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August 24, 2010

Mr. T. Grant Callery  
General Counsel  
FINRA  
1735 K Street, NW  
Washington, D.C. 20006

Re: Report on an independent review of the Financial Regulatory Authority's ("FINRA") subject matter, personal and regulatory jurisdiction over Asensio & Company, Inc.,<sup>1</sup> Manuel P. Asensio and [www.asensio.com](http://www.asensio.com) including but not limited to from August 13, 2002, the publication date of asensio.com's first PolyMedica article, through February 11, 2003, the date of FINRA's first FINRA Rule 8210 information and document request issued in FINRA Disciplinary Proceeding CAF30067 related to FINRA's presumption of denial of Asensio & Company, Inc.'s pending New Membership Application and Form MC-400 application for Mr. Asensio (together, the "Applications").

Dear Mr. Callery:

I write to you regarding the dismissal of Asensio & Company, Inc.'s<sup>2</sup> legal challenge to FINRA's bar of Manuel P. Asensio in the Applications.<sup>3</sup> I have been undergoing review of the voluminous record of the proceedings in this matter and have recently submitted to Ms. Allison Reid a legal memorandum supporting Asensio & Company, Inc.'s right to make such a challenge<sup>4</sup> as well as a document titled "FINRA's Legal and Regulatory Deficiencies," which explains the definition of this term that we have developed to identify the conflicts, biases, and rule deficiencies that have allowed FINRA to make adverse decisions against Mr. Asensio without due process or substantive review and that underlie the disputes between FINRA and Mr. Asensio.

On behalf of Asensio & Company, Inc., I am now in the process of conducting an independent review of FINRA's legal authority and subject matter, personal and

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<sup>1</sup> A Delaware corporation dissolved on March 5, 2005, formerly named asensio.com, inc. and Asensio Holdings, Inc.

<sup>2</sup> A Delaware corporation incorporated on July 31, 2009 that is currently an applicant for membership with FINRA.

<sup>3</sup> This dismissal was based completely on the existence of the bar decision, ignoring that this is in fact currently under judicial review, the result of which may be reversal.

<sup>4</sup> It is our position based on the arguments contained in this legal memorandum that Mr. Asensio's ongoing challenge to the membership bar does not constitute a collateral attack and alternatively, that even if it is a collateral attack, it is permissible.

regulatory jurisdiction over Asensio & Company, Inc.<sup>5</sup> (“ACO”), Manuel P. Asensio<sup>6</sup> and [www.asensio.com](http://www.asensio.com) (the three entities jointly referred to as “Asensio”) under state and federal law, including securities law, and the U.S. Securities & Exchange Commission’s (“SEC”) rules and regulations, and under FINRA’s own rules and By-Laws including Article v, Section 4.

Based upon the review conducted thus far, I cannot imagine that any factual or legal basis exists to support FINRA’s claim that it had jurisdiction over ACO or [www.asensio.com](http://www.asensio.com) at any time related to the events that resulted in FINRA Disciplinary Proceeding CAF30067, or that it had adequate grounds to initiate a Rule 8210 investigation against Mr. Asensio seeking information about entities and information beyond its jurisdiction. A number of issues regarding jurisdiction and prejudice in these proceedings have become immediately apparent and are discussed below.

1. An astonishing lack of fairness invades the entire proceeding.
  - a. FINRA Officers were Predisposed to Sanction Mr. Asensio

Mr. Asensio appeared for an on-the-record interview in this matter on April 9, 2003. Shockingly, at this early date, FINRA had already arrived at the decision that it would sanction Mr. Asensio—before its officers had even listened to testimony or asked questions concerning jurisdiction. Mr. Goldman, the interviewing officer, later testified that he had already formulated an opinion about whether there should be a sanction before he even met with Mr. Asensio and listened to his testimony at the on-the-record hearing. He stated that this predisposition was based on his concern with the content of the reports (FINRA 1011).<sup>7</sup>

As discussed below, the mere fact that the reports were distributed by a non-member firm not subject to FINRA regulation raises substantial questions about FINRA’s conduct. Once Mr. Goldman discovered that jurisdictional issues were present limiting the applicability of Rule 2711<sup>8</sup> and Rule 8210, he should have realized that such jurisdictional questions should prompt careful examination, rather than hasty inferences. Instead, Mr. Goldman was evidently predisposed to infer that FINRA had jurisdiction.<sup>9</sup>

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<sup>5</sup> A Delaware corporation dissolved on March 5, 2005, formerly named [asensio.com](http://asensio.com), inc. and Asensio Holdings, Inc.

<sup>6</sup> Asensio & Company, Inc. has filed a Form MC-400 with FINRA to allow Mr. Asensio to become associated with the firm.

<sup>7</sup> This refers to the Bates-stamp number of the relevant page in the certified record filed by FINRA with the SEC in this matter, Administrative Proceeding File No. 3-13733. References hereafter to the certified record follow the same format.

<sup>8</sup> This rule pertains to investment banking conflicts. Mr. Asensio and his FINRA firm did not conduct an investment banking business. [asensio.com](http://asensio.com) was not a FINRA firm.

<sup>9</sup> In a report generated by a FINRA “Special Review Committee,” composed of individuals with longtime ties to FINRA, regarding the Madoff and Stanford schemes, the Committee claimed that FINRA lacked jurisdiction to investigate Madoff investment advisory business, and that FINRA staff were often unsure of the extent of their jurisdiction. This is plainly in total opposition to the record in Mr. Asensio’s case, and the views of the FINRA Committee were also later criticized in congressional testimony by securities law expert John Coffee of Columbia University.

An outsider can easily conclude that this conduct, which was initiated by FINRA without provocation, independently of any routine exam or customer claimant, and questionably alleged to be part of an “industry sweep,”<sup>10</sup> by FINRA staff resulted from Mr. Asensio’s public and significant activities to uncover stock fraud, including Mr. Asensio’s highly publicized criticism of FINRA’s failure to protect investors for its members’ improper conduct in their promotion of PolyMedica’s publicly-traded stock. FINRA’s first request for information concerning the PolyMedica reports followed soon after a lead story front-page-of-section article in USA Today describing Mr. Asensio’s investigation of PolyMedica. This article, entitled “Short sellers sharply scrutinize companies,” contained a quote advocating action against short sellers like Mr. Asensio by Lanny Davis, former special counsel to the Clinton administration. The timing of the 8210 investigation in conjunction with the USA Today article lends a conclusion that the investigation was motivated by Mr. Asensio’s commitment to exposure of fraud and his implicit and explicit criticisms of FINRA’s regulatory leadership rather than by true investor protection or any real concern that his actions were in violation of FINRA rules. Numerous examples of animosity between Mr. Asensio and FINRA leaders further demonstrate the questionable and biased nature of these proceedings.

The on-the-record interview transcript offers further support that FINRA’s Rule 8210 investigation was a biased and an unwarranted attack on Mr. Asensio as opposed to serious concern about investor protection. Nothing in the on-the-record interview, a proceeding intended to ask questions and learn more about alleged rule violations, pertained to this critical topic. The only questions asked surrounded a futile effort to connect Mr. Asensio to Asensio and Company and the reports published on asensio.com through such lines of inquiry as getting him to admit to his use of obsolete stationary. Mr. Asensio asserted on no uncertain terms that there could be no question surrounding investor protection in relation to ACO, which had no clients and served no commercial purpose. It was akin to any news media website of the type that an FINRA officer later testified in these proceedings would not be subject to FINRA regulation (FINRA 1023 – 1024).

Moreover, Mr. Asensio articulated his strong commitment to investor protection and his intention to abide by FINRA rules when he told Mr. Goldman that he took steps to legally separate the FINRA-member broker-dealer, Asensio Brokerage Services, Inc. (“ABS”), and disaffiliate it from ACO, the public media outlet, upon realizing issues that the public speech component could create (FINRA 1527). Beginning in October, 1998, steps were taken to remove Mr. Asensio from any ownership interest, financial interest or voting control of ACO so that ACO would have no affiliation with ABS and would be free to serve as an unincorporated website dedicated to investor protection advocacy.

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<sup>10</sup> The public “Joint Report by NASD and the NYSE on the Operation and Effectiveness of the Research Analyst Conflict of Interest Rules,” dated December 2005, contradicts the claim that a “sweep” spurred the investigation of Mr. Asensio. The Report details firms being aided in complying with the new rules, and NASD Enforcement settling 29 cases with no discussion of litigated cases – all this showing that FINRA’s investigation and sanctioning of Mr. Asensio being uniquely severe.

Attached to this letter as Exhibit 1 is a summary of issues that have been presented in Mr. Asensio's pleadings in the related SEC proceeding in this matter, Administrative Proceeding File No. 3-13733. The issues raised show a pattern of bias, lack of procedural safeguards, and refusal to consider meritorious arguments. Despite the unfair treatment Mr. Asensio has received thus far in this matter, he remains committed to resolution and reinstatement of his FINRA membership.

b. FINRA Lacked Appropriate Procedures to Properly Adjudicate this Matter.

A constant thread throughout the proceedings in Mr. Asensio's case is the evident inability of FINRA and SEC to adequately adjudicate the substantive and problematic issues in this matter. The record shows that there were no FINRA procedures in place to allow Mr. Asensio to properly respond to FINRA with his own counter-claims, grievances, or legal challenges. Similarly, there were no procedural safeguards limiting the extent of FINRA's adverse inferences in place of fact-based determination.

Mr. Asensio was forced to submit to FINRA's inferences or face sanction. Thus, as a result of an effort to handle the administrative matter without the benefit of legal counsel at the hearing (apparently in reliance on the plain facts of the case against FINRA's jurisdictional claims and the lack of materiality of the investigation) and his obviously misplaced trust in FINRA or the SEC's oversight of FINRA, and his commitment to justice, he has been barred from association with all FINRA-member firms — a sanction grossly disproportionate to any underlying misconduct entailing collateral effects on all business endeavors undertaken by Mr. Asensio. The extreme nature of this sanction underscores the feeling that it represents a personal, punitive attack, with no remedial purpose. Rather than taking action to protect investors, as required of FINRA under the congressionally-mandated self-regulatory regime, FINRA barred an investor advocate who was seeking to protect investors from misconduct allowed by FINRA, even after it become the subject of a USA Today front-page story.

Although this matter had gone on years, even before a sanction was imposed, Mr. Perkins of FINRA stated at the pre-hearing conference: "If you decide to challenge an 8210 request under the decided case law you do so at the risk that you will subsequently be found to have refused to comply with the request and that you could then be sanctioned. There isn't built into NASD's procedural code an ability to raise an objection, have that ruled on, and then give you the opportunity to comply or to follow whatever the outcome of the first proceeding is" (FINRA 692).

In essence, Mr. Perkins informed Mr. Asensio that because there was no procedural outlet to challenge a FINRA Rule 8210 request vis-à-vis jurisdiction, Mr. Asensio would be sanctioned for the attempt to challenge such request, even if the challenge were justified. That is exactly what happened here. Furthermore, in his effort to confirm that jurisdiction was proper, the agreement that he was negotiating with FINRA to be assessed

a fine of \$15,000 in exchange for resolution of the matter fell through, and instead of receiving an appropriate sanction, he was completely barred from membership.<sup>11</sup>

Procedural deficiencies should not preclude effective and just litigation of a matter as serious as this and one, which involves an individual being deprived of property and livelihood putatively by a private party, and which has had devastating consequences to Mr. Asensio personally and professionally. Deficiencies of this nature deprived the FINRA disciplinary proceedings of any foundation in fairness or justice. To date, Mr. Asensio continues to challenge that FINRA ever had the appropriate ability to adjudicate this matter, an argument that apparently falls on deaf ears at both FINRA and the SEC.

2. There are serious questions surrounding FINRA's jurisdiction to have commenced and certainly to have continued an investigation into the reports published by ACO on asensio.com.

As mentioned above, my review of the record in this matter to date has prompted substantive concerns about FINRA's jurisdiction to have even started this investigation. Looking at the record, FINRA's enforcement attorney, Mr. Jeffrey Bloom, stated that FINRA had jurisdiction over the member firm based on its use and control of materials published on the website asensio.com, owned by ACO. In briefing, the FINRA further stated, "[FINRA] has subject matter jurisdiction of this proceeding because the Respondents wrote and published the PolyMedica reports."

At no time did Mr. Asensio dispute that FINRA had jurisdiction over matters and records within the control of Mr. Asensio or ABS, then a FINRA-member firm. However, the testimony and evidence provided made it clear that the subject articles were published by asensio.com and that efforts had been taken to ensure that anything published on asensio.com was wholly separate and disaffiliated from the brokerage services provided by the member firm.

The decision of FINRA's NAC decision dated July 28, 2006, show a failure to adequately consider the issue of jurisdiction. The NAC decision relies upon inferences, rather than a thorough consideration of fact, to establish jurisdiction. Specifically, the NAC made three inferences to support an assertion of jurisdiction: (1) it determined in the absence of evidence that Mr. Asensio authored<sup>12</sup> asensio.com's PolyMedica articles; (2) despite documentary evidence establishing otherwise, the NAC determined that Mr. Asensio controlled ACO and asensio.com; and (3) that all the information and documents requested by FINRA were in Mr. Asensio's control. The NAC relied upon a careful

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<sup>11</sup> A motion titled "Motion to Extend 30 Day Period in Rule 420 Based on Extraordinary Circumstances surrounding Jurisdictional Dispute and Settlement Offer," dated March 3, 2010, filed in SEC Administrative Proceeding File No. 3-13733 provides details of the process used by FINRA to convert Mr. Asensio's attempts to challenge FINRA's jurisdiction (and thereby avoid the imposition of the \$15,000 fine and future misunderstanding concerning [www.asensio.com](http://www.asensio.com)) into a bar sanction.

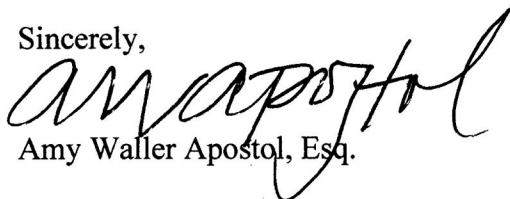
<sup>12</sup> Access to asensio.com required users to read and confirm their acceptance to a Mandatory User Agreement that limits to the fullest extent of the law claims that Mr. Asensio was in any way liable for asensio.com articles including that he was involved with their authorship. FINRA testified that it entered its agreement with asensio.com's user agreement and decided to violate its terms.

selection of statements from emails, for instance, to support its inferences. The NAC did not make an exhaustive consideration of the relevant corporate structure, including publicly available corporate records, or records of share ownership and control, or even its own membership records. Likewise, the NAC inferred that Mr. Asensio “wrote” and therefore was somehow responsible to FINRA for the articles from a careful selection of statements. The NAC did not base its decision on direct and incontrovertible evidence. As such, the NAC’s decision does not reflect a careful consideration of issues of jurisdiction in a unique case. Rather, the NAC showed a desire to infer the worst, and to impose the most severe sanction, in excess of its own sanction guidelines, irrespective of facts and evidence. The use of inferences, rather than evidence and fact, is a tenuous basis for depriving an individual of property and livelihood without any evidence of remedial or regulatory purpose.

In contrast, the actual documentary evidence supports a lack of jurisdiction over the content published on asensio.com. Exhibit 2 contains copies of a letter agreement, dated June 10, 2002, between Mr. Asensio and Mr. Michael Feiler, whereby Mr. Asensio surrendered his ACO shares to Mr. Feiler with the understanding that Mr. Feiler would organize a trust to hold such shares (FINRA 1713 – 1714). Exhibit 2 also contains a letter from Mr. Asensio to Mr. Feiler dated September 17, 2004, requesting documents related to Mr. Asensio’s resignation from ACO and relinquishment of ACO shares (FINRA 1707). Finally, Exhibit 2 contains a response from Mr. Feiler to Mr. Asensio, dated September 20, 2004, in which Mr. Feiler acknowledges Mr. Asensio’s resignation from ACO and refuses “absent lawful subpoena, [to] produce or provide copies of any documents internally generated by ACO’s advisers independently of [Mr. Asensio]” (FINRA 1709). These three letters were submitted by Mr. Asensio as exhibits in the disciplinary hearing, and appear in the record filed with the SEC in this matter, bearing the Bates-stamp numbers noted above. The response of Mr. Feiler shows that Mr. Asensio was not in control of relevant information sought by FINRA surrounding ACO. However, despite their relevance, the NAC decision dated July 28, 2006 does not address these letters. In particular, the NAC did not make note of or consider this evidence that Mr. Asensio may not have been in control of relevant information surrounding ACO before leaping to its unsubstantiated conclusion that he was.

Although I will undoubtedly continue to uncover other issues surrounding Mr. Asensio’s membership bar and subsequent applications as well as perform continued legal research on these matters, I wish to keep you abreast of the issues I have discovered in our ongoing effort to examine the proceedings thus far. It is in the spirit of transparency and creation of an adequate record that we respectfully submit this letter to you for your review and consideration.

Sincerely,



Amy Waller Apostol, Esq.

cc: Allison Reid  
Associate District Director  
Financial Regulatory Authority  
New York District Office  
One Liberty Plaza  
New York, NY 10006

Lorraine Lee  
FINRA Statutory Disqualification Administrator  
9509 Key West Avenue  
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**Attachments Enclosed:**

- Exhibit 1 - Summary of Issues Presented in Manuel P. Asensio's Pleadings in SEC Administrative Proceeding File No. 3-13733.
- Exhibit 2 - Jurisdictional Evidence Documents.
- Exhibit 3 - Timeline of Events Surrounding Disaffiliation of ACO and ABS.
- Exhibit 4 - Overview of Documents Reviewed.