SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

----------X

EROS INTERNATIONAL PLC,

Plaintiff,

- v -

MANGROVE PARTNERS, NATHANIEL AUGUST, MANUEL ASENSIO, ASENSIO & COMPANY, INC.,MILL ROCK ADVISORS, INC.,GEOINVESTING, LLC,CHRISTOPHER IRONS, DANIEL DAVID, FG ALPHA MANAGEMENT, LLC,FG ALPHA ADVISORS, FG ALPHA, L.P., CLARITYSPRING INC.,CLARITYSPRING SECURITIES LLC,NATHAN ANDERSON, JOHN DOES, KNIGHT ASSETS & CO., LLP., AKSHAY NAHETA

Defendants.

----------X

**INDEX NO.** 653096/2017

**MOTION DATE** 12/04/2017

**MOTION SEQ. NO.** 007

**DECISION + ORDER ON MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 122, 123, 124, 127, 157, 160, 362, 382, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 483, 484, 485, 486, 488, 489

were read on this motion for DEFAULT JUDGMENT.

This motion for default judgment turns on whether Plaintiff Eros International Plc ("Eros") properly served Defendant Manuel P. Asensio in accordance with the CPLR. Following a traverse hearing to assess Eros's service on Asensio, the Court finds, for the reasons set forth below, that Asensio was properly served. Therefore, Eros's motion is granted.

## FACTUAL BACKGROUND

Eros filed a Complaint on September 29, 2017, alleging that Asensio, Asensio & Company, and Mill Rock Advisors (the "Asensio Defendants"), along with a host of other individuals and entities (the "Defendants"), carried out a "short and distort" scheme to sabotage Eros's stock price by spreading false or misleading information about the company. The Complaint contained seven causes of action against the Defendants, including defamation and

defamation per se. Eros alleged that Asensio, "who had a short position in Eros' stock at the time of Defendants' short and distort scheme, is a notorious short-seller," "[a] self-proclaimed 'pioneer' of activist short-selling," and "the founder and owner of asensio.com, a corporate website on which he disseminates his short reports." (Compl. ¶22) (NYSCEF Doc. No. 3). In addition, "Asensio is also the founder of Asensio & Company and the sole managing member of Mill Rock [Advisors]." (*Id.*)

According to Eros, its counsel "employed multiple procedurally correct methods for serving Asensio" with the Complaint. (Eros Mem. of Law in Supp. of Mot. for Default J., at 6) (NYSCEF Doc. No. 99). To attest to these various methods of service, Eros filed two affidavits of service on October 10, sworn to by its process server Corey Guskin. (*See* NYSCEF Doc. Nos. 399-400) (the "Affidavits of Service"). According to the Affidavits of Service, Guskin made five attempts to serve Asensio at his apartment between Friday, September 29 and Monday, October 2, 2017, to no avail. Following those five fruitless attempts, Guskin avers that he affixed true copies of the full set of pleadings on the door to Asensio's residence, and then mailed true copies of those papers to Asensio. (Eros Reply Mem. of Law, at 3-4) (NYSCEF Doc. No. 483). On October 3, Guskin tried for a sixth and final time to serve Asensio personally. On that attempt, however, Guskin avers that a doorman (or "building concierge") in Asensio's apartment building denied Guskin access to Asensio's residence. Turned away, Guskin avers that he left a copy of the pleadings with the doorman. (*Id.*)

Under the CPLR, Asensio had 30 days from the date on which service was completed to "serv[e] an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." CPLR 320(a). In Eros's view, service on Asensio was completed on October 20, since the CPLR deems such "service shall be complete ten days after" the

Affidavits of Service are filed. *See* CPLR 308(2), (4). Therefore, Asensio had until November 20, 2017, to respond to the Complaint.

In addition, Eros served the corporate Asensio Defendants – Asensio & Co. and Mill Rock Advisors – on October 2, 2017, by delivering two copies of the papers to the corporations' registered agent, the New York Department of State. (*See* NYSCEF Doc. Nos. 21-22). The corporate Asensio Defendants had until November 1, 2017 to respond to the Complaint.

The Asensio Defendants did not answer, move against, or otherwise formally respond to Eros's Complaint before the respective deadlines. But on November 20, Asensio himself told Eros's counsel that he had heard about Eros's attempts at serving him, "anecdotally," and that "[he] had not been served." (Manuel P. Asensio's Further Affidavit in Opposition ("Asensio Opp."), ¶2) (NYSCEF Doc. No. 478). Other Defendants, by contrast, had agreed on stipulations with Eros to extend their time to respond to the Complaint. (*See, e.g.*, NYSCEF Doc. Nos. 29, 31).

On December 1, 2017, Eros moved, by Order to Show Cause, for an order granting default judgments against all three Asensio Defendants. (NYSCEF Doc. No. 98). This Court (Bransten, J.) granted Eros's motion as to Asensio & Company and Mill Rock Advisors, but instructed that "[t]he motion as to defendant Asensio is to be held in abeyance pending a traverse hearing." (February 14, 2018 Hearing Tr. at 13:8-10) (NYSCEF Doc. No. 160). The Court stated that "[t]he supplemental service made upon the concierge . . . gives this Court pause to question the validity of the plaintiff's purported 'nail and mail' service." (*Id.* at 11:13-16). As a result, "this Court cannot determine service was properly made upon the individual defendant Asensio at this time." (*Id.* at 12:9-11). Instead, in an Order dated February 23, 2018, the Court

ordered that a traverse hearing be held to "assess the service made on Defendant Manuel P. Asensio." (NYSCEF Doc. No. 160).

Meanwhile, Eros's case against the other Defendants moved forward. On March 8, 2019, this Court granted motions to dismiss that had been filed by the GeoInvesting Defendants, the Mangrove Defendants, the ClaritySpring Defendants, and the Knight Defendants. *Eros Int'l PLC v. Mangrove Partners*, 2019 N.Y. Slip Op. 30604(U), 2019 WL 1129196 (Sup. Ct. N.Y. Cty. Mar. 8, 2019). That Decision and Order – which was based on the specific allegations asserted against the moving Defendants – left only the Asensio Defendants remaining in the case.

The traverse hearing to assess service on Asensio was conducted on June 13, 2019. The process server who allegedly served Asensio did not testify at the hearing. Eros's counsel testified that the server, Mr. Guskin, had relocated to Ecuador and refused to participate in the hearing despite repeated attempts by counsel to persuade him to do so. (Traverse Hearing Tr. at 27-28; Eros Mem. of Law in Advance of Traverse Hearing, at 4) (NYSCEF Doc. No. 397)). In his stead, Eros entered the Affidavits of Service into evidence, and called two attorneys from the law firm Kasowitz Benson Torres LLP ("Kasowitz") to testify. Asensio testified on his own behalf.[1]

---

[1] Asensio also attempted to call two additional witnesses to challenge Eros's account of its alleged service. These witnesses were precluded, however, because Asensio failed to provide proper notice to Eros. The Court had instructed the parties to submit "briefing, which shall include the identities of the witnesses expected to be called" at the traverse hearing, by June 6. (NYSCEF Doc. No. 396). Asensio submitted no briefing, and only disclosed the identities of his proposed witnesses on June 12, less than 24 hours before the hearing was set to begin. Asensio evidently served subpoenas on these witnesses on June 5, yet waited until the eve of the hearing to inform Eros that those subpoenas had been issued. (*See* NYSCEF Doc. Nos. 443, 446). Similarly, Asensio tried to submit into evidence an "Incident Report" he had obtained some time prior to the hearing – he was evasive about exactly when – that was also not disclosed despite

## LEGAL ANALYSIS

### A. Service of Process

1. The CPLR Requirements for Proper Service

The CPLR authorizes several different methods for "personal service upon a natural person." *See* CPLR 308. Most directly, under CPLR 308(1), such service may be made "by delivering the summons within the state to the person to be served." Alternatively, CPLR 308(2) permits service to be made:

> "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served . . . ."

If service cannot be made under either of those provisions, CPLR 308(4) offers a two-step alternative, commonly referred to as "nail and mail":

> 4. where service under paragraphs one and two cannot be made with due diligence, [service may be made] by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served . . . .

---

Eros's continuing discovery demands. The Court exercised its discretion not to countenance such tactics and disregard of Court orders and precluded the witnesses' testimony as well as the Incident Report. *See Daniels v. New York City Transit Authority*, 171 A.D.3d 601, 602-03 (1st Dep't 2019) (affirming preclusion of testimony where plaintiff gave no reason for waiting until the eve of trial to notify defendants of witness's identity); *Shmueli v. Corcoran Group*, 29 A.D.3d 309, 309 (1st Dep't 2006) (same).

Eros maintains here that it satisfied both 308(4) and 308(2). First, Eros contends that the process server completed nail-and-mail service under 308(4) after five unsuccessful tries at serving Asensio at his apartment. Second, Eros says that the process server also left a copy of the pleadings with "a person of suitable age and discretion" under 308(2) – specifically, the doorman or building concierge who worked at Asensio's apartment building. The traverse hearing was conducted to probe the veracity of Eros's account.

2. Eros Proved by a Preponderance of the Evidence that it Properly Served Asensio

At the traverse hearing, the burden fell on Eros to establish, by a preponderance of the evidence, that Asensio was properly served. *Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 A.D.3d 475, 476 (1st Dep't 2016) ("Plaintiff met its burden at the traverse hearing of demonstrating proper service of process by a preponderance of the evidence."); *compare with Chaudry Const. Corp. v. James G. Kalpakis & Assocs.*, 60 A.D.3d 544, 545 (1st Dep't 2009) ("[P]laintiff failed to carry its burden of establishing proper service" at traverse hearing and "the court erred in shifting that burden to defendant to disprove service").

When a process server "cannot be compelled with due diligence to attend" the traverse hearing, the process server's affidavit of service can satisfy the plaintiff's evidentiary burden. Under CPLR. 4531, "[a]n affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial." *See Gordon v. Nemeroff Realty Corp.*, 139 A.D.2d 492, 492 (1988) ("Pursuant to both statutory and decisional law, where a process server dies after service and prior to a hearing as to whether service was properly effected, his affidavit of service shall be received as prima facie evidence of

service provided it is not conclusory and devoid of sufficient detail.") (citing CPLR 4531); *Kaszovitz v. Weiszman*, 110 A.D.2d 117, 119 (2d Dep't 1985) ("[T]he affidavit of the process server [is] not admissible into evidence to prove that service had been made in conformity with the CPLR unless the affiant was made available for cross-examination or was dead or otherwise unavailable."); *see also Olympia Mortg. Corp. v. Rottenberg*, No. 1479/00, 2002 WL 877608, at *3 (Sup. Ct. Kings Cty. Jan. 18, 2002) (conducting traverse hearing where process server "did not testify" because he could not be found and the "plaintiff relied on his affidavit of service").

The evidence established that Guskin refused to testify at the traverse hearing despite Eros's diligent efforts. Skye Gao, an associate at Kasowitz, described in detail the steps she took on behalf of Eros to secure Guskin's attendance. First, Gao testified that she tried calling Guskin in November 2018. Though Guskin did not answer, he called her back shortly thereafter and informed her that "he cannot, personally, attend the traverse hearing because he had retired and moved to Ecuador." (Traverse Hearing Tr. at 77-78) (NYSCEF Doc. No. 455). Gao "reach[ed] out to him again, by phone," in January 2019. (*Id.* at 78-79). This time, Gao hoped that Guskin might be willing to testify via video or telephone. But in March 2019, Guskin sent a WhatsApp message "respond[ing], very adamantly, that he refuses to come in – to either come in to testify or telephone remotely." (*Id.* at 80). Guskin also told Gao "to never contact him again." (*Id.* at 84). As the Court stated on the record at the hearing, Gao's testimony "credibly and persuasively show[ed] . . . that reasonable and vigorous attempts were made to have the witness testify live or by phone or by video and he refused to do so." (*Id.* at 93).

Although Asensio insists that Eros "did not satisfactorily demonstrate under CPLR 4531 that Mr. Guskin . . . could not be compelled with due diligence to attend the trial," he provides no evidence to back that assertion. (Cantor Aff., ¶29) (NYSCEF Doc. No. 470). Indeed, his

specific arguments – the claim, for example, that Guskin "was available, at least remotely" (*id.*, ¶¶29-30) – were specifically refuted by the credible testimony of Eros's counsel. (Traverse Hearing Tr. at 80 ("[Guskin] responded, very adamantly, that he refuses to come in – to either come in to testify or telephone remotely.")). Further, Asensio's so-called "investigat[ion]" into Guskin's availability after the traverse hearing simply cements the conclusion that Guskin refused to participate in the traverse hearing in any manner. (*See* Asensio Opp., ¶11; *id.*, Ex. 1 (Guskin email stating he was "retired and living in Salinas, Ecuador," and requesting Asensio "[p]lease don't write to me or bother me again")). Notwithstanding Asensio's conclusory objections, the Court finds that the process server could not "be compelled with due diligence to attend" the traverse hearing, as contemplated by CPLR 4531. The Affidavits of Service are thus admissible to prove that Asensio was served in accordance with CPLR 308(4) and 308(2).

The Affidavits of Service constitute prima facie evidence of proper service under CPLR 308(4) and 308(2). The first affidavit indicates that on October 2, 2017, Guskin "affix[ed] a true copy" of the relevant papers to Asensio's door after attempting to serve him personally on five previous occasions at different times of day. (NYSCEF Doc. No. 399). Five attempts at in-person service easily satisfies the "due diligence" requirement in CPLR 308(4). *See Krodel v. Amalgamated Dwellings, Inc.*, 139 A.D.3d 572, 573 (1st Dep't 2016) (finding three attempts at in-person service to constitute "minimal diligence . . . sufficient to warrant substituted service pursuant to CPLR 308(4)"). This affidavit further indicates that Guskin completed "nail and mail" service by "depositing a copy of [the papers] in a first class mailing" addressed to Asensio's home. (NYSCEF Doc. No. 399). The second affidavit shows that on October 3, Guskin delivered the papers to a "suitable person . . . authorized to accept service of process" – *i.e.*, Asensio's building concierge – in accordance with CPLR 308(2). (NYSCEF Doc. No. 400).

*See Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 A.D.3d 475, 476 (1st Dep't 2016) (finding service on building concierge proper under CPLR 308(2) where process server was denied access to the door of the defendant's apartment).

Asensio's testimony at the hearing did not, in the Court's view, rebut the presumption of proper service raised by Guskin's affidavits. To be sure, Asensio flatly denied ever receiving the pleadings at his apartment. (*See, e.g.*, Traverse Hearing Tr. at 134). But once prima facie evidence of proper service is established, "the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper." *Grinshpun v. Borokhovich*, 100 A.D.3d 551, 520-21 (1st Dep't 2012); *compare with Chaudry*, 60 A.D.3d at 545 ("Even assuming the affirmations of service by plaintiff's counsel sufficiently raised a presumption of proper mailing, defendant rebutted that presumption by showing they were mailed to an incorrect address."). Asensio acknowledged residing at the apartment listed on the Affidavits at the time service was allegedly made and receiving mail there. (Traverse Hearing Tr. at 172-73, 135). He also confirmed that he knew "two doormen" in his building who fit the description of the "concierge" in the Affidavits. (*Id.* at 142-43; NYSCEF Doc. No. 400).

Moreover, the credibility of Asensio's broad denials was undermined by other aspects of his testimony. For example, he repeatedly testified that until very recently he "had no idea what [this] matter was about." (Traverse Hearing Tr. at 146; *id.* at 136 ("[I have] never even seen the complaint. I'm not involved."); *id.* at 145-46 ("Eros is not on my mind at all. . . . This is not something that I have any conscious knowledge of or that is important in my life or that I have any role in whatsoever."). Such statements, however, are not credible in light of the lengthy record showing Asensio's awareness of Eros's claims against him from the outset of this litigation. (*See* Asensio Aff. ¶6 ("I contacted Plaintiff's attorney on or about November 20, 2017

. . . to discuss various proposals or approaches that I believed might resolve the present matter."); *see also* NYSCEF Doc. Nos. 106-112). Asensio's credibility was also damaged by his frequent resort to inflammatory personal attacks at the hearing, including inappropriate comments he made towards an Eros witness during a recess in proceedings, *see* Traverse Hearing Tr. at 94-97, 177-78, and bald accusations of fraud leveled at Eros's attorneys. *Id.* at 108.

Further, to the extent Asensio's account of what occurred in the apartment building when Guskin tried to serve him there is based on inadmissible hearsay, that testimony cannot be considered. At the hearing and in his briefing, Asensio relies on secondhand statements from several different individuals to argue that Guskin failed to serve him. *See* Asensio Aff., ¶8 ("I testified that I obtained information that contradicted Mr. Guskin's allegations from three eyewitnesses . . . that dealt with Mr. Guskin with assistance from their two direct supervisors one in the building and the other in the management company."). These individuals were either not made available to testify at the hearing, or were precluded from testifying due to Asensio's failure to notify Eros about them beforehand. *See* n.1, *supra*. Asensio's hearsay testimony about what those individuals told him will not defeat the presumption of valid service. *See Berger v North Street Global, LLC*, No. 653145/2017, 2018 WL 6016624, at *1 (Sup. Ct. N.Y. Cty. Nov. 13, 2018) (noting that "the court cannot consider [defendant's] hearsay account of what the process server may have said or did"); *Ricatto v Rolling Gates Services, Corp.*, No. 703374/2014, 2016 WL 7323284, at *3 (Sup. Ct. Queens Cty. Nov. 17, 2016) (holding that "the Court does not credit" an "alleged hearsay statement" about service at traverse hearing).

In sum, the Court finds, based on the evidence presented at the traverse hearing, that Asensio was properly served in accordance with CPLR 308(4) and 308(2).

**B. Default Judgment**

With the validity of Eros's service on Asensio established, the Court turns to Eros's pending motion for default judgment against Asensio.

Under CPLR 3215, "[w]hen a defendant has failed to appear, [or] plead . . . the plaintiff may seek a default judgment against him." *Maesa LLC v London Luxury LLC*, No. 653424/2013, 2018 WL 998753, at *3 (Sup. Ct. N.Y. Cty. Feb. 21, 2018) (quoting CPLR 3215(a)). Eros moved for a default judgment against Asensio on December 1, 2017. (*See* NYSCEF Doc. No. 99). The Court declined to grant the default only because "this Court c[oud not] determine service was properly made upon the individual defendant Asensio at th[at] time." (February 14, 2018 Hearing Tr. at 12:9-11). Now that proper service has been determined, Eros is entitled to the default judgment it sought.

"It is well established that to avoid entry of a default judgment upon a failure to appear or answer, a defendant is required to demonstrate both a justifiable excuse for the default and a meritorious defense." *Young v. Richards*, 26 A.D.3d 249, 250 (1st Dep't 2006); *Morrison Cohen LLP v. Fink*, 81 A.D.3d 467, 468 (1st Dep't 2011) (affirming plaintiff's motion for a default judgment where defendant failed to properly respond to summary judgment motion). "[W]hether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." *New Media Holding Co. LLC v. Kagalovsky*, 97 A.D.3d 463, 465 (1st Dep't 2012).

Asensio has provided no justifiable excuse for failing to respond to Eros's Complaint. Rather, Eros has shown that Asensio was fully aware of: (i) the deadline by which to respond to

Eros's Complaint, (ii) the possibility of extending that deadline, and (iii) the fact that Eros intended to move for default judgment if Asensio failed to respond. In November 2017, Eros's counsel offered "stipulating to a 1-week extension beyond the date that [Eros] negotiated with the other defendants, together with a stipulation of service, which would require [Asensio] to respond by December 7, 2017." (Bowe Aff., Ex. G) (NYSCEF Doc. No. 107). Asensio responded that "EROS is not anything I remotely care about at all," that "service is defective," and that Eros's offer to extend the deadline by which Asensio must respond to the Complaint "is not acceptable under the factors and circumstances." (Bowe Aff., Ex. H) (NYSCEF Doc. No. 108).

The evidence suggests that Asensio's failure to respond was a tactical choice to contest service rather than the substance of Eros's allegations. Certainly, that was Asensio's choice to make. But the Court's finding of proper service nullifies Asensio's primary excuse for his failure to respond. *Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 A.D.3d 475 (1st Dep't 2016), is instructive. There, the defendant sought to vacate a default judgment on the ground that "service was not proper under CPLR 308(2)," arguing that the plaintiff "failed to show that the process server requested and was denied access to [the] defendant's apartment before delivering papers to the building's concierge." *Id.* at 476. After a traverse hearing, the court found that the plaintiff "met its burden . . . of demonstrating proper service of process by a preponderance of the evidence." *Id.* As a result, the "[d]efendant's only proffered excuse for his default – that he never received the complaint – [was] negated by a finding of proper service." *Id.*; *see also Thomas v. Karen's Body Beautiful LLC*, 168 A.D.3d 500 (1st Dep't Jan. 15, 2019) ("[A]s no issue of fact existed as to service, the motion court also properly found that defendants had failed to offer a reasonable excuse for their default[.]"); *Wells Fargo Bank, N.A. v. Leonardo*, 167

A.D.3d 816, 817 (2d Dep't 2018) ("The defendant's mere denial of service in an affidavit failed to rebut the presumption of proper service created by the process server's affidavit and, therefore, was insufficient to demonstrate a reasonable excuse for her default.").

The parties' subsequent settlement discussions do not change the result. At the traverse hearing, Asensio's counsel advised the Court that "[t]here were ongoing settlement negotiations between the two sides which lasted from December of 2017 through July of 2018, and, in fact, a settlement agreement was ultimately signed." (Traverse Hearing Tr. at 113). Eros confirms that it "entered into a confidential settlement agreement with Asensio" on or about July 12, 2018; it terminated the settlement agreement two weeks later, however, citing Asensio's failure to comply with certain terms therein. (Eros Mem. of Law in Advance of Traverse Hearing, at 9). Whatever transpired between the parties, it does not change the facts as it relates to this motion before the Court – that is, whether Asensio was properly served and whether his failure to respond to the complaint constituted a default. Eros's motion for default judgment was never withdrawn, and no stipulation concerning service, or Asensio's opportunity to respond to the Complaint, was ever entered. In short, the aborted settlement "does not explain defendant's continuing failure to answer." *Straub v. Becker*, 210 A.D.2d 125, 125 (1st Dep't 1994) (affirming decision not to vacate default where defendant failed to answer despite notice on multiple occasions).

Because Asensio lacks a reasonable excuse for failing to respond to Eros's Complaint, the Court need not reach the question whether he has a meritorious defense to Eros's substantive claims. *See Citibank, N.A.*, 144 A.D.3d at 476–77 ("Absent a reasonable excuse, vacatur [of default judgment] is not appropriate regardless of whether defendant has a meritorious defense."); *LaSalle Bank Nat. Ass'n v. Calle*, 153 A.D.3d 801, 803 (2d Dep't 2017) ("Since the

defendant failed to establish a reasonable excuse for his default in appearing or answering the complaint, it is unnecessary to consider whether he established the existence of a potentially meritorious defense.").[2]

* * * *

Accordingly, it is:

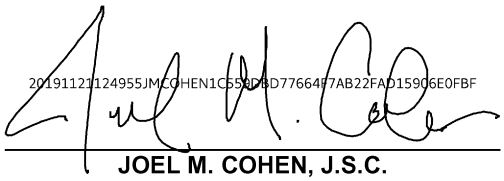
**ORDERED** that Eros's motion for default judgment against Manuel P. Asensio is Granted; and it is further

**ORDERED** that, consistent with this Court's February 26, 2018 Decision and Order granting Eros's motion for default against Asensio & Company and Mill Rock Advisors (NYSCEF Doc. No. 160), Eros shall conduct an inquest before a Referee on damages as to the Asensio Defendants once its claims against all other Defendants are fully resolved and all appeals exhausted.

---

[2] The fact that other defendants in the case prevailed on their motions to dismiss based on the specific allegations asserted against them does not, by itself, demonstrate that Asensio would have had a meritorious defense if he had decided to defend the specific allegations made against him rather than defaulting. When Asensio's counsel indicated at the traverse hearing that "he would move to vacate [a default judgment] on the grounds of both excusable default and meritorious defense," the Court instructed counsel to make those arguments "in opposition to the default judgment being entered." (Traverse Hearing Tr. at 114-15). Asensio's opposition papers, however, failed to do so. And "conclusory assertion[s] . . . [are] insufficient to show a meritorious defense." *Imovegreen, LLC v. Frantic, LLC*, 139 A.D.3d 539, 540 (1st Dep't 2016). On August 24, 2019, two months after the opposition papers were filed, Asensio submitted a "Memorandum of Law in Opposition to Plaintiff's *Pending* Motion for Default Judgment Against Defendants Manuel P. Asensio, Asensio & Company, Inc., and Mill Rock Advisors, Inc." (NYSCEF Doc. Nos. 488) (emphasis in original), and a "Supplemental Memorandum of Law in Support of the Asensio Defendants' Request for Vacatur Under CPLR 5015 with Leave to Move for Dismissal in the Event this Court Deems Service was Proper on Defendants Manuel P. Asensio, Asensio & Company, Inc., and Mill Rock Advisors, Inc." (NYSCEF Doc. No. 489). Those papers purported to describe meritorious defenses. Asensio did not seek, or receive, leave to file additional briefing in opposition to Eros's motion and the Court will not consider his belated filing.

This constitutes the Decision and Order of the Court.




11/21/2019
DATE

JOEL M. COHEN, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | X | GRANTED | | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |