

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62315 / June 17, 2010

Admin. Proc. File No. 3-13733

In the Matter of the Application of

MANUEL P. ASENSIO
c/o Mill Rock Investment Advisors
747 Third Avenue, 25th Floor
New York, NY 10017

For Review of Disciplinary Action Taken by

FINRA

ORDER GRANTING
MOTION TO DISMISS
APPLICATION FOR
REVIEW

Manuel P. Asensio, formerly a registered representative associated with Asensio Brokerage Services, Inc. ("ABSI" or the "Firm"), a former NASD member firm, has filed a series of motions. He asks, among other things, that the Commission consider his appeal of both a July 2006 NASD¹ disciplinary decision that barred Asensio from associating with any member firm (the "2006 Bar Decision"),² and an August 2008 FINRA decision that denied the application of FINRA member firm ISI Capital, LLC ("ISI"), seeking permission for Asensio to associate notwithstanding the bar (the "2008 Eligibility Denial Decision"). Asensio has requested that the Commission "cancel" his "bar and/or MC-400 denial or deny [his] petition in the form of a final ruling or other decision that will assure [his] right to pursue legal redress in an appropriate U.S. District Court," as well as grant various other relief discussed in Section III below. NASD filed a motion to dismiss Asensio's

¹ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517, 517. Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

² NASD also fined ABSI \$20,000.

application for review on the grounds that it is untimely and that "extraordinary circumstances" do not exist for granting Asensio's late appeal. For the reasons discussed below, we have determined to grant NASD's motion and dismiss Asensio's application.

I.

A. 2006 Bar Decision

1. Background

Between August 2002 and January 2003, entities affiliated with Asensio published six investment research reports about Polymedica Corporation ("Polymedica") on the website www.asensio.com. NASD began an investigation to determine whether such reports contained misleading facts and omitted required information in violation of NASD Conduct Rule 2711.³

On February 11, 2003, NASD's Department of Enforcement ("Enforcement") sent Asensio and ABSI separate requests for information pursuant to NASD Procedural Rule 8210.⁴ Enforcement requested that Asensio individually provide brokerage account statements for all his accounts between 2002 and 2003, and provide certain information about Asensio & Company, Inc. ("A&C").⁵ The ABSI letter requested that the Firm provide information about, among other things, A&C, materials showing ABSI's compliance with NASD Conduct Rule 2711(h) and (I), and the Polymedica research reports dated from August 2002 through January 2003.

Asensio and ABSI responded to Enforcement's requests in two separate letters, both signed by Asensio, dated February 25, 2003. Asensio provided copies of ABSI's and A&C's brokerage account statements and informed Enforcement that he owned "73.76% of" A&C and also owned "a

³ NASD Conduct Rule 2711 seeks "to improve the objectivity of research and provide investors with more useful and reliable information when making investment decisions" and "to restore investor confidence in a process that is critical to the equities markets." NASD Notice to Members 02-39.

Rule 2711(h) requires that a member firm 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 firm has assigned a rating for at least one year. The required disclosures must be clear and comprehensive. Conduct Rule 2711(i) requires that member firms "adopt and implement written supervisory procedures reasonably designed to ensure that the member and its employees comply with the provisions of this rule"

⁴ Rule 8210 requires members and associated persons to provide information if requested by NASD as part of an investigation, complaint, examination, or proceeding.

⁵ A&C was not an NASD member firm. Asensio was A&C's chairman, president, and chief executive officer. A&C owned 100% of ABSI.

super-voting preferred that gives him 90% voting control." However, he did not provide copies of his personal monthly brokerage statements. He also refused to provide copies of certain requested Polymedica research reports, asserting that A&C and its reports were "exempt from NASD regulation," as A&C was not a member firm. He further asserted that ABSI had not prepared or distributed the Polymedica research reports.

On March 12, 2003, Enforcement sent follow-up letters to Asensio and ABSI reiterating its initial request to ABSI for the Polymedica research reports. Enforcement notified Asensio that "[a]s an associated person with an ownership interest in Asensio & Co., you are required to provide information in your possession or under your control, even if it relates to a non-member entity." Enforcement also asked how ABSI defined "institutional investor" and whether ABSI had any such investors as clients.

Asensio responded with two letters dated March 25, 2003, one in his individual capacity and the other as an ABSI associated person. Contrary to his statement in the February 25, 2003 letter, Asensio wrote that he "ha[d] no ownership interest in [A&C]." He further asserted that he did not "possess or control any of [A&C]'s property." He reiterated that A&C was not a NASD member firm nor was it associated with a member firm. In the letter from ABSI, Asensio stated that ABSI "does not conduct, publish, distribute or market any research." He represented that the Firm had an unspecified number of "institutional investor clients," and referred NASD to a dictionary for the definition of institutional investor.

On April 9, 2003, Asensio appeared with counsel at an on-the-record interview ("OTR"), pursuant to NASD Rule 8210. The OTR was contentious. Asensio told Enforcement that he would only answer those questions that are "directly related to my activities that are regulated by" NASD and would decline to answer questions that he viewed as outside of NASD's jurisdiction. He also stated that the whole proceeding was "a fraudulent, corrupt, intentional attempt to discredit my firm, keep me from doing my work and cost [sic] me harm." While Asensio answered some of Enforcement's questions at the OTR, including some about A&C, he refused to answer several other questions about A&C and www.asensio.com.⁶

After approximately two hours of questioning, Asensio informed Enforcement staff that he would not answer any further questions. At Asensio's counsel's request, Asensio left the interview room. Counsel and Enforcement staff then agreed to terminate the interview and to have Asensio answer the staff's outstanding questions in writing by the end of April.

⁶ During the OTR, Asensio accused Enforcement's attorney of "staring at" him in a manner that was "offensive and disconcerting" and "making faces" and "mocking" him during the OTR by his "staring into my eyes without blinking." He asserted that the Enforcement attorney was "subject[ing] [Asensio] to this kind of harassment." Asensio protested several of the questions asked of him, accusing Enforcement of being "hostile," "crooks," and "corrupt regulators." He also claimed that certain evidence offered by Enforcement about which he was questioned was "provided to [Enforcement] by the corrupt politicians and corrupt lawyers that are involved in the securities corruption." He asserted that Enforcement was "harassing" him with its questions and maintained that Enforcement had requested his attendance at the OTR "to play . . . little childish games."

In mid-May, Enforcement wrote to Asensio's attorney that NASD had not received either the information requested in its March 12 letter or responses to the outstanding questions from the OTR. Enforcement also informed counsel that it "intended to request more documents and information," but that it did not wish to do so "if Mr. Asensio ha[d] no intention of providing responses." Accordingly, Enforcement requested an immediate response as to whether Asensio would provide the outstanding information. On May 16, 2003, Asensio responded, writing that his attorney did not represent him and that he had no knowledge of any agreement reached between the attorney and Enforcement about his providing written answers. On May 29, 2003, Enforcement sent Asensio a letter enclosing the portion of the OTR transcript reflecting the agreement with counsel, reiterating earlier requests for information that had not yet been provided, and requesting additional information.

In letters dated June 20, 2003, Asensio responded to certain of Enforcement's information requests for himself, and an ABSI employee responded for the Firm.⁷ Asensio and ABSI stated that A&C was the author of the Polymedica investment reports in question but that A&C "is a non-member firm." They did not respond to Enforcement's inquiries concerning the bases for certain representations made in the investment reports nor to questions concerning the reports' compliance with NASD rules.

2. Disciplinary Proceeding

On February 6, 2004, Enforcement filed an amended complaint against Asensio and ABSI.⁸ Asensio and ABSI denied the allegations and raised several affirmative defenses, including that Asensio and ABSI did not write or publish the Polymedica reports and that NASD lacked subject matter jurisdiction to bring this proceeding against them. Asensio and ABSI also filed counterclaims and a counter complaint against Enforcement, alleging, among other matters, that Enforcement had acted improperly in entering into a consent agreement with Asensio and ABSI in an earlier disciplinary proceeding and that Enforcement was "acting as agents of the 'criminal' element in the securities industry" by proceeding against them.⁹ The counterclaims and counter

⁷ Further "corrected" answers from the ABSI employee were provided in a letter dated June 23, 2003.

⁸ The amended complaint alleged that ABSI and Asensio had issued investment reports that failed to comply with NASD disclosure requirements and made unwarranted or misleading statements and that Asensio had failed or refused to comply with Enforcement's requests for information and documents.

⁹ The counterclaims requested, among other relief, the dismissal of all charges brought by Enforcement, as well as an order vacating an earlier disciplinary decision and sanction. The counterclaims did not identify the factual basis for Enforcement's alleged improper actions. Asensio and ABSI also asserted that NASD had provided "support[]" to "extensive fraudulent stock promotion schemes and fraudulent activity" engaged in by certain specified individuals. They

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complaint were stricken by an NASD Hearing Officer on March 31, 2004 on the grounds that NASD's "Code of Procedure does not permit counterclaims against the Department of Enforcement, and the Hearing Panel lacks jurisdiction to grant the relief Respondent Asensio seeks."

An evidentiary hearing was held before an NASD Hearing Panel on September 21, 2004. At this hearing, Asensio represented himself and ABSI, without counsel. During the hearing, Asensio testified on his own behalf and offered ten exhibits, all of which were admitted into evidence, and was able to cross-examine NASD's witnesses.

In January 2005, the Hearing Panel found that Asensio and ABSI were liable on all three counts. The Hearing Panel barred Asensio from associating with any member firm in any capacity for his failure to provide information requested by NASD staff pursuant to NASD Rule 8210.¹⁰

On January 28, 2005, Asensio and ABSI appealed the Hearing Panel's decision to the National Adjudicatory Committee ("NAC") and subsequently retained counsel to represent them on appeal. At the hearing before a NAC Subcommittee, Asensio's and ABSI's counsel advised the Subcommittee that they were "not raising any issues with respect to procedure, due process or things like that" and noted that Asensio "had a full opportunity for a hearing [before the Hearing Panel]."

On July 28, 2006, the NAC issued the 2006 Bar Decision. The NAC affirmed the Hearing Panel's findings, except as to the finding that the research reports failed to disclose the price chart required by Rule 2711(h)(6), and affirmed all of the sanctions imposed. Specifically at issue here, the NAC affirmed the Hearing Panel's finding that Asensio had willfully failed to provide information requested by Enforcement in violation of Rule 8210 and the bar imposed by the Hearing Panel for this violation. The NAC noted in this regard that Asensio did not dispute that he violated Rule 8210 and emphasized that, despite repeated requests, Asensio failed to answer a number of requests for information about the Polymedica reports.

In its letter accompanying the 2006 Bar Decision, NASD advised Asensio and ABSI that they could appeal to the Commission within thirty days of their receipt of the decision. Asensio's

⁹ (...continued)

further claimed that the "illegal activities of the NASD and these individuals were obstructed and publicized by Asensio and Asensio-NY's research." They did not, however, provide any specifics in their counterclaims of NASD's alleged support or illegal activities.

¹⁰ The Hearing Panel fined ABSI \$20,000 for its failure to comply with Conduct Rules 2711(h) and 2210. In addition, the Hearing Panel ordered Asensio and ABSI jointly and severally to pay costs in the amount of \$3,147.16. The Hearing Panel noted that, if it were not imposing a bar against Asensio for his violations of Procedural Rule 8210, it would have fined Asensio \$20,000 and suspended him for sixty days for his violations of Conduct Rule 2711(h).

counsel filed a timely appeal on his behalf with the Commission. However, on September 7, 2006, Asensio's attorney requested that this appeal be withdrawn. The Commission issued an order granting the request on September 11, 2006.

B. 2008 Eligibility Denial Decision

On September 12, 2007, ISI, an NASD member firm, submitted an application on Form MC-400 to permit Asensio to associate with ISI as a general securities representative.¹¹ ISI proposed that Asensio would be subject to a heightened level of supervision beyond that generally applied to other securities professionals at the firm. NASD's Department of Member Regulation ("Member Regulation") recommended that ISI's application be denied.

On March 6, 2008, NASD held a hearing on ISI's application, at which ISI and Asensio were represented by counsel. Asensio testified that he now recognized that he had made a "horrible" mistake in not providing all of the information requested by Enforcement with respect to the Polymedica reports. Asensio acknowledged that he had violated Rule 8210 by not providing Enforcement with the information it requested and that this violation was "most serious" and "grave." He further regretted that his behavior during the investigation had been "ugly." Asensio admitted he had "looked at FINRA members as being part of the cabal that was out to get me." He had mistakenly believed that NASD was "protecting and helping" Polymedica's questionable activities, and was helping other companies that were the subjects of his research reports to bring suit against Asensio. He also conceded that he had dealt poorly with the stress caused by the numerous lawsuits and the subsequent NASD investigation.¹² Asensio assured the Hearing Panel that he had become "more aware of how important it is to train yourself to comply with regulations, to comply with authority, to not respond in an aggressive fashion" and that he now realized that NASD "was on my side -- because at the end of the day, [NASD] is investor protection."¹³

¹¹ A person who, like Asensio, has been barred by NASD is subject to a statutory disqualification. Securities Exchange Act of 1934 Section 3(a)(39)(A), 15 U.S.C. § 78c(a)(39)(A). A statutorily disqualified person is not eligible to associate with an NASD member firm without the consent of NASD. NASD By-Laws, Art. III, §§ 3(b) and (d). An NASD member firm wishing to employ someone with a statutory disqualification must apply to NASD for permission to continue operating notwithstanding such employment. *Id.* § 3(d).

¹² Asensio also testified that he was under additional stress caring for his mother who had been severely injured in an accident.

¹³ Asensio stated that he now had a different, and positive, view of NASD. NASD, Asensio emphasized, is "an organization that is necessary and . . . without it, there is no order." He noted that with NASD, "[t]here is . . . at least [an] attempt at fairness and [an] attempt at protecting investors, an attempt at giving an individual who needs capital a fair chance to raise it ahead of an individual who is just a flimflam artist."

On August 12, 2008, the NAC issued the 2008 Eligibility Denial Decision, denying ISI's application.¹⁴ The NAC observed that precedent required a barred applicant to make an "extremely strong showing" for the NAC to find that approval of an application for re-entry would serve the public interest.¹⁵

The NAC found that Asensio's misconduct leading to the 2006 Bar Decision was serious. It noted that the 2006 Bar Decision found that Asensio knowingly failed to respond to numerous NASD requests for information. The NAC also found that this misconduct was "further compounded" by Asensio's admission at the hearing on the ISI application that "he had lied under oath during the [2006 hearing] when he denied that he was involved in the writing or posting of the Polymedica research reports," which "purposefully impeded" NASD's investigation of the inadequacy of the Polymedica research reports and their "potential damaging effect on the investing public." Moreover, Asensio acknowledged at the MC-400 hearing that he chose to refuse to comply with Enforcement's requests for information. This showed, the NAC concluded, that Asensio "did everything within his power to obstruct [NASD]'s attempts to gather information concerning potentially misleading research reports" and "demonstrated a wanton disregard for FINRA's regulatory authority."¹⁶

The NAC also noted that Asensio had been barred very recently and had been the subject of three additional regulatory actions.¹⁷ Given Asensio's "extensive and lengthy history of proven lack

¹⁴ Pursuant to NASD Procedural Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the NASD Statutory Disqualification Committee. The Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the NAC, in accordance with NASD Rule 9524(b)(1).

¹⁵ Citing, *e.g.*, *Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) ("In NASD proceedings . . . , the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment."); *M.J. Coen*, 47 S.E.C. 558, 561 (1981) ("[A]ny member wishing to employ such a [statutorily disqualified] person . . . must 'demonstrate why the application should be granted.'") (quoting NASD Manual ¶ 1113(c), p. 1067).

¹⁶ The NAC pointed out that Rule 8210 is NASD's "primary means" of obtaining information from members and associated persons in investigations. Quoting our opinion in *Jonathan Garret Ornstein*, 51 S.E.C. 135, 141 (1992) (internal quotations omitted), the NAC declared that, "[t]o allow associated persons to flout [Rule 8210] would subvert the NASD's ability to carry out its regulatory responsibilities." The NAC stated that, consistent with this policy, it would not disturb Asensio's bar in the absence of the requisite strong showing of exceptional circumstances, which it did not find in ISI's application.

¹⁷ In 1994, FINRA issued a letter of Acceptance, Waiver and Consent ("AWC") to Asensio and his firm for failing to obtain an amendment to the firm's restriction agreement. In 1998, FINRA issued an AWC finding that Asensio and ABSI had failed in 1996 and 1997 to develop and
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of compliance" with NASD rules, the NAC gave little weight to Asensio's arguments regarding his purported reformation of character and newly found respect for regulatory authority. The NAC also expressed concern that ISI's proposed supervision plan was "fragmented" and "d[id] not place the primary daily responsibility for Asensio squarely in the hands of one capable and available supervisor." It further observed that Asensio was used to being in charge of operations "and not one who submits willingly to the authority of others."

The letter accompanying the 2008 Eligibility Denial Decision advised ISI and Asensio that they had a right to appeal the denial to the Commission and that if they chose to appeal, they were required to file the appeal within thirty days of their receipt of the decision. Neither ISI nor Asensio sought Commission review within that period. By letters dated December 9, 2009 and January 4, 2010, Asensio filed the instant appeals.

II.

Exchange Act Section 19(d)(2) directs that any associated person aggrieved by an NASD final disciplinary sanction or denial of association may file an application for review with the Commission "within thirty days" after the date notice of the final sanction determination was filed with the Commission and received by the aggrieved person, "or within such longer period as [the Commission] may determine."¹⁸ Our Rule of Practice 420(b) provides that an applicant "must" file an application for review with us "within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review." The rule further directs that we "will not extend this 30-day period, absent a showing of extraordinary circumstances [and that] [t]his rule is the exclusive remedy for seeking an extension of the 30-day period."¹⁹

Here, Asensio filed these applications for review of the 2006 Bar Decision more than three years after the final sanction determination, and the 2008 Eligibility Denial Decision more than eighteen months after it had become the final decision of NASD, both well after the applicable thirty-day deadlines. Asensio concedes that his filings are not timely. Thus, the issue for our determination is whether Asensio has shown the "extraordinary circumstances" that would permit us to extend the thirty-day period for filing an application for review.

¹⁷ (...continued)

maintain a written training plan and a continuing and current education plan for the firm's registered persons. In 2000, FINRA accepted another AWC from Asensio and ABSI for, among other things, short selling, trade reporting, advertising, and supervision violations. For the 2000 violations, FINRA imposed a \$75,000 joint and several fine, required the firm to retain an independent consultant, and required Asensio to requalify by examination as a general securities principal.

¹⁸ 15 U.S.C. § 78s(d)(2).

¹⁹ 17 C.F.R. § 201.420(b).

As we have recently observed in *PennMont Securities*:²⁰

Courts have recognized that strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief. As we have repeatedly stated, "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed." For this reason, the "extraordinary circumstances" exception is to be narrowly construed and applied only in limited circumstances. To do otherwise would thwart the very clear policies of finality and certainty underlying the thirty-day filing deadline set forth in Exchange Act Section 19(d) and Rule of Practice 420(b).

(internal citations omitted). In *PennMont*, we concluded that an extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for an applicant's failure timely to file was beyond the control of the applicant. We further noted that our decisions have rejected applications for review where applicants did not act promptly in pursuing their appeals.²¹

Asensio maintains that the "principal extraordinary circumstance in this case is the exercise of bias" by NASD and its staff in instituting the 2006 disciplinary proceeding against him and in denying his request to associate with ISI. This bias, Asensio asserts, derives from Asensio's "actions to reveal stock fraud," including "deficiencies in listings oversight at the American Stock Exchange . . . , which was owned by [NASD] from 1998 to 2004." He charges that NASD conducted a "bad-faith investigation" of him that involved "unanswerable requests for information . . . and abuse of [NASD]'s regulatory discretion in pursuing disciplinary sanctions related to such bad faith investigation."²²

²⁰ Exchange Act Rel. No. 619671 (Apr. 23, 2010), __ SEC Docket ____, ____ (footnotes omitted; quoting *Edward J. Jakubik, Jr.*, Exchange Act Rel. No. 61541 (Feb. 18, 2010) 97 SEC Docket 25437, 25400 (citation omitted)).

²¹ *Id.*, __ SEC Docket at ____ n.26 (citing *Robert M. Ryerson*, Exchange Act Rel. No. 57839 (May 20, 2008), 93 SEC Docket 6058, 6064 (dismissing petition for review where, among other things, NASD "did not cause the fourteen-month delay between the issuance of the [underlying] opinion and the filing of the petition before [the Commission]," but rather the delay "resulted from [applicant's] deliberate choice not to appeal. . . ."); *Larry A. Saylor*, Exchange Act Rel. No. 51949 (June 30, 2005), 85 SEC Docket 3118, 3124-25 (dismissing application for review citing "[applicant's] thirty-two year delay in filing an appeal of NASD action taken after a proceeding in which he participated, and of which he admits being apprised immediately"); *but see David L. Turpinseed*, 48 S.E.C. 689, 689 n.1 (1987) (accepting application for review filed twenty days late by exercising "the discretion granted us by Section 19(d)(2) of the Securities Exchange Act" prior to enactment of Rule 420(b)).

²² Similarly, he asserts that NASD "punished" him "for a violation that [NASD] created by making unanswerable, overly burdensome requests for information pursuant to [NASD] Rule 8210 under threat of disciplinary sanction, *disproportionate to any alleged underlying*

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We recently rejected a similar attempt to claim that alleged "serious issues of alleged prosecutorial misconduct" at an earlier NASD disciplinary proceeding constituted "extraordinary circumstances" excusing the late filing of an appeal. In *Edward J. Jakubik, Jr.*, we held that the applicant's assertions "fail[ed] to present the kind of circumstances required to justify an extension of the appeal filing deadline, particularly given the extreme delay in the filing of his appeal."²³ Moreover, unlike Jakubik, who was *pro se* during his disciplinary proceeding, Asensio was represented by counsel during the investigation and appeal to the NAC in the 2006 disciplinary proceeding and throughout the 2008 MC-400 proceeding.

Asensio states that he delayed in filing these appeals "because of the time required to conduct discovery related to understanding the extent of [NASD]'s violation of the [Exchange] Act and the ways in which [NASD] violated the Act specifically in this case." However, he does not contend, and the record does not show, that he was prevented from conducting ample discovery or proffering evidence in support of his various claims during the disciplinary proceeding or the MC-400 proceeding. Moreover, Asensio's assertions of NASD's bias, conflict of interest and abuse of discretion, such as a purported lack of whistleblower protections, rely on facts that Asensio demonstrably knew at the time of the earlier proceedings.²⁴

Asensio also claims that there were procedural defects in the 2006 disciplinary proceeding: (a) the Hearing Officer's denial of his request for "a separation of the hearing on the issue of jurisdiction over the subject matter of the proceeding and the alleged [NASD] Rule 8210 violation;" (b) the denial of his counterclaim and discovery requests; (c) the requirement that he testify about his efforts to restructure A&C and ABSI "without the benefit of testimony from the corporate, litigation,

²² (...continued)
violation" (emphasis in original).

²³ *Jakubik*, 97 SEC Docket at 25444.

²⁴ For example, Asensio asserts, as an example of NASD's alleged bias and conflict of interest that NASD had taken actions against him because of an investment report he wrote in 2000 critical of a public company that purportedly led to a Congressional investigation into deficiencies in listings oversight at the AMEX, which was then owned by NASD.

Asensio also claims that NASD investigated him after he had reported on irregularities in the activities of another public company, which he asserts resulted in the "instigation of a Congressional investigation beginning in 2000 into deficiencies in listings oversight at the AMEX, owned by [NASD] from 1998 to 2004, while [NASD] and the Commission failed to take such steps." He also notes the high compensation paid by NASD to a senior official who had previously been the subject of a Commission legal proceeding while that official was employed by the AMEX, a proceeding that, he claims, came about only because of his reporting on "deficiencies in listing oversight at the AMEX, owned by [NASD] from 1998 to 2004" and the subsequent Congressional inquiry.

trust and tax attorneys that assisted in the execution of the [r]eorganization;" and (d) Enforcement's decision to seek a bar after discussing lesser sanctions during settlement negotiations.²⁵ He further objects to NASD's decision to bar him as being unjustified by the record and inconsistent with NASD's sanction guidelines.

We have held that adherence by a self-regulatory organization ("SRO") to its procedures rebuts a claim of "extraordinary circumstances."²⁶ However, before the NAC on appeal of the Hearing Panel's bar decision, Asensio's counsel declined to challenge the Hearing Panel procedures and agreed that Asensio "had a full opportunity for a hearing." We also note that in both proceedings here, Asensio had notice, was permitted to present evidence, was able to examine witnesses, was given notice of the findings, and was informed of his appeal rights. Moreover, during the appeal to the NAC in the 2006 disciplinary proceeding, his counsel declined to challenge the Hearing Panel's procedures and agreed that Asensio "had a full opportunity for a hearing."

Asensio claims that his decision not to appeal the 2006 Bar Decision "arose from the view that the Commission generally grants too much deference to [NASD]'s determinations in the appeal process and focuses too narrowly on procedural issues to allow for a fair and proper review of substantive issues." However, Asensio in fact filed a timely appeal of the 2006 Bar Decision but then chose to withdraw that appeal. He cannot now seek, years after the fact, to undo that earlier decision. To permit such a late appeal now would defeat the central purpose of the rule in assuring finality of disciplinary proceedings and allowing parties to rely upon the decisions made in these proceedings.

Asensio also asserts that there is "considerable discretion afforded to [NASD] by the SEC in MC-400 applications."²⁷ Asensio claims that the Commission's "policy of allowing [NASD] to operate with vague and incomplete rules" facilitates "blatant conflicts-of-interest with [NASD] staff, which conflicts go unquestioned by the Commission staff."²⁸ He also faults the review function of

²⁵ Asensio asserts that an Enforcement staff attorney took a harder line on the terms of a proposed settlement after Asensio chose not to respond to the NASD's offer until the evidentiary hearing.

²⁶ *Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1176-77 (2002) (quoting *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1998)).

²⁷ Asensio also suggests that there is "[a] predisposition of the Commission's staff towards [NASD] sanctions of the type in this case" and speculates that Commission staff members have prejudged his appeal. Asensio cites a letter he received in November 2009 from our Division of Trading and Markets. As discussed in Section III.D below, the letter was a response from the staff regarding Asensio's inquiries about NASD procedures. It did not purport to express the views of the Commission.

²⁸ *See, e.g., supra* note 24. One of Asensio's filings on the issue of bias includes a
(continued...)

the Courts of Appeals which, he asserts, grants "judicial deference . . . to [NASD] and the SEC [that] can indeed be absolute" (internal quotation omitted).

Contrary to these assertions, our review of these proceedings is governed by statute and precedent. Exchange Act Section 19(e) and caselaw require that we sustain NASD's disciplinary action if the record shows by a preponderance of the evidence that the applicant engaged in the violative conduct that NASD found and that NASD applied its rules in a manner consistent with the purposes of the Exchange Act.²⁹ Appeals from denials of requests to associate are governed by Exchange Act Section 19(f), which requires that we dismiss such an appeal if we find that (1) the specific grounds on which NASD based its denial exist in fact, (2) NASD's action was in accordance with its rules, and (3) NASD's rules were applied in a manner consistent with the purposes of the Exchange Act.³⁰ We have stated that, under Section 19(f), we consider other misconduct in which the applicant may have engaged, the nature and disciplinary history of a prospective employer, and the supervision to be accorded the applicant.³¹

²⁸ (...continued)

request made to the Director of our Division of Enforcement in a letter to the Director dated April 5, 2010. There, Asensio asserted that the Division's purported "failure" to contact him or follow up on evidence he furnished to the Division purporting to show "specific and serious violations of securities laws" by NASD is "evidence of the Commission's wrongful bias in favor of, and deference to, [NASD]." However, this letter is another variation of his collateral attack on NASD's actions at issue in this appeal.

²⁹ 15 U.S.C. § 78s(e); *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982). Section 19(e)(2) directs that we review NASD sanctions to determine whether they are excessive or oppressive or a burden on competition.

³⁰ 15 U.S.C. § 78s(f).

³¹ *Paul Edward Van Dusen*, 47 S.E.C. 668, 671 (1981). *See also Harry M. Richardson*, Exchange Act Rel. No. 51236 (Feb. 22, 2005), 84 SEC Docket 3485, 3488-89 (noting that relevant factors in reviewing association application include "misconduct in which a statutorily disqualified person may have engaged since the misconduct that gave rise to the statutory disqualification, the nature and disciplinary history of a prospective employer, and . . . the proposed supervisory structure to which the statutorily disqualified person would be subject"). *Accord Timothy P. Pedregen, Jr.*, Exchange Act Rel. No. 61791 (Mar. 26, 2010), ___ SEC Docket ____, ___ (holding that relevant factors include "the recency of the [proposed associate's] conviction" and the inadequacy of the proposed supervision).

Asensio filed a motion on June 7, 2010 requesting that the Commission issue an order "compelling [NASD] to provide precise and adequate guidance on what terms would be acceptable for [Asensio]'s readmission to [NASD] and remedy of [his] bar sanction via [NASD's] Membership Continuance Application . . . process." In connection with this motion, Asensio has advised us that a
(continued...)

Asensio argues that the consolidation of NASD and NYSE regulatory functions in 2007 constitutes extraordinary circumstances because it created a NASD monopoly as "the sole primary decider of who may be allowed to associate with" a broker-dealer. Asensio suggests various reasons why, as a result, NASD's sanctions violate various provisions of the Exchange Act and the U.S. Constitution. He argues that the "full extent of [NASD]'s violation of the Act and the U.S. Constitution could not have been known to the Applicant at the time that [NASD] imposed the sanction on Applicant, in part because [NASD]'s monopolization did not exist to the same degree . . . prior to the noted formation of FINRA on July 30, 2007." However, Asensio offers no reason why these claims could not have been raised in connection with the 2008 Eligibility Denial Decision, at which he was represented by counsel and which was after the consolidation of NASD and the NYSE. Nor does he explain why, in connection with a possible appeal of the 2006 Bar Decision, he did not "promptly arrange[] for the filing of the appeal as soon as reasonably practicable" after the consolidation in 2007.³² In any event, his arguments are without merit.

Asensio asserts that NASD's alleged "monopolization of membership decisions for self-regulatory organizations makes a[n] [NASD] bar sanction for all effects and purposes a bar sanction imposed by the Commission *de facto*." Asensio contends that, under SRO rules established since the consolidation of NASD and NYSE, any application for Asensio's association submitted by a broker-dealer to any SRO "would be evaluated solely by [NASD], and no other independent body in the first instance." He claims that any appeal of NASD's determination to the Commission "would involve the Commission's consideration of [NASD]'s reasoning without a hearing [as required under Exchange Act Section 15(b)(6) and] would not involve an independent consideration of whether [Asensio] is fit to associate . . ."

Even if NASD were the only SRO currently evaluating applications to associate with broker-dealers, this would not convert NASD's bar of Asensio into a *de facto* Commission bar. Congress, by enacting Exchange Act Section 15A(b)(7), gave any registered securities association the separate power to discipline members and associated persons with sanctions including, where "fitting," a bar, without regard to whether that association is the only SRO with such disciplinary authority or with authority over decisions to permit individuals to associate but subject to Commission and ultimately judicial review.³³

³¹ (...continued)

new application has been filed with NASD by Asensio & Company, Inc. to permit Asensio to associate. As noted, standards for reviewing such applications exist and have been enunciated by us in numerous cases. Accordingly, we deny Asensio's motion.

³² See *PennMont*, __ SEC Docket at ____.

³³ Exchange Act §§ 19(e), 25(a), 15 U.S.C. §§ 78s(e); 78y(a). In addition, nothing prevents the future creation of another SRO.

(continued...)

Asensio also contends, without further explanation or analysis, that "[t]he current self-regulatory regime in the administration of [sanctions administered prior to the NASD merger with the NYSE] . . . violates the Appointments Clause of the U.S. Constitution." We understand him to claim that the violative appointments are NASD appointments. Constitutionally protected appointments, however, are those that are "conferred by the appointment of a government."³⁴ As Asensio himself concedes in a different pleading, NASD "executives and board are not appointed by the U.S. President, nor are they appointed by any other governmental body." As discussed above, Asensio does not explain why he did not raise these issues in the MC-400 proceeding or, in connection with the 2006 Bar Decision, promptly after the 2007 consolidation.

Asensio contends that the underlying facts did not support NASD's decisions and that NASD acted in the manner it did because of its animus towards Asensio. However, because we have declined to accept jurisdiction to review Asensio's application for review, we will not consider the merits of these proceedings.³⁵

Accordingly, we grant NASD's motion to dismiss Asensio's application for review and we deny Asensio's motions requesting that we deny NASD's motion.

III.

To date, Asensio has filed in connection with this proceeding, in addition to his opposition to NASD's motion to dismiss, more than thirty motions and requests. A complete listing is attached hereto as Exhibit A and incorporated by reference herein. We find that these are cumulative and may be grouped into categories. We discuss them below.

A. Motions to Adduce Evidence

³³ (...continued)

Asensio, noting that the U.S. Court of Appeals for the D.C. Circuit in *Victor Teicher v. SEC*, 177 F.3d 1016 (1999) disapproved of the Commission imposing "collateral bars," contends that, by permitting NASD to impose a bar without "an opportunity for Commission review, hearing and determination," the Commission has, in effect, imposed a collateral bar on him. A collateral bar against a broker-dealer associate is a bar imposed "outside the broker-dealer branch of the securities industry." *Id.* at 1019. No such bar was imposed on Asensio.

³⁴ *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

³⁵ *See Minton*, 55 S.E.C. at 1178 (holding that Commission will "not consider the merits of the allegations concerning rule violations" when it declines to accept jurisdiction) (quoting *Van Alstyne*, 53 S.E.C. at 1100, n.20). Moreover, to the extent that Asensio's motions seek to have us make factual determinations based on new evidence and theories that he did not present in the proceedings below, we decline to do so. Similarly, we deny Asensio's motion requesting that we initiate an "independent investigation of [NASD]'s bad faith investigations of him and of [NASD]'s acts of bias and prejudgment against him."

Pursuant to our Rule of Practice 452, we permit new evidence to be adduced if the moving party "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."³⁶

1. Documents Attached as Exhibits to Asensio's Filings

Asensio seeks to adduce as additional evidence documents attached as exhibits to his filings.³⁷ Certain of these exhibits predate the 2006 Bar Decision and the 2008 Eligibility Denial Decision, but Asensio has offered no explanation for why these were not adduced before NASD in those earlier proceedings.³⁸ Other exhibits post-date the NASD proceedings, but Asensio has not adequately explained their materiality to determinations made by NASD at earlier points in time. Nevertheless, as a discretionary matter, we have determined to admit all the documents Asensio seeks to adduce.

2. Motions to Compel Production by NASD

Asensio seeks to compel NASD to produce unspecified records of other investigations NASD initiated against Asensio, which "would provide further evidence of [NASD]'s bias, bad-faith, and abuse of regulatory discretion." He requests that NASD be ordered to produce all of its records "related to all investigations" that it undertook involving Asensio, and "all documents containing requests for information pursuant to [NASD Procedural] Rule 8210 sent to [Asensio] prior to the investigation underlying the sanction in this proceeding."

We reject Asensio's requests to compel NASD to produce additional evidence. Asensio, who was represented by counsel in much of the investigation, part of the disciplinary proceeding, and all of the MC-400 proceeding, had ample opportunity during those proceedings to request all such documents but did not do so.³⁹

³⁶ 17 C.F.R. § 201.452.

³⁷ Generally speaking, these documents include a number of articles from various publications and extensive correspondence among Asensio, NASD staff, Commission staff, and various members of Congress pertaining generally to Asensio's efforts to have his bar revoked and/or the denial of his MC-400 application reversed. He contends that his exhibits support his position that "extraordinary circumstances" exist and "allow for further determinations of fact concerning instances of conflicts-of-interest and bias by [NASD] towards the Applicant and improper ex parte communications in this review."

³⁸ For example, he seeks to introduce an excerpt of a brief that he had previously presented to the NAC and which is already a part of the record.

³⁹ As the U.S. Court of Appeals for the Second Circuit observed:

Moreover, Asensio has failed to identify the other investigations that he claims NASD has initiated against him. He has also not identified the Rule 8210 requests for information that were not included in the record for the 2006 Bar Decision or explained why, if they were sent to Asensio, he does not have access to these requests.⁴⁰ We therefore deny Asensio's motions asking us to compel NASD to produce documents.

B. Motions to Recuse Chairman Schapiro and Commissioner Walter and to Require Written Assurances from Other Commissioners

Asensio has filed motions requesting the recusal of Chairman Schapiro and Commissioner Walter on account of their previous senior positions at NASD and their purported actions during that tenure. In a similar vein, he filed a "Motion To Consider Compliance With Executive Order No. 13490 In Support Od [sic] Request For Recusal of Chairman Schapiro."⁴¹ Neither the Chairman nor Commissioner Walter has participated in this proceeding. Accordingly, we deny these motions as moot.

Asensio has also moved that the other Commissioners who were not formerly employed by NASD "make written statements that their determination in this proceeding will not be swayed by [Asensio]'s filing of evidence of bad acts by Chairman Schapiro, or by [Asensio] asking for the recusal of these Commissioners on the basis of that their former employment as [NASD] executives

³⁹

(...continued)

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.

MFS Sec. Corp. v. SEC, 380 F.3d 611, 621-22 (2d Cir. 2004).

⁴⁰ We note further that Asensio's requests for NASD production are generally very broadly drafted. Asensio is "not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense." *John Montelbano*, 56 S.E.C. 76, 100 (2003).

⁴¹ Executive Order No. 13490 requires that presidential appointees "will not for a period of 2 years from the date of [their] appointment participate in any particular matter involving specific parties that is directly and substantially related to [their] former employer."

presents a direct and material conflict of interest and potential for bias and prejudgment." Asensio asserts that this written statement is required because of "the adverse impact on their judgment implied in their collegiality with [NASD] that [Asensio] has shown to have conflicts against him" and the need for the commissioners to show that they have not been "swayed or biased."

Asensio's request for written statements is without merit. Asensio does not claim, and has provided no evidence, that the participating Commissioners have any actual bias against him, rather he argues the Commissioners' judgment *may* somehow be adversely impacted. Acceptance of this contention "would undermine the strong presumption of 'honesty and integrity' accorded the Commission and its members in performing the Commission's diverse functions."⁴² As the U.S. Court of Appeals for the D.C. Circuit observed in *Blinder, Robinson & Co. v. SEC*, "[i]t would be a strange rule indeed that inferred bias on such a tenuous basis, and then presumed that the bias spread contagion-like to infect Commissioners."⁴³ Moreover, to accept such a theory would "manifest profound disrespect for Congress' deliberately structuring agencies as (typically) multi-member bodies, with staggered terms and with requirements that the President appoint a certain number of members from the political party other than his own."⁴⁴ Accordingly, we also deny Asensio's motion for written assurances by the commissioners who were not formerly employed by NASD.

C. Motions to Determine that Asensio's Work Aided Investor Protection

Asensio requests that we make a factual determination that "his securities-related work has been of material value in aiding investor protection." Asensio cites examples of inquiries he conducted which, he believes, led to regulatory action or adoption of new regulations.⁴⁵

⁴² *Jean-Paul Bolduc*, Exchange Act Rel. No. 43884 (Jan. 25, 2001), __ SEC Docket ____, ____, quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As the U.S. Court of Appeals noted in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106-07 (D.C. Cir. 1988), "[t]o give credence to [such] dark suspicion of bias notwithstanding this carefully crafted structure would flout what Justice White, in writing for the [Supreme] Court in *Withrow v. Larkin*, called 'a presumption of honesty and integrity' on the part of those who serve in office."

⁴³ *Blinder, Robinson & Co., supra*.

⁴⁴ *Id.*

⁴⁵ According to Asensio, "[t]he most pertinent example" is his "action to spur and assist Congressional action on deficiencies in listing standards oversight at the American Stock Exchange." Among other examples cited by Asensio, he claims that his investigation of an issuer "led to the discovery of conflicts-of-interest at a prominent mutual fund company . . . which resulted in the SEC and the New York Attorney General taking action against [the mutual fund company], the creation of an investor education program and remedial changes" at the company.

Asensio raised this argument before NASD in support of the application to associate with ISI. He asserts that NASD erred in its 2008 Eligibility Decision by not giving his pro-investor activities any weight. Asensio's renewal of this contention is a collateral attack on the 2008 Eligibility Decision. As we discussed above, Asensio could have raised this issue in connection with a timely filed appeal of that matter, and because his contention is both untimely and a collateral attack on the 2008 Eligibility Decision, we will not consider the merits of that decision.⁴⁶

⁴⁶ To the extent his support for his "pro-investor" activities include matters that post-date the 2008 Eligibility Decision, they were not part of the record before NASD and thus are not material to his application to appeal that decision.

D. Motions Requesting Review of FINRA Policies Pursuant to Rule of Practice 430

Asensio also asks that we review certain NASD policies pursuant to our Rule of Practice 430, "or such other form of review that the Commission may deem appropriate extrinsic to Rule 420 of the Commission's Rules of Practice." Our Rule of Practice 430⁴⁷ provides that any person aggrieved by a Commission action made pursuant to delegated authority enumerated in that Rule may seek review of the action in accordance with the provisions of this Rule. Asensio explains that he was dissatisfied by written responses he received from the Chief Counsel and Associate Director of our Division of Trading and Markets (the "Chief Counsel"), dated July 23, 2009 and November 17, 2009 in response to inquiries concerning NASD's readmission process for statutorily disqualified individuals and the Commission's oversight of this process.

As an initial matter, he asserts that he had given notice of his intention to file a petition under our Rule of Practice 430 to have these matters reviewed by us. He claims that we "created the application for a Rule 420 review using three (3) letters related to [his] request for a Rule 430 review" and that in choosing to treat his application as a Rule 420 review, we did so knowing that the deadlines for filing reviews of the 2006 Bar Decision and 2008 Eligibility Decision had passed and that such reviews could only be considered upon a showing of "extraordinary circumstances." We accepted his December 9, 2009 and two January 4, 2010 letters as an appeal under Rule 420 because he requested that we "cancel [his NASD] bar and or MC 400 denial or deny [his] petition in the form of a final ruling or other decision that will assure [his] right to pursue legal redress" in court. We also note that the only proceeding through which the Commission may take such an action is an appeal of NASD's actions pursuant to Rule 420. By letter to the Office of the Secretary dated January 14, 2010, Asensio stated, "I confirm that I will proceed with seeking a review by the Commission pursuant to Rule 420 of the Commission's Rules of Practice."

Asensio's application under Rule 430 is inapposite. The Chief Counsel merely summarized the NASD's analysis in the 2006 Bar Decision and 2008 Eligibility Decision, and described certain legal authorities and procedures relating to Asensio's disciplinary action, his MC-400 application, and his desire to have those actions by NASD reversed by the Commission. The letter does not take action and does not purport to exercise authority delegated by us to the Division. In any event, the views embodied in the correspondence are staff opinions and are not binding on the Commission.⁴⁸ We therefore deny Asensio's motions requesting our review of certain NASD policies pursuant to Rule of Practice 430.⁴⁹

⁴⁷ 17 C.F.R. § 201.430.

⁴⁸ See *George Salloum*, 52 S.E.C. 208, 217 n.40 (1995) (alleged verbal consent by our staff to allow trader and syndicate manager's continued association with broker dealer was not binding on the Commission, and so did not limit our ability to prosecute or sanction him).

⁴⁹ In connection with his request for a Rule 430 review, Asensio requests that, if we do
(continued...)

E. Request for Review of Commission's Oversight of NASD

Asensio has requested that we conduct a "broader review" of our oversight of NASD "including the considerable discretion afforded to [NASD] by the Commission in consideration[] of MC-400 applications and in sanctions related to [NASD] Rule 8210," as well as NASD's "fail[ure] to comply with its own sanction guidelines." Asensio contends that such a review is warranted because of the "misconduct" committed by NASD in its investigation of, and proceedings involving, him. Asensio maintains that, in order to "assure [NASD]'s compliance with the securities laws, the Commission should allow for a full review of the merits and issues of laws evidenced in this case," as the traditional "judicial deference" of NASD's actions "may avert a justified review should the Commission dismiss the application in this proceeding."⁵⁰

Our review in this proceeding is limited to Asensio's application for review. Under Exchange Act Section 19(d)(1),⁵¹ our review powers are limited to disciplinary sanctions, prohibitions or limitations of access to services, bars from association, and denials of membership or participation.

The Office of the Secretary has acknowledged Asensio's request "that the Commission conduct rulemaking to require [NASD] to propose new rules aimed at improving provisions for investor protection in [NASD] rules," assigned his petition a file number, and referred it to the appropriate division of the Commission. We also note that Asensio has directly raised these concerns with members of the staff.

F. Motion to Strike NASD Filing as Untimely

Asensio moves to strike NASD's reply brief in support of its motion to dismiss because Rule of Practice 154(b) requires reply briefs to be filed "within three days after service of the

⁴⁹ (...continued)

not proceed with the Rule 430 review, we conduct a "merits-based review . . . pursuant to Commission Rule of Practice 420." For the reasons stated in granting NASD's motion to dismiss, we are not conducting a merits-based review under Rule 420.

⁵⁰ Asensio contends that, if the Commission were to conduct a merits review, it could inquire into, among other matters, "potential acts of bias" [by NASD] against him related to improper conduct engaged in by a former chairman and CEO of then-NASD subsidiary, the American Stock Exchange, and other senior NASD officials, including the current Commission chairman, and the current chairman and CEO of NASD. In this regard, Asensio notes that the Commission recently settled an administrative proceeding against that person. These arguments appear to be an extension of his charges of NASD bias against him in connection with the 2006 Bar Decision and the 2008 Eligibility Denial Decision and are addressed earlier.

⁵¹ 15 U.S.C. § 78s(d)(1).

opposition."⁵² Asensio notes that NASD's reply brief was filed on February 2, 2010, eight calendar days after Asensio served his opposition brief.

Rule of Practice 160 governs how time is computed under our Rules of Practice.⁵³ Rule 160(a) states that "the day of the . . . event . . . from which the designated period of time begins to run shall not be included" and that "[i]ntermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this rule."⁵⁴ Rule 160(b) provides that, if service is "made by mail," as it was here, "three days shall be added to the prescribed period for response."⁵⁵

Asensio served his opposition brief, entitled "Motion to Deny Motions Made by Financial Industry Regulatory Authority to Dismiss and Strike, or, in the alternative, to Define Accepted Application or Accept a New Application; and Motion to Stay Consideration of Motions made by FINRA until such Definition or New Application has been Made," by mail on January 25, 2010.⁵⁶ Pursuant to the above rules, NASD's deadline for filing its reply brief is calculated from January 25. We exclude January 25 (the date of service) and January 30 and 31, 2010 (the intermediate Saturday and Sunday), and add three days for service by mail. NASD's reply brief was thus timely filed. Accordingly, we deny Asensio's motion to strike NASD's reply brief.

G. Motion to Allow Asensio to Pursue Claims Against NASD in Civil Court

Asensio has requested that, in the event that we dismiss his application for review, we issue an order allowing him to "Pursue Claims against [NASD] and its Officers for Damages and To Vacate [NASD]'s bar and/or MC 400 denial in Civil Court." He contends that this would be the only way for him to "clear his name, recover monetary damages and punitive penalty from [NASD] and the individuals who caused him harm, or have the right to file a new member application at [NASD] or an MC 400 individually or as part of a new member application." Asensio's request is

⁵² 17 C.F.R. § 201.154(b).

⁵³ 17 C.F.R. § 201.160.

⁵⁴ *Id.* (a).

⁵⁵ *Id.* (b).

⁵⁶ Asensio also served his opposition brief by fax but that was not a sufficient means of service. Our Rule of Practice 150, 17 C.F.R § 201.150, provides that facsimile service is permitted only when certain conditions have been met, including that "the persons so serving each other have provided the Commission and the parties with notice of the facsimile machine telephone number to be used and the hours of facsimile machine operation." 17 C.F.R § 201.150(c)(4)(i). The record does not show that these conditions were met. We also note that it appears from our docket that the fax transmission was received here on January 26. Excluding the January 26 and the intermediate weekend, NASD's brief was due February 2.

beyond the scope of this proceeding and outside our jurisdiction under Exchange Act Section 19. Accordingly, we deny this motion.⁵⁷

* * * * *

Accordingly, it is hereby ORDERED that NASD's motion to dismiss the application for review filed by Manuel P. Asensio be, and it hereby is, GRANTED; and it is further

ORDERED that Asensio's motions, identified in Exhibit A to this Order, seeking to adduce specific exhibits attached to his filings, are GRANTED.

To the extent these motions seek other relief, and as to Asensio's other motions and requests, identified in Exhibit A to this Order, we hereby DENY them for the reasons discussed above.⁵⁸

By the Commission (Commissioners CASEY, AGUILAR, and PAREDES); Chairman SCHAPIRO and Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

⁵⁷ On May 1 and 2, 2010, Asensio sent e-mails to our Office of the Secretary that were also directed to FINRA. These e-mails appear to refer to a proposed settlement and a new application for Asensio to associate notwithstanding his bar. These matters are not before us in this proceeding. We also note that the e-mail filings do not comply with our Rules of Practice 150 (Service of Papers by Parties), 151 (Filing of Papers with Commission), or 152 (Filing of Papers; Form), 17 C.F.R. §§ 201.150-152.

⁵⁸ We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this order.

EXHIBIT A

Post 1/4/2010 Filings Submitted by Asensio Through 6/7/2010¹

1. Email dated January 11, 2010 from Manuel Asensio to Robert Cook, Director of Trading and Markets, SEC, Attaching Letter dated January 11, 2010, from Manuel Asensio to Florence Harmon, Deputy Secretary, SEC
2. Letter dated January 14, 2010 from Manuel Asensio to David Becker, General Counsel, SEC
3. Certified Notice of Filing of Documents Attached and/or Referenced in Letters dated December 9, 2009, January 4, 2010 and January 4, 2010 Accepted as an Application for Review by the Commission (1-14-2010) (with exhibits)
4. Email dated January 19, 2010 from Manuel Asensio to David Becker, General Counsel, SEC
5. Second Notice of Filing of Additional Documents Concerning Commission Action and/or Decision to Deny Actions, Deny Review and Decision Concerning the Investigation and/or Enforcement Action Against FINRA in Letters dated December 9, 2009, January 4, 2010 and January 4, 2010 (Including Attachments and Letter Referred to Therein) Accepted as an Application for Review by the Commission on January 6, 2010 (1-20-2010)
6. Letter dated January 20, 2010 from Manuel Asensio to Elizabeth Murphy, Secretary, SEC
7. Motion to Deny Motions Made by Financial Industry Regulatory Authority to Dismiss and Strike, or, in the alternative, to Define Accepted Application or Accept a New Application; and Motion to Stay Consideration of Motions made by FINRA until such Definition or New Application has been Made (1-25-2010) (with exhibit)
8. Notice of Filing of Request for Recusal of Commission Chairman and Commissioner Walter in Letter Dated January 26, 2010 (with Appendix) and Letter Dated January 4, 2010 (1-26-2010)
9. Notice of Filing Motion of Manuel P. Asensio (I) for Determination of Fact Concerning Specific Instances of Bias by the Financial Industry Regulatory Authority, Inc. ("FINRA"); (II) for Leave to Adduce Additional Evidence; and (III) to Compel FINRA to Produce Additional Documents Related to Bias to be Included in the Record (2-2-2010) (with exhibits)

¹ Some of the filings listed here are denominated as a "Reply" to an NASD filing but, in fact, make a request of some kind; we are treating these filings as motions. In addition, some documents filed by Asensio denominated as "Motions" are actually requests that the Commission deny some motion filed by NASD. We are treating these filings as oppositions to the relevant NASD motions. Finally, some of Asensio's filings listed here were directed to offices other than the Office of the Secretary, but because they either relate directly to this matter, or make requests pertaining to this matter, they have been included in the record, and in this Exhibit A.

10. Motion of Manuel P. Asensio for Consideration of Extraordinary Circumstances Contained in Letters Accepted as an Application and in Supporting Documents Filed January 14, 2010, and Second Motion for Leave to Adduce Additional Evidence (2-9-2010) (with exhibit)
11. Motion of Manuel P. Asensio to Strike from the Record "Reply of FINRA to Asensio's Opposition to FINRA's Motion to Dismiss, to Stay Briefing Schedule, and to Strike" (2-9-2010)
12. Motion Entering Grievances under Rule 420(A)(III), Claim for Damages, and Seeking Order Allowing Applicant to Pursue Claims Against FINRA and its Officers for Damages and to Vacate FINRA's Bar and MC-400 Denial in Civil Court (2-12-2010) (with exhibits)
13. Reply to FINRA's Opposition to Asensio's Motion for "Fact Finding" and to Compel Production of Documents (2-23-2010)
14. Reply to FINRA's Opposition to Motion for Consideration of Extraordinary Circumstances (2-26-2010)
15. Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict-of-Interest Towards the Applicant and Support Extraordinary Circumstances (2-26-2010) (with exhibits)
16. Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection and that FINRA's MC400 Decision Evidences Bias (3-1-2010) (with exhibit)
17. Notice of Filing of Record of Request for Commission Review of Certain FINRA Policies pursuant to Rule 430 of the Commission's Rules of Practice or Such Other Form of Review Extrinsic to Rule of Practice 420 that the Commission May Deem Appropriate (3-1-2010)
18. Motion to Extend 30 Day Period in Rule 420 Based on Extraordinary Circumstances Surrounding Jurisdictional Dispute and Settlement Offer (3-3-2010)
19. Motion for Review Under Commission Rule of Practice 430 or in the Alternative in Support of a Merits-Based Review Under Commission Rule of Practice 420 Based on a Showing of Extraordinary Circumstances (3-3-2010) (with exhibits)
20. Motion for Leave to Adduce Additional Evidence Concerning Instances of Improper Ex Parte Communications and Bias and for Order Summarily Vacating Bar in Accordance to Applicant's Petition in this Proceeding (3-5-2010)
21. Reply to "Opposition of FINRA to (1) Asensio's Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict of Interest, (2) Asensio's Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection, (3) Asensio's Motion to Extend 30 Day Period in Rule 420, and (4) Asensio's Motion for Review under Commission Rule of Practice 430 (3-9-2010)

22. Motion for Recusal of Commissioners Who Formerly Worked as FINRA Executives (3-12-2010)
23. Motion for Finding that Evidence of Recurring FINRA Conduct that is Counter to Investor Protection along with Evidence that the Applicant's Membership Will Benefit Investors Requires a Review Under Its Plenary Authority over FINRA Sanctions and Membership Application Decisions (3-15-2010)
24. Motion of Applicant for Consideration of Bias from other FINRA Members due to Applicant's Short-Selling Activities (3-15-2010)
25. Motion for Finding that FINRA's Statutory Disqualification Application ("MC400") Process is Futile as a Remedy for Applicant's Grievances due to FINRA's "Unreasoned Decisionmaking" and "Considerable Discretion" Evident in Applicant's MC400 (3-16-2010)
26. Motion to Consider Issues Created by FINRA's Unprecedented Actions and the Applicant's Special Circumstances as a Unique Member in Deciding Whether to Use the Commission's Plenary Authority Over FINRA Sanctions to Allow a Review of a Bar Past the Time Limitations Contained in Rule 420 and Rule 421 of the Commission's Rules of Practice (3-19-2010) (with exhibits)
27. Motion to Compel Review of FINRA Sanction under Commission's Plenary Authority and Investigate Improper Ex Parte Communication with FINRA or Communication Otherwise Deferential to FINRA (3-22-2010)
28. Motion for Consideration of the Commission's Bias Against Short sellers, Further Evidence of FINRA's Bias Against the Applicant, and Instances of Misconduct by FINRA Executives Collectively Justifying a Commission Review, and for Leave to Adduce Additional Evidence (3-30-2010) (with exhibits)
29. Motion for Consideration of Commission's Deference to FINRA Executives' Lying and Jurisdictional Misrepresentations as Evidence in Support of Applicant's Claims and Justification for Review, and for Leave to Adduce Additional Evidence (3-31-2010) (with exhibits)
30. Filing of Documents Adduced as Exhibits in Previously Filed Motions of Applicant, Bearing Bates-Stamp Numbers 238 through 348 (3-31-2010)
31. Notice of Filing of Second Request to the Director of the Commission's Division of Enforcement to Commence Investigation of FINRA's Violation of Securities Laws that Resulted in the Applicant's Bar and MC400 Denial (4-5-2010) (with exhibit)
32. Motion for Order Finding that Richard Ketchum's Specific and Direct Conflicts-of-Interest Adversely Affect the Legality of FINRA's Investigation and Claims Against the Applicant and Requires a Review of the Applicant's Sanction and Membership Denial Notwithstanding Their Dates (4-9-2010)

33. Motion for Order Allowing for De Novo Review at the U.S. Court of Appeals Based Upon Commission's Deference to FINRA and "Unreasoned Decisionmaking" With Respect to the Extraordinary Circumstances Requirement of Commission Rule of Practice 420 (4-12-2010) (with exhibits)
34. Notice of Filing of Letter to Certain Commissioners Dated April 14, 2010 and Attached Summary of Issues Presented in Applicant's Pleadings (4-14-2010)
35. Motion for Consideration of Further Evidence of FINRA's Extraordinary Bias and the Applicant's Extraordinary Record of FINRA Rule 8210 Compliance Justifying a Commission Review or Order Vacating Applicant's Bar Sanction, and Supporting Applicant's Motion to Compel Production of Additional Documents by FINRA (4-19-2010)
36. Motion to Vacate FINRA Sanction Based on the Sanction's Specific Violation of the Securities Exchange Act of 1934 and the U.S. Constitution or to Conduct an Alternate Form of Review (4-29-2010) (with exhibits)
37. Motion for Independent Investigation of FINRA Executives' Bias and for Written Assurances by Commissioners Not Formerly Employed by FINRA (4-29-2010)
38. Motion to Consider Compliance with Executive Order No. 13490 in Support of Request for Recusal of Chairman Schapiro (5-12-2010) (with exhibit)
39. Motion for Consideration of Potential for Wrongful Conduct by Commission Officials Against Applicant in Support of Applicant's Claims of Bias, Prejudgment, and Extraordinary Circumstances, and Motion for Leave to Adduce Additional Evidence (6/1/2010) (with exhibits)
40. Motion for Order to Compel FINRA to Provide Precise and Adequate Guidance on Readmission Based Upon a Finding That FINRA has Rendered its Readmission Process Futile and Injurious for Applicant (6-7-2010) (with exhibits)