the Default Motion to be heard at 10 AM on February 14, 2018 (the "February 14 Hearing"). (*See* Tountas Aff. Ex. L.) Justice Bransten granted the Asensio Defendants over a month – until January 10, 2018 – to oppose the Default Motion. (*Id.*)

D. The Asensio Defendants Fail to Oppose the Default Motion

Almost immediately thereafter, Eros entered into settlement negotiations with Asensio. (*See* Tountas Aff. ¶ 55.) The parties were unable, however, to come to terms by January 10, 2018 – the deadline for Asensio's opposition to the Default Motion. (*See id.* ¶ 56.) On January 5, 2018, Mr. Cantor requested that Eros consent to an extension of the Asensio Defendants' time to oppose the Default Motion. (*See* Tountas Aff. Ex. M, ¶ 57.) On January 9, 2018, counsel for Eros agreed. (*See* Tountas Aff. Ex. N, ¶ 58.) On January 10, 2018, Mr. Cantor circulated a stipulation (the "First Stipulation") extending the Default Motion briefing schedule. (*See* Tountas Aff. Ex. O, ¶ 59.) 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*

[8] *See* CPLR 320(b) ("***an appearance of the defendant is equivalent to personal service*** . . . unless an objection to jurisdiction . . . is asserted **by *motion or in the answer***.") (emphasis added).

Tountas Aff. Exs. P & Q, ¶ 60.) Justice Bransten never so-ordered the First Stipulation. (*See* Tountas Aff. ¶ 61.)

On January 19, 2018, Mr. Cantor requested that Eros consent to a second extension of the Asensio Defendants' time to oppose the Default Motion. (*See* Tountas Aff. Ex. R, ¶ 62.) That same day, counsel for Eros agreed, and Mr. Cantor circulated a second stipulation (the "Second Stipulation") extending the Default Motion briefing schedule. (*See* Tountas Aff. Exs. S & T, ¶¶ 63-64.) 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* Tountas Aff. Exs. U & V, ¶ 65). Justice Bransten never so-ordered the Second Stipulation, either. (*See* Tountas Aff. ¶ 66.)

On February 13, 2018 – a mere *day* before the February 14, 2018 hearing scheduled by Justice Bransten to determine the motion for default – counsel for Asensio requested that Eros consent to a ***third*** extension of the Asensio Defendants' time to oppose. (*See* Tountas Aff. Ex. W, ¶ 67.) That same day, counsel for Eros agreed. (*See* Tountas Aff. Ex. X, ¶ 68.) At 5:58 PM on February 13, 2018, Mr. Cantor circulated a third stipulation (the "Third Stipulation") extending the default motion briefing schedule yet again. (*See* Tountas Aff. Ex. Y, ¶ 69.) Counsel for Eros countersigned and returned the Third Stipulation to Mr. Cantor at 7:16 PM on February 13, 2018. (*See* Tountas Aff. Ex. Z, ¶ 70.)

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* Tountas Aff. Ex. AA, ¶ 71.)

E. <u>The February 14 Hearing</u>

Once set by Justice Bransten, the February 14 Hearing was never rescheduled, notwithstanding the parties' various stipulations of extension, which were not so-ordered. (*See*

Tountas Aff. ¶ 72.) 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.[9] Nevertheless, neither Mr. Cantor nor Asensio attended the February 14 Hearing.

After providing factual and procedural background for the record, Justice Bransten turned to the Default Motion, without hearing argument. (*See* Tountas Aff. Ex. BB at 10:10-11.) Justice Bransten noted that "[t]he supplemental service made upon the concierge of defendant Asensio's address gives this Court pause to question the validity of the plaintiff's purported 'nail and mail' service," because "service of process upon a building concierge is only proper where the process server is denied access to the defendant's apartment." (*Id*. at 11:13-24.) The Court went on to note that "[a]bsent testimony, the service upon the concierge also does not explain the process server's seeming ability to enter the building five times to attempt service without objection by the concierge," and ultimately held that it could not "determine service was properly made upon the individual defendant Asensio at this time." (*Id*. at 11:25-12:11.)

The Court ultimately concluded that "[s]ervice [was] proper against defendant Asensio & Company and Mill Rock [A]dvisors"[10] and entered default judgment against the Corporate Defendants on February 26, 2018. (ECF No. 160.) Justice Bransten also determined that "[t]he [default] motion as to defendant Asensio is to be held in abeyance pending a traverse hearing." (*See* Tountas Aff. Ex. BB at 13:8-9.) Accordingly, but for the question of service, Justice Bransten would have entered a default against Asensio as well. To date, the Asensio Defendants

[9] *See id.* & ¶ 73 (demonstrating that the Default Motion – designated motion sequence 007 – was at all times scheduled for hearing at 10 AM on February 14, 2018).

[10] Tountas Aff. Ex. BB at 12:12-13:13.

have never even attempted to answer the complaint, move to dismiss the action, or oppose the Default Motion.

F. Eros Enters Into a Settlement Agreement with Asensio, Who Promptly Breaches

On or about July 12, 2018, Eros entered into a confidential settlement agreement with Asensio. (*See* Tountas Aff. ¶ 76.) Pursuant to the terms of the Settlement Agreement, Asensio was required to produce over 100 emails and 23 phone records – minimum benchmarks that ***Asensio and his counsel unilaterally*** calculated and offered to Eros based on their own purported diligence. (*See* Tountas Aff. ¶ 77.) On or about July 16, 2018, Asensio made a production in connection with the Settlement Agreement that fell well short of these material terms, as Asensio admitted in a sworn affidavit. (*See* Tountas Aff. ¶ 78; *see also* Dkt. No. 374.) Thereafter, Eros provided Mr. Asensio with multiple opportunities to cure his breach of the Settlement Agreement. (*See* Tountas Aff. ¶ 79.) Ultimately, however, Asensio failed to do so, causing Eros to terminate the Settlement Agreement on July 26, 2018. (*See* Tountas Aff. ¶ 80.)

G. The April 10 Conference

On April 4, 2019, only one week prior to the traverse hearing, the Asensio Defendants filed a motion to vacate the default entered against the Corporate Defendants.[11] (*See* Tountas Aff. ¶ 81.) Eros responded to this motion with a letter detailing the legal and factual misrepresentations contained in the motion, and requesting that it be withdrawn immediately. (*See* Tountas Aff. Ex. CC, ¶ 82.) Following this exchange, the Court held a conference on April 10, 2019 (the "April 10 Conference"), at which, among other things, the Court adjourned the previously scheduled traverse hearing so that Asensio could address a purported "conflict" with Mr. Cantor, and directed Asensio to promptly propose new dates for a traverse hearing.

[11] This motion has since been withdrawn by the Asensio Defendants. (ECF. No. 380.)

Thereafter, the parties engaged in extensive correspondence. (*See* Tountas Aff. ¶ 84.) 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. (Tountas Aff. Ex. DD, ¶ 85.) The next business day, on Monday, April 15, Eros provided Mr. Cantor with Responses and Objections to Asensio's "request pursuant to CPLR 3101(a)" 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. (Tountas Aff. Ex. EE, ¶ 86.) On April 18, Eros expressly (and without objection from Asensio) reserved its right to rely on additional documents at the traverse hearing, and provided Mr. Cantor with two witness affidavits attaching the evidence on which it intended to rely at that tine.[12] (Tountas Aff. Ex. FF, ¶ 87.)

On May 9, 2019, the Court so-ordered Eros' correspondence to the Court requesting that i) the traverse hearing be scheduled for June 31, 2019 (as requested by Asensio); and ii) the parties be permitted limited briefing in connection with the traverse hearing. (ECF No. 396.)

On May 20, 2019, Eros served Asensio with limited discovery requests comprised of document requests and notices to admit. (Tountas Aff. Exs. GG & HH.) Eros has requested that Asensio respond to these discovery requests no later than June 10, 2019. (*Id*.)

[12] Pursuant to the Court's instructions (ECF No. 396), Eros intends to call Stephen Tountas and Rich LaRosa as witnesses. Further, Eros intends to rely on the exhibits to the Tountas Aff. and LaRosa Aff. filed herewith, which comprised of the exhibits provided to Asensio on April 18, 2019, as well as additional documents.

ARGUMENT

I. UNDISPUTED FACTS CONFIRM THAT ASENSIO WAS PROPERLY SERVED

As a matter of undisputed fact, Eros properly served Asensio pursuant to two separate and independently sufficient methods expressly provided for under the CPLR. Following the exercise of due diligence, service under CPLR 308(4) ("nail and mail") is performed by affixing a copy of the pleadings to the door of the defendant's "dwelling or usual place of abode," mailing a copy of the pleadings to the defendant's last known residence, and filing an affidavit of service with the court. Service pursuant to CPLR 308(2) is completed by leaving the pleadings with a person of suitable age at the dwelling place or usual abode of the defendant. Here, out of an abundance of caution, Eros completed service pursuant to ***both*** of these methods.

First, Eros attempted in-person service of Asensio at his residence at 400 East 54th Street, Apartment 29B, New York, NY 10022 on no less than ***five separate occasions***, at various times of day between Friday, September 29, 2017 and Monday, October 2, 2017.[13] (*See supra* at 3; Tountas Aff. Ex. A, ¶¶ 40-43.) On each of these attempts, Asensio either refused to answer his door, or was physically absent from his residence at the time.

Where a defendant cannot, through the exercise of due diligence, be served in person or through a person of suitable age and discretion, the CPLR permits a plaintiff to complete service through the alternative method of "nail and mail" under CPLR 308(4). New York courts routinely deem just ***three*** attempts at in-person service at different times over the span of several days as sufficient due diligence. *See, e.g.*, *Heywood Condo. v. Wozencraft*, 148 A.D.3d 38, 45

[13] Specifically, service was attempted 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.

(1st Dep't 2017) (three attempts sufficient to satisfy due diligence); *Krodel v. Amalgamated Dwellings, Inc.*, 139 A.D.3d 572, 573 (1st Dep't 2016) (same).[14] Here, Eros attempted in-person service of Asensio more than ***five times***, surpassing its due diligence obligation, and permitting it to perform service via "nail and mail" under CPLR 308(4).

As discussed, service under CPLR 308(4) ("nail and mail") is performed by affixing a copy of the pleadings to the door of the defendant's "dwelling or usual place of abode," mailing a copy of the pleadings to the defendant's last known residence, and filing an affidavit of service with the court. In the instant case, having been thus far granted access to the door of Asensio's residence, the process server affixed a copy of the pleadings to Asensio's door following Eros' fifth attempt at in-person service at 6:41 PM on Monday, October 2, 2017. (ECF No. 20).

Out of an abundance of caution,[15] the next day, Tuesday, October 3, 2017, Eros attempted in-person service on Asensio a ***sixth*** time at 12:56 PM. (Tountas Aff. Ex. B, ¶¶ 44-47.) On this sixth attempt, however – and for the first time – the process server was denied access to Asensio's apartment door by building concierge. (LaRosa Aff. Exs. D & E, ¶ 9.) Upon this denial, which had not occurred previously, the concierge became a "person of suitable age and discretion" under CPLR 308(2), and Eros was permitted to serve the concierge in place of

[14] *See also Farias v. Simon*, 73 A.D.3d 569, 570 (1st Dep't 2010) (several attempts to serve defendants in person at various times of the day when it could be reasonably expected they would be home satisfied due diligence for nail and mail service); *Dunleavy v. Moya*, 237 A.D.2d 176, 176 (1st Dep't 1997) (three attempts to serve defendant in person over a single weekend satisfied due diligence for nail and mail service); *Brown v. Teicher*, 188 A.D.2d 256, 256 (1st Dep't 1992) (three attempts to serve defendant in person at diverse times, including early in the morning and late at night, satisfied due diligence for nail and mail service).

[15] *See* CPLR 308, C308:5 ("The due diligence component of CPLR 308(4) underscores the legislative preference for in-hand delivery to a person, whether it be the defendant herself or a person of suitable age and discretion at defendant's home or place of business."); *see also McSorley v. Spear*, 50 A.D.3d 652, 653 (2d Dep't 2008) ("The preferred methods of personal service on an individual are by delivering the summons to the defendant, or by delivering the summons to a person of suitable age and discretion and mailing another copy of the summons to the defendant's last know residence or actual place of business.").

Asensio.[16] Accordingly, Mr. Guskin left a copy of the pleadings with the concierge. (Tountas Aff. ¶ 46.)

The next day, on October 4, 2017, Mr. Guskin sent a true and correct copy of all required documents to Asensio's residence at 400 East 54th Street, Apartment 29B, New York, NY 10022 via first class mail, thus completing service under both CPLR 308(2) and (4). (Tountas Aff. Exs. A & B, ¶ 47.) On October 10, 2017, Eros filed two affidavits of service sworn to by its process server, Mr. Guskin, confirming service of process on Asensio service under both CPLR 308(2) and (4). (Tountas Aff. ¶ 48.)

Under well-settled New York law, "the affidavit of the process server constitutes prima facie evidence of proper service." *Grinshpun v. Borokhovich*, 100 A.D.3d 551, 520-21 (1st Dep't 2012).[17] Once prima facie evidence of proper service is presumptively established through filing of an affidavit of service, that presumption must be rebutted by the party challenging service. *See e.g.*, *Trilock Enterprise LLC. v. Your Marketing Corp.*, 17-607541, 2019 WL 1526932 at *3 (Sup. Ct., Suffolk Cnty. Apr. 5, 2019) ("A respondent... must in the first instance, rebut the presumption of proper service inherent in the affidavit of service filed by the petitioner"); *Lasalle Bank Nat. Ass'n v. Legier*, 975 N.Y.S.2d 710 (Sup. Ct., Kings Cnty. 2013) ("The burden is on the defendant to rebut the presumption of regularity and valid service.").

Here, Asensio has never even come close to rebutting this presumption, and indeed, has never specifically challenged ***any*** of the foregoing facts. For example, Asensio has never

[16] The First Department has deemed a concierge a person of suitable age at a dwelling, if that concierge refused the process server access to the defendant's door. *See Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 A.D.3d 475, 476 (1st Dep't 2016) (service on building concierge was proper where process server was denied access to the door of the defendants apartment); *Bank of America, N.A. v. Grufferman*, 117 A.D.3d 508, 508 (1st Dep't 2014) ("Service upon the doorman of defendants' apartment building was proper under CPLR 308(2), given that the process server was denied access to defendants' apartment.").

[17] *See also In re de Sanchez*, 57 A.D.3d 452, 454 (1st Dep't 2008) (same); *Koyenov v. Twin-D Transp., Inc.*, 33 A.D.3d 967, 968-69 (1st Dep't 2006) (same).

asserted residence at an address different from the one at which he was served. To the contrary, in documents Asensio recently filed in a pending federal action, Asensio lists his address as 400 East 54th Street, Apartment 29B, New York, NY 10022 – precisely where he was served. (*See* Tountas Aff. Exs. II-KK.) Nor has Asensio ever suggested that he does not receive mail at his address.

In fact, to date, Asensio's only objection to the adequacy of service came in an email dated November 20, 2017, in which Asensio claimed "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]." (ECF No. 106.) But New York law is clear on this point: a "conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper." *Grinshpun,* 100 A.D.3d at 520-21. Further, in order to be properly interposed, an objection to the sufficiency of service must he made via a formal answer, or a motion to dismiss pursuant to CPLR 3211. CPLR 320(b); 3211(e); *see also Wisener v. Avis Rent-A-Car, Inc.*, 182 A.D.2d 372, 372-3 (1st Dep't 1992) ("A defense based upon the lack of personal jurisdiction [due to improper service] is deemed waived if the defendant fails to assert it in answering the complaint, or of the defendant fails to raise it in connection with a pre-answer motion based upon a ground set forth in CPLR 3211(a)).

Accordingly – and as a matter of law – Eros' service of Asensio was both proper and adequate.

II. ASENSIO HAS WAIVED THE ABILITY TO CONTEST SERVICE OF PROCESS

Even assuming, *arguendo*, Eros did not properly serve Asensio – which, as discussed, it did – black-letter New York law makes clear that Asensio has long since waived his opportunity to contest service of process.

Indeed, the CPLR could not be clearer: "***an appearance of the defendant is equivalent to personal service*** of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211." CPLR 320(b) (emphasis added). Here, Asensio's counsel entered an appearance on his behalf on December 3, 2017 (ECF No. 117), conclusively establishing the adequacy of service. *See, e.g.*, *Resolution Trust Corp. v. Beck*, 243 A.D.2d 307, 307 (1st Dep't 1997) ("individual defendant served a notice of appearance, which was the equivalent of personal service of a summons upon him"); *see also National Loan Investors, L.P. v. Piscitello*, 21 A.D.3d 537, 537 (2d Dep't 2005) (an appearance is equivalent to personal service and "by statute a party may appear in an action by attorney").

Further, as CPLR 320(b) makes clear, upon his counsel's appearance, Asensio could have challenged the sufficiency of service – either through a motion to dismiss pursuant to CPLR 3211(a), or by asserting an appropriate defense in a formal answer to Eros' Complaint. *See* CPLR 320(b); *see also Al-Dohan v. Kouyoumjian*, 93 A.D.2d 714, 715-16 (1st Dep't 1983) ("objections to personal jurisdiction under CPLR 3211(a)(8) may be made either by motion or in the answer"). Asensio, however, has opted to do neither. Indeed, to this day, Asensio has ***never filed*** either an Answer or a motion to dismiss, and has never properly challenged the adequacy of service.[18]

[18] Further, the Court must reject any suggestion by Asensio that his November 20, 2017 email constituted a valid objection to the sufficiency of service. A party seeking to raise a jurisdictional defense – such as insufficient service of process – is required to move to dismiss the complaint on such grounds within 60 days of raising the defense, ***or the defense is waived***. *See* CPLR 3211(e) (an objection to the adequacy of service is waived if, ***having raised such an objection in a pleading***, the objecting party does not move for judgment on that ground within sixty days after serving the pleading); *see also Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 315 (1st Dep't 2004) (same). Thus, even assuming the November 20, 2017 email properly interposed an objection to the adequacy of service – which, as a matter of law, it did not – Asensio ***still*** waived his right to object by failing to move for dismissal at any point, much less within 60 days.

Accordingly, even ignoring that he was in fact adequately served, Asensio has, as a matter of law, waived any right to challenge the adequacy of service by failing to timely file an Answer or motion to dismiss. *See Urena v. Nynex, Inc.*, 223 A.D.2d 442 (1st Dep't 1996) ("Where a defendant makes an appearance without having been served and without raising the objection, he becomes a volunteer and is subject to in personam jurisdiction."); *Zucco v. Antin*, 257 A.D.2d 421, 422 (1st Dept. 1999) (deeming defense of improper service waived based on failure to timely move to dismiss case); *Fleet Bank N.A. v. Riese*, 247 A.D.2d 276, 276 (1st Dep't 1998) (same); *Montcalm Pub. Corp. v. Pustorino*, 125 A.D.2d 188, 188 (1st Dep't 1986) (same).

III. EROS IS ENTITLED TO DEFAULT JUDGMENT AGAINST ASENSIO

Under New York law, a default judgment may be entered against any defendant who fails to answer in an action. *See* CPLR 3215(a); *Straub v. Baker*, 210 A.D.2d 125, 125 (1st Dep't 1994) (affirming decision not to vacate default where defendant continued to refuse to answer despite being informed of complaint numerous times).

Here, Asensio's failure to i) answer Eros' complaint; ii) file a motion to dismiss; and iii) file an opposition to Eros' Motion for Default – despite being properly served and voluntarily appearing in this action while formally represented – compels the entry of a default judgment against him. This result is further confirmed by Justice Bransten's own findings at the February 14 Hearing, which make clear that she was holding a default against Asensio in his individual capacity "in abeyance" pending the outcome of a traverse hearing. (*See* Tountas Aff. Ex. BB at 13:8-9.) In short, but for her question regarding Eros' process server's denial of access to Asensio's residence (*see supra* at 8), Justice Bransten would have entered a default against Asensio just as she entered defaults against the Corporate Defendants.

Now, having demonstrated that service of Asensio was proper as a matter of both fact and law, and that, in any event, Asensio has waived his right to object to service, there is no reason to

hold entry of a default against Asensio in abeyance any longer. Accordingly, based on the foregoing, Eros respectfully requests this court renew and grant Eros' Default Motion as against Asensio.

CONCLUSION

For the foregoing reasons, Eros respectfully requests that the Court hold that Manuel P. Asensio was either properly served (or has waived any right to challenge service), and that the Court renew and grant the Default Motion.

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CERTIFICATE OF COMPLIANCE

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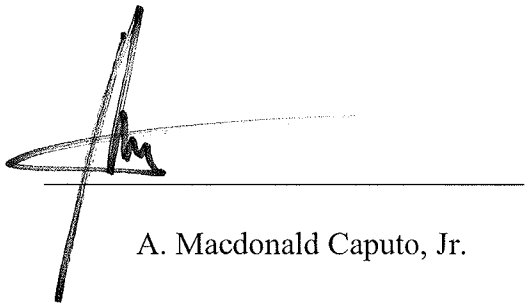

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