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

EROS INTERNATIONAL PLC, Plaintiff, -against- MANGROVE PARTNERS, NATHANIEL H. AUGUST, 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. Eileen Bransten Mot. Seq. No. ___

MEMORANDUM OF LAW IN SUPPORT OF PLANTIFF'S MOTION FOR DEFAULT JUDGMENTS AGAINST DEFENDANTS MANUEL P. ASENSIO, ASENSIO & COMPANY, INC. AND MILL ROCK ADVISORS, INC.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff Eros International Plc ("Eros") respectfully submits this brief in support of its motion for default judgments against defendants Manuel P. Asensio ("Asensio"), Asensio & Company, Inc. ("Asensio & Company") and Mill Rock Advisors, Inc. ("Mill Rock") (collectively, the "Asensio Defendants") pursuant to CPLR 3215.[1]

PRELIMINARY STATEMENT

Manuel P. Asensio – who has been barred by a national securities regulator and found liable by a jury of his peers for fraudulent stock price distortion – has, along with the corporate defendants he controls, refused to appear in this lawsuit despite their indisputable knowledge thereof. The Asensio Defendants sat on their hands, even though service of process on them was diligent, timely and procedurally sound. They disclaimed any prior knowledge about Eros' lawsuit, despite Asensio's tweet to the contrary posted a mere day after he was served by mail. They remained radio silent, even though every other named defendant appeared and contacted Eros' counsel in unison. They rebuffed Eros' good-faith attempts to negotiate an extension to their deadline to respond to the complaint, and instead inundated Eros' counsel with emails and calls that, not unlike their short reports on Eros, contained plain distortions of fact. And at present, even after conceding their "constructive knowledge" of this action to Eros' counsel, they continue to neglect their duty to appear. In view of this flagrant and inexcusable disregard for the legal process, the Court should enter default judgments against the Asensio Defendants.

FACTS

Defendant Asensio has a long history of publishing negative reports aimed at driving down the stock price of companies in which he holds a short interest. Since 1998, Asensio and

[1] Submitted with this brief is the Affirmation of Michael J. Bowe, dated December 1, 2017 (the "Bowe Aff."). Citations herein to "Ex. __" are to exhibits attached to the Bowe Aff.

his corporate affiliates have been subject to regulatory scrutiny and civil lawsuits.[2] In 2003, the National Association of Securities Dealers ("NASD," n/k/a "Financial Industry Regulatory Authority" or "FINRA") began investigating Asensio due to misleading claims he made about a medical supply company in six separate reports that he published on his website, asensio.com. Following a disciplinary hearing, a NASD panel found, *inter alia*, that Asensio's reports made "exaggerated, unwarranted or misleading claims," and further barred Asensio from associating with any member firm in any capacity for his willful failure to provide information requested by NASD. *Asensio v. S.E.C.*, 447 F. App'x 984, 986 (11th Cir. 2011).

Moreover, Asensio has been implicated in multiple civil lawsuits for market manipulation. For instance, in *Miller v. Asensio*, No. 2:99-1861-18 (D.S.C. Mar. 28, 2002), a jury found Asensio liable for federal securities fraud under § 10(b) of the Securities Exchange Act and Rule 10b-5, arising from his publication of false and defamatory statements about a company in which he had a short position as part of a stock manipulation scheme to artificially depress the price of the target company's stock price, and profit off his investment in the target.

Consistent with his past *modus operandi*, Asensio struck again by targeting Eros – an issuer in which he has admitted to having a short position. As detailed in Eros' complaint (ECF No. 3 ("Compl.")), the Asensio Defendants, in collusion with other defendants both named and anonymous, waged a coordinated short attack on Eros by disseminating numerous false and misleading statements designed to decimate the price of Eros' stock and yield a windfall to defendants. (Compl. ¶ 1.) The Asensio Defendants used a multi-pronged strategy in their

[2] Asensio has created a host of corporate entities, many of which employ only Asensio and that became defunct several years after their formation due to regulatory sanction or inactivity. In the last five years, Asensio has had two active alter ego companies: defendants Asensio & Company and Mill Rock.

recurrent attacks on Eros in summer 2016. (*See, e.g., id.* ¶ 4.) Specifically, from June to August 2016, Asensio published a total of seven "research" reports on asensio.com, and re-published four of those reports on the investor website Seeking Alpha. (*See, e.g., id.* ¶ 6.) In addition, Asensio sent in June 2016 a total of six letters to various regulators, Eros' outside auditor affiliate and legal counsel, all of which mirrored the falsehoods in the "research" reports and which were re-published on asensio.com. (*See id.* ¶ 124-125.) On top of these tactics, Asensio in mid-July 2016 gave interviews to a podcast, Oxford Club Radio, and an investment research publication, Activist Insight, in which he repeatedly smeared and slandered Eros. (*Id.* ¶ 127.) Finally, Asensio published a number of negative tweets about Eros that were strategically timed to coincide with his and his collaborators' short reports. (*See id.* ¶ 213-216.)

To recover for the harm the Asensio Defendants and their conspirators caused through their relentless false attacks (*see, e.g., id.* ¶ 333), Eros commenced the instant action, first filing a summons with notice on June 6, 2017 naming Asensio, Asensio & Company and Mill Rock as defendants.[3] Eros then filed a supplemental summons and complaint on September 29, 2017.

After Eros filed the complaint, its counsel made immediate, diligent and varied attempts to serve each of the Asensio Defendants with a full set of pleadings – the summons with notice, supplemental summons, complaint and notice of commencement. The proofs of service Eros filed with this Court reflect those assiduous efforts. (*See* Bowe Aff., Exs. A, B, C & D.)

On October 2, 2017, a process server, at the direction of Eros' counsel, made five attempts to locate Asensio at his apartment between Friday, September 29, 2017 and Monday, October 2, 2017. The server tried serving Asensio in the morning, in the afternoon, at night, on

[3] Eros was entitled to a 120-day window, *i.e.*, until October 4, 2017, to serve the summons on the Asensio Defendants. *See* CPLR 306-b.

the weekdays and on the weekend. (*See* Bowe Aff., Ex. A.) Asensio purportedly was not home during any of these varied service attempts, and only after the fifth attempt, on the night of October 2, 2017, did the server affix true copies of the full set of pleadings on the door to Asensio's doorman residence. Then, on October 4, 2017, the server completed the two-step nail and mail procedure by sending true copies of those papers by first class mail in an envelope bearing Asensio's apartment address and the label "Personal and Confidential." (*See id.*)

In addition, to ensure that Asensio received process, the server made a sixth attempt to reach Asensio at his doorman residence on October 3, 2017. This time, Asensio's doorman, in contrast to before, denied the server access to Asensio's apartment door. As such, the server effected service on Asensio's doorman by furnishing a full set of pleadings to him and mailed a copy of the same to Asensio's apartment address the next day. (*See* Bowe Aff., Ex. B.) On October 10, 2017, Eros timely filed affidavits that swore to not only the nail and mail service, but the additional doorman service as well. (*See* Bowe Aff., Exs. A & B.)

Likewise, as to Asensio & Company and Mill Rock, a process server completed service on those corporate defendants by submitting a full set of pleadings to the New York Secretary of State, the registered agent of record for both, on October 2, 2017. (*See* Bowe Aff., Exs. C & D.)

Indeed, the Asensio Defendants' own actions evince that they received process. On October 5, 2017, Asensio replied to a string of tweets regarding Eros' lawsuit by "Alpha Exposure" (*see* Bowe Aff., Ex. O.) – the admitted alias of defendants Mangrove Partners ("Mangrove") and its President Nathaniel August ("August") – in which Asensio bemoaned that freedom of speech is "not free when you have to defend it. Certain states are better than others at this missing [sic] these frivolous complaints." (*See* Bowe Aff., Ex. P.)

Though they knew about the instant lawsuit and their duty to defend against it, the Asensio Defendants strategically decided to stand on the sidelines. They did not timely appear in the action.[4] They did not timely respond to the complaint. And they made no effort to coordinate their response dates with the other named defendants, all of whom retained lawyers who diligently contacted Eros' counsel to jointly request an extension. (*See* Bowe Aff., Ex. N.)

After weeks of total silence, and weeks after the corporate defendants' time to respond had already elapsed, Asensio sent an email to Eros' counsel on November 20, 2017 – the precise date by which he was required to appear or respond personally. (*See* Bowe Aff., Ex. F.) In that email, Asensio purported that he first learned of Eros' lawsuit that very day during a call with defendant August "on a matter unrelated to Eros" and disclaimed any prior knowledge of the lawsuit, in contradiction to his telling October 5, 2017 tweet. (*Id.*)

Choosing not to focus on the inconsistencies in his story, Eros' counsel replied and stated that Eros was open to extending the Asensio Defendants' deadline to respond to the complaint. Eros offered December 7, 2017, a one-week extension beyond the date that had been agreed to with the other defendants. (*See* Bowe Aff., Ex. G.) Asensio, however, rebuffed the offer and refused to make a counterproposal. (*See* Bowe Aff., Ex. H.) Instead, he peppered Eros' counsel with numerous phone calls, as well as rambling, self-contradicting[5] and self-serving emails, which distorted the facts and touched on the merits of the case. (*See* Bowe Aff., Exs. I & J.) While Asensio informed Eros on November 28, 2017 that he now was represented by counsel in

[4] The deadline for Asensio & Company and Mill Rock to appear or respond was November 1, 2017, and the deadline for Asensio to appear or respond was November 20, 2017.

[5] For instance, Asensio claims that he has never seen the complaint that Eros filed in this action, yet tellingly accessed the e-docket filing system to download the proof of service, which he attached in an email sent to Eros' counsel on November 20, 2017. (*See* Bowe Aff., Ex. F.)

this matter and referred Eros' counsel to his alleged attorney (*see* Bowe Aff., Ex. L), that attorney himself clarified that he has not yet been retained by the Asensio Defendants (*see* Bowe Aff., Ex. M). The Asensio Defendants still have not appeared in the action or answered in accordance with CPLR 320 and 3012, even though every other named defendant timely responded on November 30, 2017. The Asensio Defendants' continued refusal to comply with rudimentary legal procedures has left Eros with little choice but to seek the instant relief.

ARGUMENT

Under New York law, a default judgment may be entered against any defendant who fails to appear in an action. *See* CPLR 3215(a). The Asensio Defendants' failure to appear in the action or answer Eros' complaint, despite being properly served by Eros, compels the entry of a default judgment against each of them.

There can be no question that service on Defendant Asensio was proper. In fact, out of an abundance of caution, Eros' counsel employed multiple procedurally correct methods for serving Asensio. First, Asensio was served using the nail and mail method of service, which is specifically authorized under New York law after attempts at personal service have failed. *See* CPLR 308(4). Courts of this State consistently deem that three attempts at personal service within the span of several days, at different times of the day, are sufficient before resorting to the nail and mail method of service. *See Heywood Condo. v. Wozencraft*, 148 A.D.3d 38, 45 (1st Dep't 2017) (three attempts sufficient to satisfy due diligence before resorting to nail and mail); *Krodel v. Amalgamated Dwellings, Inc.*, 139 A.D.3d 572, 573 (1st Dep't 2016) (three attempts over three days satisfied due diligence pursuant to CPLR 308(4)); *Farias v. Simon*, 73 A.D.3d 569, 570 (1st Dep't 2010) (several attempts to serve defendants at various times of the day when it could be reasonably expected they would be home satisfied due diligence for nail and mail);

Dunleavy v. Moya, 237 A.D.2d 176, 176 (1st Dep't 1997) (three attempts over a single weekend satisfied due diligence pursuant to CPLR 308(4)); *Brown v. Teicher*, 188 A.D.2d 256, 256 (1st Dep't 1992) (three attempts at diverse times, including early in the morning and late at night, satisfied due diligence for nail and mail).

Here, Eros surpassed that well-settled standard for due diligence. Eros' counsel attempted to serve Asensio in person ***five separate times*** – including early in the morning, late at night and over the weekend – before nailing a full set of pleadings on the front door of Asenio's personal residence in a doorman building on October 2, 2017. *See* ECF No. 20; *see also Dunleavy*, 237 A.D.2d at 176. The server then completed mailing on October 4, 2017, within Eros' 120-day window to serve Asensio under CPLR 306-b.

Further, even though nail and mail service had been properly effected and Eros had no duty to use a second method of service, Eros' counsel also served Asensio through his doorman. New York courts allow substituted service on a target through his or her doorman where a server is denied entry to the target's apartment. *See Bank of America, N.A. v. Grufferman*, 117 A.D.3d 508, 508 (1st Dep't 2014) (service on doorman was proper where process server was denied access to target's apartment); *Al Fayed v. Barak*, 39 A.D.3d 371, 372 (1st Dep't 2007) (service on doorman was proper where process server was denied access to target's apartment and was told defendant was not at home); *Rosenberg v. Haddad*, 208 A.D.2d 468, 469 (1st Dep't 1994) ("[S]ervice that is left with a doorman, followed by a mailing, is valid where access to the building is prohibited.").

In the case at bar, the process server made yet another attempt to serve Asensio in person on October 3, 2017, the day after he affixed the pleadings to Asensio's apartment door. This time, he was denied access to Asensio's apartment by, and thus effected service on, Asensio's

doorman by providing him a full set of pleadings, and timely mailed a copy of the same to Asensio on October 4, 2017. (*See* ECF No. 19.)

Service on defendants Asensio & Company and Mill Rock through the New York Secretary of State was likewise proper. New York law dictates that service of process on a corporation through the New York Secretary of State is valid. *See* N.Y. Bus. Corp. Law § 306(b); *Associated Imports, Inc. v. Leon Amiel Publisher, Inc.*, 168 A.D.2d 354, 354 (1st Dep't 1990) ("service . . . on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant"); *see also* N.Y. Bus. Corp. Law § 1006(a)(4) (a dissolved corporation "may sue or be sued . . . in its corporate name, and process may be served by or upon it").

The process server here completed service on defendants Asensio & Company and Mill Rock by submitting a full set of pleadings to the New York Secretary of State, the registered agent of record for both corporations, on October 2, 2017. Eros, moreover, met the heightened notice procedure for the corporate defendants under CPLR 3215(g). On November 10, 2017, at least twenty days before any entry of default judgment could be made, Eros' counsel served by first class mail a full set of all pleadings on both Asensio & Company and Mill Rock, and enclosed in each mailing a notice to each corporation that service was made pursuant to New York Business Corporation Law §306(b). *See* CPLR 3215(g)(4)(i)-(ii); Bowe Aff., Ex. E.

Despite proper service on all three Asensio Defendants, not a single one has appeared in the action or responded to the complaint. Their failure to fulfill their most basic duties as defendants is all the more flagrant in light of Asensio's indisputable knowledge of this action. Asensio admitted that he had "constructive knowledge" of Eros' lawsuit (Bowe Aff., Ex. K); admitted to accessing the docket for this action to procure one of the multiple proofs of service

against him (Bowe Aff., Ex. F); and tweeted as early as October 5, 2017 – one day after he was served by mail – that he was aware of the lawsuit in a Twitter exchange with defendants Mangrove and August (Bowe Aff., Ex. P). This procedural record speaks for itself and belies any excuse for default that the Asensio Defendants could conceivably claim.

CONCLUSION

Based on the foregoing, plaintiffs respectfully request that this Court grant plaintiffs' motion to enter default judgments against the Asensio Defendants pursuant to CPLR 3215.

Dated: New York, New York
December 1, 2017

KASOWITZ BENSON TORRES LLP

By: */s/ Michael J. Bowe*

Michael J. Bowe (mbowe@kasowitz.com)
Stephen W. Tountas (stountas@kasowitz.com)
1633 Broadway
New York, New York 10019-6022
(212) 506-1700

Attorneys for Plaintiff Eros International Plc