

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ASENSIO BROKERAGE SERVICES, INC.,
n/k/a Integral Securities, Inc.
(CRD No. 31742),

and

MANUEL PETER ASENSIO
(CRD NO. 1148811),

Respondents.

Disciplinary Proceeding
No. CAF030067

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

January 4, 2005

The individual respondent is barred for failing to respond to requests for information in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. In addition, the Respondents are found to have issued research reports that contained misleading information and failed to define the ratings and terms employed by the issuing firm, in violation of Conduct Rules 2711(h), 2210, and 2110. The Firm is fined \$20,000 for the research report violations. In light of the bar, no additional sanction is imposed on the individual respondent for this violation.

Appearances

For the Department of Enforcement: Jeffrey P. Bloom, Senior Counsel, and Brian D. Craig, Senior Attorney (Rory C. Flynn, NASD Chief Litigation Counsel, Of Counsel).

For the Respondents: Manuel Asensio.

DECISION

I. PROCEDURAL HISTORY

The Department of Enforcement (the “Department”) filed a three-count Amended Complaint on February 6, 2004,¹ against Asensio Brokerage Services, Inc., now known as Integral Securities, Inc. (“Asensio Brokerage” or the “Firm”)² and Manuel Peter Asensio (“Asensio”). The first cause of action alleges that the Respondents failed to comply with the disclosure requirements of NASD Conduct Rule 2711(h) in connection with research reports the Firm published on PolyMedica Corporation, Inc.³ (“PolyMedica”). The second cause of action alleges that the PolyMedica research reports contained an unwarranted or misleading statement, in violation of NASD Conduct Rules 2210 and 2110. And the third cause of action alleges that Asensio refused to supply requested information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On March 26, 2004, Asensio Brokerage filed an Answer and denied the charges in the Amended Complaint. The Firm also filed Affirmative Defenses, in which the Firm alleged that NASD lacked subject matter jurisdiction of this case. On March 29, 2004, Asensio filed three pleadings: (1) Answer to Amended Complaint; (2) Affirmative Defenses; and (3) Counter Claims and Counter Complaint. On the same day, the Respondents also filed a “First Amended Counter Claims and Counter Complaint.” Although the Respondents did not specifically request

¹ The Department filed the original Complaint on February 2, 2004.

² Asensio Brokerage Services, Inc. was originally named Asensio & Company, Inc. (Ex. C-12, at 32.) It later changed its name to Integral Securities, Inc. (See Ex. C-1.) For convenience, the Respondent firm will be referred to as “Asensio Brokerage” or the “Firm.”

³ The company’s common stock trades on the NASDAQ National Market under the symbol PLMD.

a hearing, the Hearing Officer determined that a hearing was necessary due to the complexity of the issues.

On March 31, 2004, the Hearing Officer struck the Respondents' counterclaims because NASD's Code of Procedure does not allow them in disciplinary proceedings.

On September 21, 2004, a one-day hearing was held in New York City before a hearing panel composed of the Hearing Officer, a current member of the District 8 Committee, and a current member of the District 4 Committee. The Department presented three witnesses and offered 15 exhibits, of which 14 were admitted into evidence.⁴ Asensio testified on his own behalf and offered 10 exhibits, which were admitted into evidence.⁵

On December 1, 2004, the Hearing Officer directed the Department to supplement Exhibit C-1, the Firm's Central Registration Depository ("CRD") record, by filing copies of each Form BD and Form BDW the Firm filed with NASD. The Department filed the forms on December 3, 2004; they are labeled as Exhibit C-16.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Respondents

Asensio started his career in the securities industry in 1982. Between 1982 and 1992, Asensio worked for 15 different brokerage firms before founding Asensio & Company, Inc. ("Asensio & Co."), the predecessor to Asensio Brokerage.⁶ Asensio served as the Firm's Chairman, CEO, and President until September 11, 2003, during which time he was registered as

⁴ The Hearing Officer excluded the Department's proposed Exhibit C-15, a copy of the transcript of the pre-hearing conference held on September 10, 2004, because it was already in the record.

⁵ References to the hearing transcript are cited as Tr.; the Department's exhibits are cited as "Ex. C"; and the Respondent's exhibits are cited as "Ex. R."

⁶ See Ex. C-1.

a General Securities Representative and a General Securities Principal.⁷ Asensio is not currently registered with any member firm.⁸

Asensio Brokerage is a small broker-dealer located in New York City that specializes in “undervalued securities and short selling.”⁹ The Firm has a handful of institutional clients, such as hedge funds; it does not conduct a general retail business.¹⁰ Between August 2002 and January 2003 (the relevant review period), the Firm had four employees: Asensio; OH, Asensio’s nephew; CS; and LL.¹¹ Except for Asensio, each still works at the Firm. OH and CS are

⁷ During the relevant period, Asensio also was registered through the Firm as an Equity Trader, a Financial and Operations Principal, a Municipal Securities Principal, a Municipal Securities Representative, and a Registered Options Principal. (Ex. C-2, at 4.)

⁸ Ex. C-2, at 3.

⁹ Ex. C-4, at 1.

¹⁰ Tr. at 317, 321.

¹¹ Tr. at 225.

registered with NASD;¹² LL is employed in a non-registered administrative capacity.

B. Organizational Structure and Business of Asensio Brokerage

At the heart of the Respondents' defense is their claim that, before the PolyMedica reports were published, they restructured the Firm to separate the research and public advocacy functions from the broker-dealer functions. Up until December 15, 1999, Asensio owned all of the Firm's issued and outstanding stock, and he had complete control of the Firm. He served as its President, Chairman, and CEO. On December 15, 1999, the Firm filed an amended Form BD with NASD that added Asensio.com, Inc. ("Asensio.com") as an indirect owner.¹³ Asensio remained listed as a direct owner of the Firm and the amended Form BD disclosed that he controlled Asensio.com.¹⁴ In June 2002, the Firm adopted the named Asensio Brokerage Services, Inc. without any change in its ownership or its executive officers.¹⁵

In the early years, in addition to its short selling activities, the Firm produced and published research reports on companies Asensio considered to be overvalued, including companies he accused of disseminating false information to inflate their stock prices.¹⁶ In 1996, the Firm began publishing these reports on its Internet site, asensio.com.¹⁷ These reports were

¹² OH was associated with Asensio Brokerage from March 2002 until June 2003. He was registered as a General Securities Representative between May 8, 2002, and June 13, 2003, and as a General Securities Principal between March 12, 2003, and June 13, 2003. OH rejoined the Firm on September 11, 2003, and he has been registered as a General Securities Representative and a General Securities Principal since November 6, 2003. (*See* Ex. C-7.) CS has been associated with Asensio Brokerage since November 1995. He has been registered as a General Securities Representative since 1997 and as a General Securities Principal since 1999. (*See* Ex. C-6.)

¹³ Ex. C-16, at 14-15.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 89, 95.

¹⁶ Ex. R-4, ¶ 9.

¹⁷ Ex. C-4, at 1.

extremely critical of the subject companies, and they spawned numerous lawsuits against the Firm involving aggregate claims of \$1 billion.¹⁸

In June 2002, Asensio restructured the Firm in an attempt to insulate himself and the Firm from further litigation risk and to get the research and publishing business out from under NASD regulatory oversight.¹⁹ Effective June 6, 2002, Asensio.com, the holding company that owned Asensio Brokerage, changed its name to Asensio & Company, Inc. (“Asensio & Co.”)²⁰ Thereafter, Asensio claimed that the research and publishing business was conducted exclusively by Asensio & Co., which was not an NASD member firm. Despite this alleged separation of functions, however, Asensio controlled both entities. Indeed, he remained the President, Chairman, and CEO of Asensio Brokerage. In addition, each entity used asensio.com as its Internet site.²¹

In September 2003, Asensio ended his formal association with Asensio Brokerage.²² The amended Form BD the Firm filed on September 12, 2003, reported that OH had assumed the role as the Firm’s “registered principal.”²³ Asensio testified that his ultimate intent was to turn the Firm over to OH.

¹⁸ Tr. at 310–11, 322, 344.

¹⁹ Ex. R–4; Ex. C–4, at 1.

²⁰ See Ex. R–1. The Firm filed an amended Form BD in August 2002 that showed the holding company, Asensio & Co., as the owner of Asensio Brokerage.

²¹ Ex. C–4; Ex. C–5.

²² Ex. C–2, at 4. Asensio’s registrations terminated effective with his withdrawal from the Firm on September 11, 2003.

²³ Ex. C–16, at 244.

Then, in October 2003, the Firm filed to restructure once more. On October 2, 2003, the Firm reported that it had changed its name to Integral Securities, Inc.²⁴ Although the Firm originally reported this as only a name change, Integral Securities is actually a New York corporation formed in November 2003.²⁵

Finally, on February 10, 2004, the Firm filed an amended Form BD that reported that OH and the Alta Mar Trust now owned the Firm.²⁶ The Alta Mar Trust is a foreign trust Asensio established for the benefit of his family; OH is the sole trustee.²⁷ However, the Membership Department of NASD District 10 denied the Firm's change of ownership application, and Asensio has appealed that decision.²⁸

C. Jurisdiction

NASD has jurisdiction over the Respondents and this proceeding. Asensio Brokerage is a member firm, and, although Asensio's last registration terminated effective September 11, 2003, NASD has continuing jurisdiction over him for two years after that date under NASD By-Laws, Article V, Section 4. The Department filed the Amended Complaint on February 6, 2004, within the period of extended jurisdiction.

The Respondents nevertheless contend that NASD lacks subject matter jurisdiction. In their Affirmative Defenses, the Respondents cast this proceeding as an attempt by NASD to regulate Asensio & Co., which was not an NASD member during the relevant period. However,

²⁴ *Id.* at 258.

²⁵ *Id.* at 286, 348.

²⁶ *Id.* at 306.

²⁷ *Id.* at 306; Tr. at 290–91; Ex. R–5, at 2. Asensio claims that he has no control over the Alta Mar Trust and has no current information regarding its beneficiaries. (Tr. at 291–92.)

²⁸ Tr. at 20–21.

the Respondents' argument misses the mark. NASD has not asserted jurisdiction over Asensio & Co. NASD has subject matter jurisdiction of this proceeding because the Respondents wrote and published the PolyMedica reports, and Asensio refused to supply information the staff requested within the period of extended jurisdiction pursuant to NASD Procedural Rule 8210.

D. Origin and Nature of Underlying Investigation

NASD began the investigation that led to this proceeding in November 2002 as part of a general review of industry compliance with NASD Conduct Rule 2711.²⁹ Conduct Rule 2711 was a new rule that had come into effect in July 2002.³⁰ The new rule was designed to improve the objectivity of research and provide investors with more useful and reliable information when making investment decisions.³¹ Generally, Conduct Rule 2711 restricts the relationship between research and investment banking departments; requires disclosure of financial interests in covered companies by the analyst and the firm; requires disclosure of existing and potential investment banking relationships with subject companies; imposes quiet periods for the issuance of research reports; restricts personal trading by analysts; and requires disclosure of information that helps investors track the correlation between an analyst's rating and the stock's price movements.³²

NASD specifically centered the investigation on Conduct Rule 2711(h), which contains the Rule's disclosure requirements. To begin, NASD staff looked at the Internet sites run by a

²⁹ Tr. at 48–49, 125.

³⁰ See Order Approving Rule Change Relating to Analyst Conflicts of Interest, Exchange Act Release No. 45908, 2002 SEC LEXIS 1262 (May 10, 2002).

³¹ See Notices to Members 02–39, 2002 NASD LEXIS 47 (July 2002).

³² *Id.*, Joint Memorandum of NASD and the New York Stock Exchange, at *18–19.

number of different firms and then, when needed, the staff sent the firms written requests for additional information. Asensio Brokerage was one of the firm's the staff reviewed.

The staff sent a series of request letters to Asensio and Asensio Brokerage in an effort to obtain information about Asensio & Co., Asensio.com, and the relationship between Asensio & Co. and Asensio Brokerage. In general, the Respondents did not supply the requested information concerning Asensio & Co. and Asensio.com although, by letter dated February 25, 2003, Asensio did answer some questions about his control and ownership of Asensio & Co. Notably, in that letter, Asensio stated that he controlled and owned a majority interest in Asensio & Co.³³ When the staff was unable to obtain all the information it needed to complete its review of the Firm's compliance with Conduct Rule 2711, the staff scheduled Asensio for an on-the-record interview, which was held on April 9, 2003.³⁴ Asensio did not answer all of the staff's questions. Consequently, the Department eventually filed the Complaint initiating this proceeding.

E. The PolyMedica Reports

Pursuant to Conduct Rule 2711(h), a member must disclose within its research reports, among other things, the meaning of each rating used in its rating system, the percentage of "buy," "hold/neutral," or "sell" ratings issued by the firm, and a line-graph price chart showing the price changes relative to the firm's recommendations for securities for which the member has assigned a rating for at least one year. The required disclosures must be clear and comprehensive.

³³ Ex. C-11A.

³⁴ Ex. C-12 (transcript of on-the-record interview).

According to Rule 2711(a)(8), “research report” means “a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.” Each of the six PolyMedica reports meets those criteria. Each was a specific communication published on asensio.com that discussed a particular event or action and analyzed its impact on PolyMedica and its stock price in a manner that provided the reader a basis for determining whether to buy or sell the stock. In addition, the reports recommended that investors sell the stock short.

The six PolyMedica reports published on asensio.com between August 13, 2002, and January 3, 2003,³⁵ did not comply with Conduct Rule 2711(h). Neither Asensio nor Asensio Brokerage took any action to see that any of the disclosures required by Conduct Rule 2711 were included in the reports. None included a definition of the Firm’s ratings, as required by Conduct 2711(h)(4). The four reports published after September 9, 2002, failed to disclose the percentage of “buy,” “hold/neutral,” or “sell” ratings assigned by the Firm, as required by Conduct Rule 2711(h)(5)(a).³⁶ The two reports dated October 31, 2002, and January 3, 2003, did not incorporate a line-graph price chart, as required by Conduct Rule 2711(h)(6). Accordingly, the Hearing Panel finds that the Respondents violated Conduct Rule 2711(h), as alleged in the Amended Complaint. Asensio is equally liable for these violations because he wrote the reports.³⁷ Moreover, by violating Conduct Rule 2711(h), they also violated NASD Conduct Rule

³⁵ Ex. C-8. The Respondents had published similar reports on PolyMedica since approximately October 2001. NASD staff did not review those reports, however, because they predated the effective date of Conduct Rule 2711.

³⁶ The provisions of Rule 2711(h)(5) did not become effective until September 9, 2002.

³⁷ *DOE v. Ryan Mark Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17 (NAC June 25, 2001).

2110, which requires members and associated persons to adhere to high standards of commercial honor and just and equitable principles of trade.

The reports also violated Conduct Rule 2210(d)(1)(B), which prohibits exaggerated, unwarranted, or misleading statements or claims.³⁸ The PolyMedica reports falsely stated that Asensio & Co. maintained a short position in PolyMedica stock. Asensio & Co.'s account statements reflect that it closed out its short position in PolyMedica as of June 26, 2002.³⁹

The Respondents did not dispute the allegations that the six PolyMedica reports failed to comply with Conduct Rule 2711(h) or that the reports inaccurately claimed that Asensio & Co. maintained a short position in PolyMedica stock, in violation of Conduct Rule 2210(d)(1)(B). Rather, the Respondents contended that they neither wrote nor published the reports. Asensio claimed that he split Asensio & Co. and Asensio Brokerage to avoid regulatory oversight of the reports published on asensio.com and that NASD had no authority to question him, Asensio Brokerage, or Asensio & Co. about the reports. For this reason, Asensio refused to cooperate with the staff's investigation.

Contrary to the Respondents' assertions, the Hearing Panel finds that Asensio authored the six reports and that the Respondents published the reports. In reaching these findings, the Hearing Panel carefully considered and rejected Asensio's testimony. For the reasons discussed below, the Hearing Panel found that Asensio testified untruthfully.

³⁸ See *Department of Enforcement v. U.S. Rica Financial, Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *13 (N.A.C. Sept. 9, 2003).

³⁹ Ex. C-14. See also Tr. at 60, 219.

1. Asensio Authored the Reports

Asensio denied that he wrote the subject PolyMedica reports. Over the course of the investigation, Asensio alternatively responded that NASD did not have the right to ask him about the reports or that he had no knowledge of the identity of the reports' author. Notwithstanding his denials, however, the evidence as a whole shows that Asensio did write the reports.

The most direct evidence regarding who authored the PolyMedica reports came from CS, one of the Firm's three registered principals. In a letter CS sent to counsel for the Department on or about June 3, 2003, CS stated, "Asensio conducts all the research and writing of research reports and speaks with all clients."⁴⁰ The Hearing Panel accepts this statement as true; it is consistent with the other reliable evidence, and CS sent the letter with Asensio's approval.⁴¹ In addition, CS testified that Asensio ran Asensio & Co.⁴² Under these circumstances, there is no reason to question the statement.

Nonetheless, at the hearing, CS tried to recant his earlier statement. He disavowed any knowledge of the identity of the reports' author.⁴³ In an unbelievable exchange, CS testified that unknown persons produced the research reports in the Firm's offices at night.⁴⁴ According to CS, although he had never known anyone other than Asensio to produce any research reports—and the only person he knew to be in the offices at night was Asensio—CS could not say that Asensio produced the PolyMedica reports.⁴⁵

⁴⁰ Ex. C-11H.

⁴¹ Tr. at 206.

⁴² *Id.* at 231.

⁴³ *Id.* at 227.

⁴⁴ *Id.* at 227-28.

⁴⁵ *Id.* 228, 235.

The Hearing Panel rejects CS's feigned ignorance at the hearing. Under the circumstances, it is incredible that CS would not have known how the research reports were

produced. First, there were only four people in the companies' shared offices, where CS had access to Asensio & Co.'s books and records.⁴⁶ Second, in February 2003, Asensio reported to NASD staff in response to one of its information requests that CS worked for Asensio & Co. as a "Staff Reporter."⁴⁷ Third, CS had worked with Asensio for seven years and had a comprehensive knowledge of the Firm's operations. During the period in question, he was responsible for trading and operations.⁴⁸ Fourth, CS knew about the Internet site, asensio.com, where he saw the reports. In summary, all of the credible evidence shows that CS was in a key position at the Firm and that he had unrestricted access to information concerning the production and publication of the research reports. CS's reluctance to implicate Asensio can only be attributed to CS's desire to support Asensio's untenable story. Accordingly, the Hearing Panel rejects CS's contradictory hearing testimony.

The Hearing Panel further finds that Asensio falsely denied his involvement with the PolyMedica reports. Indeed, his testimony is nonsense. Asensio claimed that he had absolutely no knowledge of who wrote the reports, while simultaneously contending that Asensio & Co. had no employees other than himself. Accordingly, when his testimony is stripped of double talk, Asensio claims that he submitted information about PolyMedica to an anonymous email address at Asensio & Co., and, thereafter, some unknown person or persons incorporated that information into six research reports that were published on the Internet.⁴⁹ Asensio's story is even

⁴⁶ *Id.* at 203-04, 232-33.

⁴⁷ Ex. C-11A, at 1. Although CS denied that he was associated with Asensio & Co. after June 2002, his CRD record shows his continuing employment with the company. (Ex. C-6, at 4.)

⁴⁸ Tr. at 221, 225.

⁴⁹ Tr. at 301-02.

more unbelievable because Asensio tacitly admitted that none of the others at Asensio & Co. was authorized or competent to write the reports. Asensio did not contradict CS's claim that he did not write the reports, and Asensio testified that OH was too inexperienced to write the reports.⁵⁰ The only remaining employee was the receptionist. In other words, Asensio asked the Hearing Panel to conclude that an unknown, unpaid, and unseen person retrieved the emails at Asensio & Co. and wrote the reports at night. The Hearing Panel rejects Asensio's contrived story and finds that Asensio wrote each of the PolyMedica reports.

2. The Respondents Published the PolyMedica Reports

The Respondents' further contention that they did not publish the reports on asensio.com is equally without merit. All of the circumstantial evidence shows they did. Foremost, the Hearing Panel notes that Asensio controlled both companies. Although Asensio claimed that he had separated Asensio & Co. and Asensio Brokerage effective June 2002, the Firm's filings show that Asensio remained in total control of both entities until at least September 11, 2003,⁵¹ well after the reports appeared on asensio.com. In addition, by letter dated February 25, 2003, Asensio himself confirmed that he owned and controlled Asensio & Co.⁵² In that response to the staff's request for information about the ownership and structure of Asensio & Co., Asensio stated that he owned 73.76% of Asensio & Co., and that he owned super-voting preferred stock that gave him over 90% voting control of Asensio & Co. Asensio further stated that he supervised OH and CS at Asensio & Co. Furthermore, Asensio continued to hold himself out as

⁵⁰ Tr. at 325–26. Although a registered principal, Asensio testified that OH was not even permitted to open accounts. In Asensio's words, OH would only "embarrass himself and the firm" if he tried to advise the Firm's clients.

⁵¹ See Ex. C–16, at 244.

⁵² Ex. C–11A, at 1.

the Chairman, President, and CEO of Asensio & Co. after June 2002. For example, in April 2003, he was still listed on Asensio & Co.'s Internet site as holding all three titles at the company.⁵³

The evidence also supports the conclusion that the Respondents operated asensio.com for their benefit. The site provided a hyperlink to information about Asensio Brokerage,⁵⁴ and the site stated that it was Asensio Brokerage's Internet home page.⁵⁵ That home page contained an email address (ABSinfo@asensio.com) for visitors to request information about Asensio Brokerage.⁵⁶ Moreover, CS testified that Asensio Brokerage received telephone calls about the research reports released on asensio.com, which he passed along to Asensio.⁵⁷

In conclusion, all of the reliable evidence points in one direction: Asensio wrote the PolyMedica reports, which he and the Firm posted on asensio.com. Asensio ran the two companies, and they functioned as one. Asensio Brokerage paid the rent on the office space and the employees' salaries. Asensio & Co. had no independent revenue; it relied on Asensio Brokerage to support its operations. Moreover, Asensio made all of the decisions at both companies, and he was the only person authorized to deal with the Firm's clients. The absurdity of Asensio's contention that he turned the reigns of the Firm over to his nephew is amply demonstrated by the fact that Asensio did not consider OH competent to open new accounts and answer clients' questions. In short, the Hearing Panel concludes that the separation of

⁵³ Ex. C-3.

⁵⁴ The hyperlink on the Asensio & Co. home page ("READ ABOUT ASENSIO BROKERAGE SERVICES, INC.") (Ex. C-3, at 1) referred viewers to a page on the asensio.com site which provided information about Asensio Brokerage and its clients. (Ex. C-5.)

⁵⁵ Ex. C-5.

⁵⁶ *Id.*

information services into Asensio & Co. was nothing more than a charade in an attempt to limit NASD oversight of the Firm's research and information services.

In conclusion, the Hearing Panel finds that the Respondents violated Conduct Rules 2711(h), 2210, and 2110, as alleged in the Complaint.

F. Asensio's Failure to Provide Requested Information

The evidence conclusively establishes that Asensio purposefully impeded NASD's investigation by refusing to provide information about the PolyMedica reports and the relationship between Asensio & Co. and Asensio Brokerage.

Starting in February 2003, the staff sent Asensio and Asensio Brokerage a series of request letters pursuant to NASD Procedural Rule 8210, which requested information about Asensio & Co., the relationship between Asensio & Co. and Asensio Brokerage, and the Internet site, asensio.com ("Request" or Requests"). The staff sent the first Request on February 11, 2003, which, among other things, requested information and documents concerning Asensio & Co.⁵⁷ Asensio provided some of the requested information by letter dated February 25, 2003.⁵⁸ As discussed above, in his response Asensio stated that he controlled Asensio & Co. and that he owned a majority of its issued stock.

On March 12, 2003, the staff sent a second Request, which asked for information about the PolyMedica reports.⁶⁰ Asensio responded by letter dated March 25, 2003, in which he stated

⁵⁷ Tr. at 229–30.

⁵⁸ Ex. C–10A.

⁵⁹ Ex. C–11A.

⁶⁰ Ex. C–10D.

that he had no ownership interest in Asensio & Co. and did not possess or control any of the company's property. In substantial part, this response directly contradicted his first. Asensio also stated that Asensio & Co. was not a member of the NASD, and, therefore, he would not provide any further information about it.⁶¹

The staff then sent a third request on April 1, 2003, to obtain the information Asensio refused to provide in response to the second Request.⁶² Asensio did not respond in any way to the third Request.

The staff then scheduled Asensio for an on-the-record interview, which was held on April 9, 2003. Asensio arrived late and immediately announced that he was going to refuse to answer any questions that he considered beyond NASD's jurisdictional reach. Specifically, he would not answer questions regarding Asensio & Co., because it was not an NASD member. The transcript of the interview reveals that Asensio refused to answer any questions regarding Asensio & Co., over the advice of his attorney. Instead, Asensio repeatedly engaged in diatribe about NASD and other self-regulatory organizations. Ultimately, Asensio terminated the interview by walking out of the room despite being warned by the staff that his failure to cooperate could lead to disciplinary action.⁶³

When Asensio refused to continue with the on-the-record interview, the staff negotiated an agreement with Asensio's attorney for Asensio to provide documentation for the staff's review. Once the staff reviewed the supplied documents, it would determine if a further on-the-

⁶¹ Ex. C-11C.

⁶² Ex. C-10F.

⁶³ Ex. C-12.

record interview was necessary. Pursuant to that agreement, on May 13, 2003, the staff sent a third Request to Asensio's counsel, FG, regarding production of the outstanding information from the staff's March 12, 2003 letter. The letter also requested that FG provide an immediate written response as to whether or not Asensio would provide the outstanding information.⁶⁴ FG did not respond. Instead, Asensio responded by letter dated May 16, 2003, in which he requested a copy of the interview transcript and any outstanding information requests. Asensio disavowed any agreement to produce documents and stated that FG no longer represented him.⁶⁵

On May 29, 2003, the staff sent Asensio a fourth Request, enclosing copies of the Requests dated March 12, 2003, and April 1, 2003, and a copy of the staff's May 13, 2003, letter to FG.⁶⁶ The May 29 letter requested documents and information Asensio had refused to supply in response to the earlier Requests as well as additional information about Asensio Brokerage, Asensio & Co. and the Poly Medica reports.⁶⁷ Asensio did not respond to this Request.

On June 23, 2003, the staff sent Asensio a fifth Request.⁶⁸ Asensio responded, but he refused to provide any information concerning Asensio & Co. Asensio responded to many questions by stating, Asensio & Co. "is a non-member firm."⁶⁹

NASD Procedural Rule 8210 authorizes NASD to require persons associated with an NASD member to "provide information orally [or] in writing ... and to testify at a location to be specified by Association staff, under oath or affirmation ... with respect to any matter" involving

⁶⁴ Ex. C-10J.

⁶⁵ Ex. C-11G.

⁶⁶ Ex. C-10K.

⁶⁷ *Id.*

⁶⁸ Ex. C-10M.

⁶⁹ Ex. C-11I.

an NASD investigation. Procedural Rule 8210 further states that “no ... person shall fail to provide information ... pursuant to this Rule.”

When Asensio registered with NASD, he agreed to abide by its rules, which are “unequivocal with respect to the obligation to cooperate with the NASD.”⁷⁰ Nonetheless, Asensio elected to willfully disregard his obligation. At every step, Asensio chose to second guess the staff’s authority and need for the information in direct violation of Procedural Rule 8210. Accordingly, the Hearing Panel finds that Asensio violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 as alleged in the Complaint.⁷¹

III. SANCTIONS

A. Asensio’s Failure to Provide Information

The NASD Sanction Guidelines (“Guidelines”) for “Failure To Respond Or Failure to Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210” state that a bar should be imposed if an individual did not respond in any manner.⁷² Indeed, a bar is particularly appropriate in egregious cases such as this where the respondent deliberately obstructed the staff’s investigation. Such conduct threatens the self-regulatory process. Because NASD does not possess subpoena power, it must rely upon Rule 8210 to gather information for its investigations. NASD would not be able to carry out its self-regulatory functions without respondents’ compliance with Procedural Rule 8210.⁷³

⁷⁰ *Michael J. Markowski*, 51 S.E.C. 553, 557 (1993), *aff’d*, 34 F.3d 99 (2d Cir. 1994).

⁷¹ *See Department of Enforcement v. Steinhart*, No. FPI020002, 2003 NASD Discip. LEXIS 23 (N.A.C. Aug. 11, 2003).

⁷² NASD Sanction Guidelines 37 (2004 ed.).

⁷³ *Toni Valentino*, Exchange Act Release No. 49,255, 2004 SEC LEXIS 330, at *15–16 (Feb. 13, 2004).

Asensio's conduct was egregious, and the Hearing Panel finds no facts in mitigation. The staff made repeated attempts to obtain the requested information and advised Asensio of the potential consequences for his non-compliance. Moreover, the information requested was material to the staff's investigation. Nonetheless, Asensio refused to provide the requested information. The Hearing Panel therefore will impose a bar, the standard sanction for failure to respond to requests for information made pursuant to Procedural Rule 8210.

B. Research Reports Violations

The Guidelines have not been amended to provide a specific guideline for violations of Conduct Rule 2711. The guideline for violations of Conduct Rule 2210 governing communications with the public recommends that widely distributing a misleading advertisement warrants a fine ranging from \$1,000 to \$20,000 and a suspension of the responsible person of up to 60 days.⁷⁴ The Department suggests that the Hearing Panel impose a joint and several fine of \$15,000.

Using the guideline applicable to Conduct Rule 2210, the Hearing Panel concludes that a \$20,000 fine against the Firm is the appropriate sanction under the facts and circumstances of this case. In addition, if the Hearing Panel were not imposing a bar against Asensio for his violations of Procedural Rule 8210, the Hearing Panel would fine Asensio \$20,000 and suspend him in all capacities for 60 days. However, in light of the bar, a suspension would be redundant,⁷⁵

⁷⁴ Guidelines 85–86.

⁷⁵ *Department of Enforcement v. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *17 (N.A.C. Mar. 27, 2002).

and a monetary fine would serve no additional remedial purpose.⁷⁶ Accordingly, the Hearing Panel will not impose any additional sanction on Asensio for this violation.

IV. ORDER

Asensio is barred from associating with any member firm in any capacity for his failure to provide information requested by NASD staff pursuant to NASD Procedural Rule 8210.

Asensio Brokerage is fined \$20,000 for its failure to comply with Conduct Rules 2711(h) and 2210.

In addition, the Respondents are jointly and severally ordered to pay costs in the amount of \$3,147.16, which includes an administrative fee of \$750 and transcript costs of \$2,397.16.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except that, if this Decision becomes the final disciplinary action of NASD, the bar shall become effective immediately.⁷⁷

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

⁷⁶ See e.g., *Castle Securities Corp.*, No. C3A010036, 2004 NASD Discip. LEXIS 1, at *36-37 (Feb. 19, 2004).

⁷⁷ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

Copies to:

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