

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Asensio Brokerage Services, Inc.
n/k/a Integral Securities, Inc.
New York, NY

and

Manuel Peter Asensio
Miami, FL and New York, NY,

Respondents.

DECISION

Complaint No. CAF030067

Dated: July 28, 2006

Individual respondent failed to respond to requests for information. Respondents issued research reports that failed to include required disclosures and that contained misleading information. Held, findings affirmed in part and reversed in part; sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Jeffrey P. Bloom, Esq., Department of Enforcement, NASD

For the Respondents: Jeffrey Plotkin, Esq.

Decision

Pursuant to NASD Procedural Rule 9311(a), Manuel Peter Asensio ("Asensio") and Asensio Brokerage Services, Inc., n/k/a Integral Securities, Inc. ("Asensio Brokerage" or "the Firm"), appeal from a January 4, 2005 Hearing Panel decision. The Hearing Panel found that: (1) Asensio failed to respond to requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110; and (2) respondents issued research reports that contained misleading information and that failed to include required definitions and disclosures, in violation of Conduct Rules 2711(h), 2210, and 2110. For the failure to respond violations, the Hearing Panel

barred Asensio. For the research report violations, the Hearing Panel fined the Firm \$20,000 but, in light of the bar, did not impose additional sanctions on Asensio. After a complete review of the record, we affirm in part and reverse in part the Hearing Panel's findings, and we affirm the sanctions imposed.

I. Background

A. Manuel Asensio

Asensio entered the securities industry in 1982. In February 1993, Asensio founded Asensio Brokerage, a broker-dealer.¹ From its founding until September 11, 2003, Asensio served as Asensio Brokerage's president, chairman, and chief executive officer. At all times relevant to this matter, Asensio was registered with the Firm in the following capacities: general securities representative and principal, financial and operations principal ("FINOP"), municipal securities representative and principal, registered options principal, and equity trader. Asensio has not been registered with any member firms since September 2003.

B. Asensio Brokerage Services, Inc.

Asensio Brokerage, originally founded as a Delaware corporation and located in New York City, has been an NASD member firm since July 7, 1993. It has a small number of institutional clients, and its focus is on short selling. During the relevant period, August 2002 to January 2003, Asensio Brokerage had three employees besides Asensio: Owen Hernandez ("Hernandez"), Charles Stewart ("Stewart"), and Lorena Llivichuzca ("Llivichuzca").²

II. Facts

This case concerns the publication of six research reports about Polymedica Corporation ("Polymedica"), whether such reports contained misleading facts and omitted required information, and whether Asensio failed to respond to requests for information concerning such reports. At the heart of respondents' arguments is their claim that the research reports were

¹ The Firm has been known by three different names over its existence: Asensio & Company, Asensio Brokerage, Inc., and Integral Securities, Inc. ("Integral"). Except where otherwise noted, this decision shall refer to the Firm as "Asensio Brokerage."

² Hernandez was registered with Asensio Brokerage as a general securities representative from March 21, 2002 to June 13, 2003, and as a general securities principal from February 20, 2003 to June 13, 2003. On September 11, 2003, Hernandez rejoined the Firm in the same capacities and as a FINOP. Hernandez is the nephew of Asensio's uncle. Stewart has been associated with Asensio Brokerage since November 1995. He has been registered as a general securities representative since May 15, 1997, and a general securities principal since September 29, 1999. Llivichuzca worked in an unregistered, administrative capacity.

published by Asensio & Company, Inc.,³ the parent company of Asensio Brokerage, not by Asensio or Asensio Brokerage.

Our presentation of the facts is in three sections. First, we describe the business, history, and structure of Asensio Brokerage and Asensio & Company. Second, we explain the six Polymedica reports at issue, which were published on www.asensio.com between August 2002 and January 2003. Third, we describe the facts that are relevant to the Department of Enforcement's ("Enforcement") claim that Asensio failed to respond to requests for information.

A. The Asensio Entities

In July 1993, Asensio formed Asensio & Company, which is not an NASD member firm. Asensio was the chairman, president, and chief executive officer. Asensio & Company registered and owned the Internet domain name "www.asensio.com." Asensio & Company was the 100 percent owner of Asensio Brokerage. According to Asensio Brokerage's Uniform Application for Broker-Dealer Registration ("Form BD"), starting in July 1993, Asensio indirectly owned more than a 75 percent interest in Asensio Brokerage through his ownership interests in Asensio & Company.

As explained in a February 1999 "joint shareholder reorganization resolution,"⁴ Asensio Brokerage "engaged in short selling, the publication of short selling research and the public advocacy of short selling" and was "involved in investigating and publishing on companies that are engaged in the dissemination of false information to inflate their stock prices." Asensio Brokerage published on www.asensio.com research reports that contained short sale recommendations beginning in 1996. Some of Asensio's reports—unrelated to the ones at issue—led to numerous lawsuits against Asensio, Asensio & Company, and Asensio Brokerage. Some of these activities also led to the opening of an NASD inquiry.

In light of these events, the "joint shareholders" expressed the desire "to protect themselves from retaliatory litigation [and] potential liability," to "avoid burdensome, potentially conflicted and unnecessary regulation," and "to avoid personal liabilities." Asensio explained that he hoped "to remove any grounds under which the NASD would have jurisdiction over the content and subject matter contained on [Asensio & Company's] web site." As an attempt to effect these purposes, the resolution stated that Asensio & Company "will be engaged in publication and will not conduct any investment or securities business," and that Asensio

³ Three companies relevant to this matter have gone by the name "Asensio & Company," including Asensio Brokerage, its Delaware-founded corporate parent (for which "Asensio & Company" was actually the fourth of four names), and a third New York corporation. All references in this decision to "Asensio & Company" are to the broker-dealer's Delaware parent company.

⁴ Asensio signed the resolution: (1) on behalf of the Firm and Asensio & Company; and (2) for himself individually and as majority shareholder of Asensio & Company.

Brokerage “will not engage in proprietary short selling or the publication of short selling research.” Several years later, on June 6, 2002, Asensio & Company claimed on www.asensio.com that the Asensio entities’ research and publishing business had been “separated” from the investment banking and securities brokerage operations.

Notwithstanding this alleged separation, however, Asensio remained in control of both Asensio Brokerage and Asensio & Company after the “separation” and throughout the relevant period of time.⁵ Moreover, the ties between the companies remained very close.⁶

B. The Polymedica Reports

On August 13, September 17, and October 31, 2002, and January 3, 2003, six written reports concerning Polymedica were published on www.asensio.com.⁷ Each report was published under the name “Asensio & Company, Inc.,” which the reports explained was “actively engaged in short sell investments and publishes research on securities it believes are overvalued.”⁸ All six reports discussed recent events that cast a negative light on Polymedica

⁵ With respect to Asensio Brokerage, a June 25, 2002 amendment to its Form BD identified Asensio as the Firm’s president, chairman, and chief executive officer. The Firm’s Form BD filings reflect that Asensio controlled Asensio Brokerage until at least September 12, 2003. With respect to Asensio & Company, Stewart claimed that Asensio “ran” Asensio & Company and “controlled” it as of October 1, 2002. Moreover, Asensio claimed in a February 2003 letter to NASD staff that he owned 73.76 percent of Asensio & Company and a “super-voting preferred that gives him over 90% voting control,” and that he supervised Hernandez and Stewart at Asensio & Company. As late as April 3, 2003, Asensio & Company’s Web site continued to identify Asensio as the president, chairman, and chief executive officer. Finally, Asensio stipulated that he had been the “owner of a majority of the votes and stock of the parent.”

⁶ Both companies continued to maintain their home pages on www.asensio.com. Asensio & Company Web pages contained links to pages describing Asensio Brokerage, such as a link stating “Read About Asensio Brokerage Services, Inc.,” and an instruction stating “[i]f you would like to learn more about [Asensio Brokerage] send an email to ABSinfo@asensio.com.” Asensio & Company had no independent revenues. Stewart testified that Asensio Brokerage paid the office rent and Hernandez’s and Stewart’s salaries. During the relevant period, Asensio Brokerage and Asensio & Company “share[d] office spaces and office services.” Stewart, Hernandez, and Llivichuzca all worked for both Asensio Brokerage and Asensio & Company. Furthermore, an October 1, 2002 amendment to Asensio Brokerage’s written supervisory procedures expressly discussed procedures concerning the distribution of research produced by Asensio & Company.

⁷ Polymedica (stock symbol PLMD) is listed on the Nasdaq stock market.

⁸ The report published on September 17, 2002, also explained that “Asensio & Company . . . is not a registered broker dealer.”

and concluded: "Asensio & Company, Inc. believes Polymedica's results are not sustainable and that its stock is grossly overvalued. Therefore, we have a short position in Polymedica and have advised our clients to sell Polymedica shares short. Our reports on Polymedica are available at www.asensio.com."

Four of the reports included the following representation: "[t]his report has been prepared from original sources and data which we believe to be reliable but accuracy is not guaranteed." All six reports contained a paragraph concerning Asensio Brokerage, including that it was a registered broker-dealer and an NASD member, and that it "predominately advises private institutional clients." In the same paragraph, the reports stated that "[s]hort selling involves a risk not associated with the purchase of stock including, but not only limited to, unlimited loss and stock borrowing risks," and that "[a]dditional information is available upon request." Pertinent to the allegations in the complaint, none of the research reports: (1) defined the sell short rating assigned to Polymedica; (2) disclosed the percentage of "buy," "hold/neutral," or "sell" ratings assigned by Asensio & Company; or (3) incorporated a line graph of Polymedica's daily closing prices.

Account statements for four accounts held by Asensio & Company, dated between July 1, 2002 and December 31, 2002, reflect that Asensio & Company closed out a short position in Polymedica as of June 26, 2002, and never held a short position in Polymedica when the Polymedica reports were issued.

C. Requests for Information, Documents, and Testimony Pursuant to Rule 8210

1. The February 11, 2003 Requests

On February 11, 2003, Tirone Veasley ("Veasley"), an NASD investigator with Enforcement, sent Asensio two requests for information, pursuant to NASD Procedural Rule 8210. Veasley sent one of the requests to Asensio in his individual capacity. That letter requested, with respect to various periods between July 1, 2002 and February 2003, that Asensio provide brokerage account statements for all accounts in which he had a beneficial interest and information concerning Asensio & Company, including its owners, services, and brokerage account statements.

Veasley sent the second request to Asensio in his capacity as an associated person of Asensio Brokerage. This letter requested similar information about Asensio & Company but also asked questions concerning the Polymedica reports. Specifically, Enforcement requested that Asensio identify who authored the reports, identify which sections of the reports complied with NASD Conduct Rules 2711(h)(5), (h)(6), and (h)(10), and provide all materials used to prepare the reports. Both letters requested a response by February 25, 2003.

On February 25, 2003, Asensio provided two letters in response. Responding in his capacity as an Asensio Brokerage associated person, Asensio first wrote that Asensio Brokerage "does not publish or distribute research reports" and that Asensio & Company "is not a member of NASD and is not subject to NASD rules and regulations." Nevertheless, Asensio responded to some of the questions concerning the ownership, employees, and services of Asensio &

Company.⁹ Asensio provided brokerage account statements for both Asensio & Company and Asensio Brokerage. In response to questions concerning the Polymedica reports and their compliance with Rule 2711, however, Asensio wrote that Asensio & Company's research reports "are exempt from NASD regulation" and that Asensio Brokerage "is not subject to Rule 2711 except as it relates to third party research by an affiliate as described in Exhibit B to the Rule." Asensio also wrote that Asensio Brokerage neither prepared nor distributed the Polymedica reports. Responding in his individual capacity, Asensio generally referred NASD to his responses contained in his other letter. Asensio did not respond at all to the request for his personal monthly brokerage account statements.

2. The March 12 and April 1, 2003 Requests

On March 12, 2003, Veasley sent to Asensio, in his individual capacity, a follow-up request, asking the same questions about the Polymedica reports that Veasley had first directed to Asensio Brokerage. Veasley wrote 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."

On the same day, Veasley also sent a follow-up request to Asensio at Asensio Brokerage. This letter asked how Asensio Brokerage "defines 'institutional investor,'" whether Asensio Brokerage has any clients who are institutional investors, and whether any such clients "receive part of their funding from 'taxpayer-paid salaries.'"¹⁰ Both of the March 12 requests asked for responses by March 26, 2003. NASD did not receive responses by March 26, 2003. On April 1, 2003, Veasley sent Asensio two additional requests for the same information requested in his March 12, 2003 letters.

In two letters received by NASD on April 2, 2003 (but dated March 25, 2003), Asensio responded to NASD's March 12, 2003 letters. Responding in his individual capacity, Asensio wrote that, in apparent contradiction of statements he provided on February 25, 2003, "I have no ownership interest in Asensio & Company. I do not possess or control any of Asensio & Company, Inc.'s property." Asensio's letter concluded, "[y]ou have previously been advised that Asensio & Company, Inc. is not a member of the NASD or is not associated with any NASD member firm."

Responding on Asensio Brokerage letterhead, Asensio again explained that "Asensio Brokerage . . . does not conduct, publish, distribute or market any research." In response to the specific questions posed, Asensio wrote that Asensio Brokerage did have institutional investor clients and referred NASD to a dictionary for the definition of institutional investor.

⁹ Among such responses, Asensio stated that he "owns 73.76% of Asensio & Company" and "a super-voting preferred that gives him over 90% voting control."

¹⁰ Veasley asked similar questions concerning Asensio & Company in his February 11, 2003 request sent to Asensio at Asensio Brokerage.

3. The April 9, 2003 On-The-Record Interview

On April 3, 2003, Veasley wrote to Asensio at Asensio Brokerage to schedule an on-the-record interview for April 9, 2003, pursuant to Rule 8210. On the day of the interview, Asensio, along with his attorney Fredric Goldfein ("Goldfein"), arrived one hour late. Asensio immediately testified that he would answer only those questions that are "directly related to my activities that are regulated by" NASD and would not answer any questions that he considered to be beyond NASD's jurisdiction. Throughout the interview, Asensio acted annoyed, accused NASD of being "hostile" and "corrupt," and protested that NASD staff's time would be better spent investigating something else.

Although Asensio responded to some questions, including some about Asensio & Company, Asensio declined to answer several questions concerning Asensio & Company and www.asensio.com. After approximately two hours, Asensio stated that he saw no basis for NASD's questions and that he had provided "more than enough time," and he announced that he was prepared to leave. At Goldfein's request, Asensio stepped out of the room. Goldfein and NASD staff agreed that they would terminate the interview, that Asensio would try to provide written responses to outstanding requests and questions by the end of April 2003, and that NASD staff would then determine if there was a need to reopen the interview.

4. The May 13, 2003 Request

In a letter dated May 13, 2003, to Goldfein, Veasley stated that NASD had not received responses to the requests originally posed in Veasley's March 12, 2003 letter or to questions posed at the interview. Veasley demanded an immediate response as to whether Asensio would provide the outstanding information. On May 16, 2003, Asensio responded in his personal capacity. Asensio wrote that Goldfein did not represent him and that Asensio had no knowledge of any agreement to provide information by April 30, 2003. Asensio asked for copies of the transcript pages reflecting such an agreement and for any pending questions or requests.

5. The May 29 and June 23, 2003 Requests

In a letter dated May 29, 2003 to Asensio, Veasley enclosed his prior letters dated March 12, April 1, and May 13, 2003, and an excerpt from Asensio's testimony reflecting the agreement with Goldfein. Veasley specified that the previous requests for information supporting the statements made in the Polymedica reports and concerning the reports' compliance with Rule 2711 remained outstanding. In addition, Veasley made an additional 98 separate requests concerning four categories: (1) statements reflected in an April 15, 2003 page from www.asensio.com; (2) statements reflected in a second April 15, 2003 page from www.asensio.com, which concerned Asensio Brokerage; (3) an October 1, 2002 amendment to Asensio Brokerage's supervisory procedures; and (4) the Polymedica reports. Enforcement gave Asensio until June 20, 2003 to respond.

In two letters dated June 20 and 23, 2003 on Asensio Brokerage letterhead, Stewart provided a "separate voluntary response" that responded to nine questions concerning the second

April 15, 2003 printout from www.asensio.com and the October 1, 2002 amendment to Asensio Brokerage's supervisory procedures. Moreover, in response to requests for information supporting representations in the Polymedica reports that Asensio & Company was "actively engaged in short selling" and held a short position in Polymedica, Stewart provided Asensio & Company account statements from May 1, 2002 to April 30, 2003.

On June 23, 2003, Veasley wrote to Asensio that Enforcement had still not received a response to its May 29, 2003 letter and that Stewart's letter was not acceptable. Veasley requested an immediate response.

On June 25, 2003, NASD received a letter dated June 20, 2003, from Asensio in response to NASD's May 29, 2003 letter. Asensio provided partial responses to questions about the first April 15, 2003 printout from www.asensio.com. Asensio did not respond to the questions to which Stewart had responded, instead writing that "[r]esponses to these requests are supplied under separate cover." In response to questions asking Asensio to identify who wrote the Polymedica reports and the names of all persons who contributed to the writing of the reports, Asensio wrote that "[Asensio & Company] was the author of the report. The report is not otherwise attributed." In response to numerous questions concerning the bases for certain representations made in the Polymedica reports, Asensio responded, "[Asensio & Company] is a non-member firm." Finally, Asensio did not respond to the outstanding questions concerning the support for statements made in the reports or the reports' compliance with Rule 2711.

III. Procedural History

This case stems from a general review conducted by Enforcement of industry compliance with NASD Conduct Rule 2711, which concerns research analysts and research reports. One of the firms that Enforcement investigated was Asensio Brokerage.

On February 6, 2004, Enforcement filed an amended three-count complaint against Asensio Brokerage and Asensio.¹¹ Causes one and two alleged that, from August 13, 2002, through January 3, 2003, Asensio Brokerage, acting through Asensio, issued six research reports concerning Polymedica that failed to comply with the disclosure requirements in NASD Conduct Rule 2711(h) and made unwarranted or misleading statements in violation of Conduct Rule 2210(d)(1)(B). Cause three alleged that, despite repeated requests, Asensio failed or refused to produce documents and information requested by NASD. On March 26 and 29, 2004, Asensio Brokerage and Asensio, respectively, filed answers denying the allegations and raising affirmative defenses, including that NASD lacked subject matter jurisdiction.

¹¹ On February 2, 2004, Enforcement filed its original complaint against Asensio only.

The Hearing Panel held a one-day evidentiary hearing. On January 4, 2005, the Hearing Panel found that respondents were liable for all alleged violations. On January 28, 2005, Asensio Brokerage and Asensio filed notices of appeal.¹²

IV. Discussion

A. Respondents Issued Research Reports that Failed to Include Required Disclosures and that Included Misleading Statements

1. Rule 2711(h)

This is the first time we have adjudicated a case involving NASD Conduct Rule 2711, which is intended “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*.¹³ We first address whether the Polymedica reports are “research reports” covered by Rule 2711. We then address whether the Hearing Panel correctly found that the Polymedica reports failed to define the ratings used, failed to disclose the distribution of the ratings used, and failed to disclose a price chart, as required by Rule 2711(h).

a. *The Polymedica Reports Were “Research Reports”*

Conduct Rule 2711 includes a number of provisions addressing “research reports.” During the relevant period, research reports were defined as “a written or electronic communication which includes an analysis of equity securities of individual companies or industries, and which provides information reasonably sufficient upon which to base an

¹² After the two-person subcommittee (“Subcommittee”) of the National Adjudicatory Council (“NAC”) empanelled to hear this case had decided what recommendation it would make to the NAC, on March 21, 2006, Judith MacDonald, the Chair of the NAC as well as a member of the Subcommittee, received an e-mail and an identical facsimile (“the March 2006 e-mail”) concerning this case from an individual. The author of the March 2006 e-mail requested confidential treatment. The March 2006 e-mail was not included in the record or considered by the NAC. For purposes of fairness, however, Counsel to the NAC sent a copy of the March 2006 e-mail to the parties, with redactions to protect the identity of the author of the e-mail. On April 17, 2006, respondents filed a motion that sought, among other things, an unredacted copy of the March 2006 e-mail. In a letter dated May 8, 2006, the Subcommittee denied respondents’ motion, for reasons explained in that letter. We adopt the Subcommittee’s decision.

¹³ As relevant here, Conduct Rule 2711(h)(4) became effective on July 9, 2002, and Conduct Rules 2711(h)(5) and (6) became effective on September 9, 2002. *NASD Notice to Members 02-39*.

investment decision and includes a recommendation.” *NASD Notice to Members 02-39* (Conduct Rule 2711(a)(8)).¹⁴

Under this definition, the six Polymedica reports were “research reports.” The reports were written communications and were electronically published on www.asensio.com. The reports contained information on which an investment decision could be based. Specifically, the reports discussed specific events concerning Polymedica and how such events supported a view that Polymedica’s equity securities were “grossly overvalued.” Furthermore, four of the reports stated that “[t]his report has been prepared from original sources and data which we believe to be reliable but accuracy is not guaranteed,” which helped persons decide how reliable the report was. Finally, a reasonable person would have read the reports as containing a specific recommendation to sell Polymedica short. Specifically, in addition to concluding that Polymedica securities were grossly overvalued, the reports represented that Asensio & Company maintained a short position in Polymedica and had “advised [its] clients to sell Polymedica shares short.” The reports also summarized Asensio Brokerage’s brokerage services and the risks of short selling, which reinforced that the reports were focused on investment options concerning Polymedica. Accordingly, the six Polymedica reports were “research reports” within the meaning of Rule 2711.

b. *Rule 2711(h)(4)*

The Hearing Panel found that respondents failed to define the sell short rating used in its Polymedica reports, as required by Conduct Rule 2711(h)(4). We agree.

Conduct Rule 2711(h)(4) requires a member to “define in its research reports the meaning of each rating used by the member in its rating system. The definition of each rating must be consistent with its plain meaning.” For example, “a member might disclose that a ‘strong buy’ rating means that the rated security’s price is expected to appreciate at least 10% faster than other securities in its sector over the next 12-month period.” *NASD Notice to Members 02-39*. All disclosures required by Rule 2711 “must be clear, comprehensive, . . . prominent,” and on the front page of a research report, or the front page must refer to the page on which disclosures are found. Rule 2711(h)(10).¹⁵

¹⁴ Effective September 29, 2003, the definition of “research report” was amended to delete the requirement that the communication contain a recommendation. *NASD Notice to Members 03-44*. The prior definition applies here.

¹⁵ “Regardless of where the required disclosures are placed, they should be labeled using a heading such as ‘Important Disclosures’ or ‘Required Disclosures’ so as to be clearly identifiable.” *NASD Notice to Members 04-18*, Attachment A. References to where disclosures are located “must be separated from the report’s body text, and in larger font size than the body text.” *Id.*

Although the six reports stated that Asensio & Company advised its clients to “sell Polymedica shares short,” the reports did not define the meaning of the “sell short” rating. Respondents argue that there is nothing ambiguous about the rating “sell short” and that Asensio Brokerage only had institutional clients who all understood what “sell short” means. Even if true, these are no excuses for failing to define ratings as required by Rule 2711(h)(4). Indeed, the definitions are *required* to be consistent with their plain meaning. Moreover, we do not agree that there was nothing potentially ambiguous about the meaning of the “sell short” rating. Respondents’ counsel conceded that the research reports on www.asensio.com could be read by retail investors, a class of investors who may not appreciate that the reasons for recommending a short sale of a security may differ substantially from the reasons for recommending that a security be sold. Accordingly, the Firm had a specific obligation to define the meaning of its sell short rating.

Respondents further argue that each report in fact defined the sell short rating. In this regard, respondents note that each report stated that “Polymedica’s results are not sustainable and . . . its stock is grossly overvalued. Therefore, we have . . . advised our clients to sell Polymedica shares short. . . .” and that the term “gross overvaluation” was defined on www.asensio.com. We reject respondents’ argument. Respondents offered no evidence that “gross overvaluation” was actually defined on the Web site. At best, therefore, the record demonstrates that the reports contained only an implied, partial definition of the sell short rating.¹⁶ Moreover, to the extent the body of the report conveyed the meaning of the sell short rating, it was not a “clear, comprehensive, and prominent” disclosure. The purported definition was not set off under a heading and appeared several paragraphs into each report, often on the second page. Accordingly, we affirm the Hearing Panel’s findings that the Polymedica reports did not comply with Rule 2711(h)(4).

c. *Rule 2711(h)(5)*

The Hearing Panel found that respondents failed to disclose, in the four research reports issued after Rule 2711(h)(5) became effective on September 9, 2002, the distribution of the ratings assigned to securities. We affirm the Hearing Panel’s findings.

Conduct Rule 2711(h)(5) requires a member to “disclose in each research report the percentage of all securities rated by the member to which the member would assign a ‘buy,’ ‘hold/neutral,’ or ‘sell’ rating.” For example, “a research report might disclose that the member has assigned a ‘buy’ rating to 58% of the securities that it follows, a ‘hold/neutral’ rating to 15%, and a ‘sell’ rating to 27%.” *NASD Notice to Members 02-39*.

¹⁶ Even if “gross overvaluation” was defined somewhere on www.asensio.com, ratings definitions must appear in the research report itself. Conduct Rule 2711(h)(10) (ratings definitions must be “presented on the front page of research reports or the front page must refer to the page on which disclosures are found”).

Four Polymedica research reports did not include the required distribution of ratings disclosure. Respondents argue that they did not need to include such information because all of their ratings were “sell.” Nothing in Rule 2711(h)(5) suggests, however, that the distribution of ratings disclosure is not required where all of a company’s recommendations are of a similar nature. To the contrary, such a disclosure is entirely consistent with the purpose of Rule 2711(h)(5), which is to “assist investors in evaluating what value to place on the ratings assigned to securities.” *Order Approving Proposed Rule Changes by NASD, Inc. and the NYSE (“Order Approving Rule Changes”)*, Exchange Act Rel. No. 45908, 2002 SEC LEXIS 1262, at *38 (May 10, 2002).

Noting that the reports stated that Asensio & Company was “actively engaged in short selling and publishes research on securities it believes are overvalued,” respondents argue that the reports essentially disclosed that all of the ratings were “sell” ratings. To the extent this disclosed anything about the distribution of ratings, however, it was not clear, comprehensive, or prominent. Conduct Rule 2711(a)(10). The quoted language does not clearly explain that Asensio & Company did not issue any reports other than ones including sell short ratings. Furthermore, the quoted language, which was not set off and was once on the report’s second page, was not prominent.

Respondents argue that Conduct Rule 2711 was not designed for analysts who issue sell ratings. Nothing in Rule 2711, however, supports respondents’ argument. To the contrary, the plain language of Rule 2711 indicates that “sell” ratings are within the scope of the rule. *See* Rule 2711(h)(5)(A) (“[r]egardless of the rating system that a member employs, a member must disclose in each research report the percentage of all securities rated by the member to which the member would assign a ‘buy,’ ‘hold/neutral,’ or ‘sell’ rating”).¹⁷

Accordingly, we affirm the Hearing Panel’s finding that four Polymedica reports did not comply with Rule 2711(h)(5).

d. *Rule 2711(h)(6)*

Finally, the Hearing Panel found that the Polymedica reports issued on October 31, 2002 and January 3, 2003, failed to include the price chart required by Conduct Rule 2711(h)(6). Conduct Rule 2711(h)(6) requires that a member “present in any research report concerning an

¹⁷ In countering respondents’ argument, Enforcement wrote in its appellate brief that there is no “reason to think that a hyperbolic or ill-founded research report recommending the short sale of a security is any less misleading or potentially manipulative than such a report recommending a purchase.” Respondents contend that this statement referred to the Polymedica reports, was “scandalous,” and should be stricken from Enforcement’s brief pursuant to Procedural Rule 9136(e). We understand the referenced language in Enforcement’s brief, however, not to refer directly or indirectly to the Polymedica reports, but instead to be a policy argument for why Rule 2711 applies equally to research reports containing sell ratings or buy ratings. Accordingly, we deny respondents’ request.

equity security on which the member has assigned any rating for at least one year, a line graph of the security's daily closing prices for the period that the member has assigned any rating or for a three-year period, whichever is shorter." Such a price chart must, among other requirements, "indicate the dates on which the member assigned or changed each rating or price target" and depict each rating and price target. Conduct Rule 2711(h)(6).

Although the Polymedica reports did not include a price chart, Rule 2711(h)(6) only requires such charts in reports concerning securities on which the member has assigned any rating "for at least one year." Respondents published the Polymedica reports at issue between August 2002 and January 2003, and there is no evidence demonstrating that they began assigning ratings concerning Polymedica any earlier than May 20, 2002. Accordingly, the record does not demonstrate that respondents were required to comply with Rule 2711(h)(6). Therefore, we reverse the Hearing Panel's decision that respondents violated Rule 2711(h)(6).

2. Rule 2210(d)(1)(B)

The Hearing Panel also found that the Polymedica reports included misleading statements, in violation of Conduct Rule 2210(d)(1)(B). We affirm the Hearing Panel's finding.

During the relevant period, Rule 2210(d)(1)(B) provided that "exaggerated, unwarranted or misleading statements or claims are prohibited in all public communications of members."¹⁸ The six Polymedica reports published between August 2002 and January 2003 all claimed that Asensio & Company had "a short position in Polymedica." Respondents conceded that such claim was false. Indeed, account statements demonstrate that Asensio & Company closed out its short position in Polymedica as of June 26, 2002.

Citing *Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17 (NAC June 25, 2001), however, respondents contend that a violation of Rule 2210 requires at least "gross negligence" and that their failure to remove the misleading statement was "at worst, inadvertent." In *Reynolds*, however, we expressly emphasized that no showing of "gross negligence . . . is required to find that a respondent has violated Conduct Rule[] . . . 2210." *Id.* at *27 n.18.¹⁹ Likewise, we reject respondents' suggestion that a violation of Rule 2210(d)(1)(B) requires a showing of motive. Rule 2210(d)(1)(B) precludes the making of misleading statements for any reason.

Respondents also argue that their false statements were immaterial because they concerned a "conflict of interest that did not exist." The materiality of statements, however, is

¹⁸ Effective November 3, 2003, Conduct Rule 2210(d)(1)(B) was amended to provide that "[n]o member may make any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public." *NASD Notice to Members 03-38*.

¹⁹ The NAC also held that a violation of Conduct Rule 2210 does not require a showing of scienter. *Reynolds*, 2001 NASD Discip. LEXIS 17, at *41.

not limited to situations involving conflicts of interest. Rather, information is material if there is a substantial likelihood that reasonable investors would consider it important in making their investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Considering that the reports recommended that Polymedica be sold short, the statement that Asensio & Company held a short position in Polymedica was material. It is substantially likely that a reasonable investor would find it important that an analyst who has represented that he invested in a manner consistent with his recommendation has not, in fact, made such an investment, because it would affect the investor's assessment of the analyst's confidence in his own recommendation.²⁰ *Cf. Batkin & Co.*, 38 S.E.C. 436, 449 (1958) (finding that a respondent's misleading statement that he had invested his own money was material).

Accordingly, the Polymedica reports did not comply with Rule 2210(d)(1)(B).

3. Respondents Wrote and Published the Polymedica Reports

Respondents argue that they did not write or publish the Polymedica research reports. Instead, respondents contend that the reports were written and published by Asensio & Company, which respondents claim qualifies as a "non-member affiliate." For this reason, respondents argue that they were required to comply only with the more limited third-party research disclosures set forth in interpretative guidance concerning Rule 2711. *See NASD Notice to Members 02-39*, Attachment B. We disagree in all respects.²¹

In interpretative guidance that clarified the application of Rule 2711 to a member's distribution of "third party research," NASD and NYSE explained that "[t]he determination of whether a research report is considered a product of the member or of a third party depends on: (1) whether the report appears to be a product of a member; or (2) whether a 'research analyst' (as defined by the SRO Rules) associated with a member is involved in producing the research report."²² *NASD Notice to Members 04-18*, Attachment A. Research reports that meet either of these factors must comply with Rule 2711. *Id.*

²⁰ Without citation to any authority, Enforcement claims that materiality is "legally irrelevant." Although in *Reynolds* we examined materiality as part of a Rule 2210 analysis, we did not expressly address whether materiality was a required element. Because the misleading statements in the Polymedica reports were material, we need not address this question here.

²¹ In addressing this issue, the Hearing Panel found that Asensio & Company and Asensio Brokerage actually "functioned as one" company and that the "separation" of information services into Asensio & Company "was nothing more than a charade." For the reasons explained below, such findings are not necessary in this particular case to conclude that respondents are accountable for the Polymedica research reports, and we do not follow the Hearing Panel's approach.

²² During the relevant period, NASD Conduct Rule 2711(a)(5) defined "research analyst" as "the associated person who is principally responsible for, and any associated person who reports

Under the second prong of this interpretative guidance, we find that the Polymedica reports were a product of Asensio Brokerage because the evidence demonstrates that Asensio—an associated person of Asensio Brokerage who was registered as, among other things, a general securities representative and principal and who served in the capacities of president, chairman, and CEO—wrote the Polymedica reports. The most probative evidence in this regard is a June 3, 2003 letter from Stewart to NASD, stating that “Mr. Asensio conducts all the research and writing of research reports and speaks with all clients.” Changing his story at the hearing, Stewart testified that he did *not* know who wrote the reports because they were always written at night after his departure from work. The Hearing Panel found, however, that Stewart’s prior written representation that Asensio authored the report was credible and that his subsequent testimony was not. We see no reason to disturb the Hearing Panel’s determination, which is entitled to considerable weight and deference. *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004). Stewart testified that he knew that Asensio would be present at the Asensio offices during the evenings, that Asensio produced research reports in the past, and that Stewart would forward calls about the reports to Asensio. Stewart also testified that he did not know of anyone, other than Asensio, to produce a research report. In light of these facts, the long duration and extent of Stewart’s involvement with both companies,²³ and the small size of the Asensio entities, Stewart’s sudden ignorance about who authored the reports was not credible.

Likewise, the Hearing Panel correctly found that Asensio’s denial of his involvement with the Polymedica reports was not credible. Asensio testified that the whole purpose of the alleged reorganization of the Asensio entities was “to be able to function within the NASD as a brokerage firm and as a principal of the brokerage firm and at the same time *publish my opinions publicly*.” Nevertheless, at the hearing Asensio claimed that he and others sent, via e-mail, information and thoughts about Polymedica to an unnamed person at Asensio & Company, but that he had no knowledge of *who* among the three Asensio & Company employees—himself, Stewart, and Hernandez—opened such e-mails, wrote the research reports, or posted the research reports. Asensio’s claimed ignorance lacked credibility, especially considering that he had previously written research reports, that he continued to control Asensio & Company and that, by

[cont’d]

directly or indirectly to such a research analyst in connection with, preparation of the substance of a research report, whether or not any such person has the job title of ‘research analyst.’” *NASD Notice to Members 02-39*. On September 29, 2003, the word “principally” in Rule 2711(a)(5) was replaced with the word “primarily.” *NASD Notice to Members 03-44*.

²³ Stewart testified that he never worked for Asensio & Company. We see no reason to disturb the Hearing Panel’s determination, however, that Stewart’s testimony, which was inconsistent with his Central Registration Depository (CRD®) report and his prior statements, was not credible.

his own admission, persons interested in the reports wanted to speak only with him.²⁴ Indeed, at the oral argument before the NAC Subcommittee, Asensio's counsel conceded, "I think it comes out clearly that [Asensio] was the one who provided the substance of the reports."

Because Asensio was responsible for preparing the substance of the reports, we attribute such reports to Asensio Brokerage. Likewise, an investor reasonably could believe that the research reports were the product of Asensio Brokerage, based on: (1) the short sell recommendations in the reports; (2) the description of Asensio Brokerage in the reports; (3) the posting of the reports on www.asensio.com, which hosted the home pages of both Asensio entities, linked to Asensio Brokerage's home page from elsewhere on the site, and explained how to contact Asensio Brokerage; and (4) the word "Asensio" in both the name of the broker-dealer and its parent. We also find that Asensio Brokerage distributed the Polymedica research reports, because they were produced with a view to creating business for Asensio Brokerage and published by an affiliate of Asensio Brokerage. Accordingly, because we ascribe the authorship and distribution of the Polymedica research reports to Asensio Brokerage, and not its non-member affiliate, those reports were required to comply with Conduct Rule 2711.

Respondents contend that their lawyers advised them that the reorganization of the Asensio entities prevented NASD from regulating the content of the research reports. Aside from the problem that there is little evidence concerning any discussions between respondents and their lawyers, the reliance on counsel defense is "available only in situations involving scienter-based misconduct" and is, thus, inapplicable as a defense to cases involving violations of Rules 2711 and 2210. *Dist. Bus. Conduct Comm. v. Goldsworthy*, Complaint No. C05940077, 2000 NASD Discip. LEXIS 13, at *35 (NAC Oct. 16, 2000), *aff'd*, *John Patrick Goldsworthy*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279 (May 15, 2002).

Accordingly, Asensio Brokerage violated Conduct Rules 2711(h) and 2210(d)(1)(B). As the author of the reports, Asensio is also personally accountable for these violations. These violations are also violations of Conduct Rule 2110.²⁵ *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) (stating that it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110").

²⁴ Asensio testified that "[p]eople that call in to Asensio & Company, Inc. want to speak with me. If [Hernandez] wanted to give advice, he couldn't. He could only embarrass himself and the firm." Asensio did not dispute Stewart's testimony that Stewart did not write the reports.

²⁵ Pursuant to NASD Rule 115(a), rules such as Rules 2711, 2210, and 2110 that are applicable to "members" are also applicable to persons associated with a member.

4. The Preponderance of the Evidence Does Not Demonstrate that Integral Is a “Successor” or Without Successor Firm Liability

The only appellate briefs filed on behalf of a firm were filed by “Integral Securities, Inc.” Integral contends that it is a “successor corporation” to Asensio Brokerage and that Enforcement has failed to prove that Integral has successor firm liability. Although Enforcement recognizes that Asensio Brokerage is “now known as” Integral, Enforcement does not maintain that this proceeding is against a successor corporation. Instead, Integral is raising the successor issue and, therefore, shoulders the burden of proving that it is not liable as a successor entity.

The preponderance of the evidence does not demonstrate that Integral is, in fact, a successor entity to Asensio Brokerage. The SEC has explained that a “successor is an unregistered entity that assumes and continues the business of a registered broker-dealer or adviser, which then ceases its broker-dealer or advisory activities.” *Registration of Successors to Broker-Dealers and Investment Advisers* (“*Registration of Successors*”), Exchange Act Rel. No. 31661, 1992 SEC LEXIS 3384, at *2 (Dec. 28, 1992). Although the Firm reported in a February 10, 2004 Form BD amendment that Alta Mar Trust, a foreign entity, had acquired a majority ownership interest in the Firm, the NAC recently denied the Firm’s application to effect such a change in ownership. *Integral Sec., Inc.*, Membership Appeal No. A10040038 (NAC May 5, 2005). Furthermore, although Asensio reported in a February 11, 2004 Form BD amendment that Integral was a New York corporation and “succeeded to the business of the broker dealer,” Integral offered no underlying proof of this transaction other than this self-serving filing.

Even if the Firm has changed its state of incorporation from Delaware to New York, Integral has not demonstrated that it would not have successor liability. A member firm that reincorporates and continues to use the existing NASD membership is, indeed, properly viewed as a “successor.” See NASD By-Laws, Art. IV, Section 7(b) (“The consolidation, reorganization, merger, change of name, or similar change in any corporate member shall not terminate the membership of such corporate member provided that the member or surviving organization, if any, shall be deemed a successor to the business of the corporate member”); *Registration of Successors*, 1992 SEC LEXIS 3384, at *12-13 (describing a “change in the state of incorporation” as a “succession”). Moreover, a company’s status as successor is not, by itself, determinative of whether it will be liable for its predecessor’s liabilities. See *Registration of Successors*, 1992 SEC LEXIS 3384, at *8 n.14 (citing cases).²⁶ In this case, however, the Firm filed an amendment to its Form BD representing that the predecessor Delaware corporation and successor New York corporation were “under the same control and management,” that the successor “assumed the operations of” the predecessor, and that “all the pre[d]eces[s]or assets

²⁶ At the same time, the Commission has stated that its successor rules, which facilitate the legitimate transfer of business between two or more entities, “are not designed to allow registered broker-dealers . . . to . . . eliminate substantial liabilities.” *Registration of Successors*, 1992 SEC LEXIS 3384, at *7.

and liabilities remained the same.” Given these admissions, to whatever extent Integral is, in fact, a successor, it would remain liable for its predecessor’s violations of NASD rules.²⁷

Accordingly, we reject Integral’s arguments that it is not liable as a successor corporation.

B. Asensio Failed to Respond to NASD Requests for Information

The Hearing Panel found that Asensio willfully failed to provide information requested by NASD staff. We affirm the Hearing Panel’s findings.

NASD Procedural Rule 8210(a) requires persons subject to NASD’s jurisdiction to respond to requests for information from NASD staff with respect to matters involved in an investigation. Rule 8210 imposes an unqualified and unequivocal obligation on members and associated persons to cooperate in NASD investigations. *Michael Markowski*, 51 S.E.C. 553, 557 (1993). A violation of Rule 8210 is also a violation of Conduct Rule 2110. *Stephen J. Gluckman*, 54 S.E.C. at 185.

On appeal, Asensio does not dispute that he violated Rule 8210. Indeed, despite repeated requests, Asensio failed to answer a number of requests for information about the Polymedica reports, including requests for: (1) the names of all persons who contributed to writing the Polymedica reports; (2) the identification of sections in the reports that complied with Rule 2711(h)(5), (h)(6), and (h)(10); (3) all materials utilized in the preparation of, or information providing support for all facts, opinions, or conclusions in, the reports; (4) information about the short position referred to in the reports; (5) the names and information about the clients referred to in the reports; and (6) information about the services that Asensio & Company provided to its clients and how it was compensated. Asensio also failed to respond to a number of requests for information posed to him at his on-the-record interview, including questions asking: (1) who had made changes to www.asensio.com within the prior two months; (2) whether Asensio & Company had clients; and (3) about letters dated December 16 and 18, 2002, written on Asensio & Company letterhead. Accordingly, we find that Asensio failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

V. Sanctions

The Hearing Panel barred Asensio for failing to respond to NASD’s requests for information. For failing to provide the disclosures required by Rule 2711(h), the Hearing Panel fined Asensio Brokerage \$20,000. The Hearing Panel also indicated that it would have fined Asensio \$20,000 and suspended him in all capacities for 60 days, but it did not do so in light of the bar. We affirm the Hearing Panel’s sanctions.

²⁷ Our discussion concerning successor liability is limited to the facts and circumstances of this case. We do not today address fully the extent to which a successor might be held accountable for a predecessor’s violations of NASD rules.

A. Rule 8210

For failure to respond violations, the NASD Sanction Guidelines (“Guidelines”) suggest that “[i]f the individual did not respond in any manner, a bar should be standard. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years.”²⁸ The Guidelines also suggest a range of monetary sanctions. In determining the appropriate sanctions, we consider the principal considerations for cases involving failures to respond and the principal considerations applicable to all sanctions determinations.

Asensio’s disregard of his obligation to comply fully with Enforcement’s requests undermined NASD’s regulatory responsibilities and its efforts to investigate possible violative activity. *See Dep’t of Enforcement v. Valentino*, Complaint No. FPI010004, 2003 NASD Discip. LEXIS 15, at *14 (NAC May 21, 2003), *aff’d*, *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004). NASD and the SEC have repeatedly indicated the importance of cooperation with NASD’s requests for information.

Noting that he provided responses to many of NASD’s requests and questions, Asensio argues that a bar is a standard sanction only for those who fail to respond “in any manner.” Asensio’s argument misses the mark. Regardless of the number of discrete requests for information, an associated person’s failure to respond at all to a *single* question can significantly impede an investigation, depending on the nature of the question involved. Asensio failed to respond to numerous questions that were at the heart of NASD’s investigation into respondents’ compliance with Rule 2711(h).²⁹ It is thus neither an excuse nor mitigating evidence that Asensio provided some, but not all, of the requested information. *See Charles R. Stedman*, 51 S.E.C. 1228, 1230-31 (1994) (imposing bar on respondent for failing to respond to four of 10 questions, specifically those questions that “probed the substance of the allegations” against respondent); *Dep’t of Enforcement v. Sahai*, Complaint No. C9B020032, 2006 NASD Discip. LEXIS 2, at *20-21 (NAC Mar. 2, 2006) (holding that respondent should be barred for failing to respond at all to two requests, in case where respondent provided dilatory and incomplete responses to other requests). In short, Asensio’s failure to respond to numerous key requests for information, notwithstanding his responses to other questions, *was* a failure to respond “in any manner.”

Asensio’s failures to respond were intentional.³⁰ *Cf. Dist. Bus. Conduct Comm. v. Chlowitz*, Complaint No. C02980025, 1999 NASD Discip. LEXIS 31 (NAC Nov. 4, 1999)

²⁸ *NASD Sanction Guidelines* 35 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

²⁹ *Guidelines*, at 35 (Principal Considerations in Determining Sanctions, No. 1).

³⁰ *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

(barring individual who adamantly and unreasonably refused to respond to NASD's requests for information). Furthermore, Asensio's failures occurred over an extended period of time.³¹ Asensio repeatedly refused over a series of months to provide responses to certain requests for information, and he never ultimately provided responses to certain outstanding requests.

Asensio argues that there are a number of mitigating factors. Asensio argues that his conduct was based on a "principled stance" that he did not need to answer questions pertaining to matters that he believed were outside NASD's jurisdiction. Refusing to respond to NASD's requests for information based on principle, however, is not mitigating. "To carry out its responsibilities, NASD must have the full cooperation of persons subject to its jurisdiction." *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, at *15 (Apr. 1, 2005), *aff'd*, *Rooms v. SEC*, No. 05-9531, 2006 U.S. App. LEXIS 6513 (10th Cir. Mar. 14, 2006). As a registered person, Asensio had an unequivocal obligation to comply fully with NASD's requests for information in his possession or knowledge.

Asensio also argues that he has no prior disciplinary history involving Rule 8210 violations. We have repeatedly emphasized, however, that the absence of a disciplinary history is not mitigating. In any event, Asensio *has* a disciplinary history that actually aggravates his conduct.³² In November 2000, NASD sanctioned Asensio and the Firm for violations of rules governing communications with the public and customers, including failing to disclose the risks associated with short selling, omitting material facts, making misleading statements, and referring to past recommendations without setting forth all relevant past recommendations. Asensio and the Firm were fined \$75,000, jointly and severally, and ordered to remove and refile with NASD all advertisements on the Firm's Web site. Asensio also was ordered to requalify as a general securities principal. Furthermore, the nature of Asensio's past misconduct, which evidenced disregard for regulatory requirements and investor protection, warrants the more serious sanctions that we impose on recidivists.³³

Asensio also contends that it is mitigating that his misconduct did not injure customers. With respect to a failure to respond in violation of Rule 8210, however, the customer harm or lack thereof usually is irrelevant to a sanctions determination. As we explained in an analogous case involving obstruction of an investigation in violation of Rule 8210, "[i]t is rare that a respondent's obstruction . . . would directly result in financial harm to a customer. The harm in such instances, as here, is to the self-regulatory process and to investors' confidence in that process." *Dep't of Enforcement v. Dieffenbach*, Complaint No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 (NAC July 30, 2004), *aff'd in relevant part*, *Michael A. Rooms*, 2005 SEC

³¹ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9)

³² *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1).

³³ *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2). Between 1994 and 2000, Asensio and the Firm also were censured and fined for a number of other less serious violations.

LEXIS 728, *aff'd, Rooms v. SEC*, No. 05-9531, 2006 U.S. App. LEXIS 6513 (10th Cir. Mar. 14, 2006).

Asensio also contends that he has accepted responsibility for his failures to respond. An acceptance of responsibility, however, is mitigating where it occurs *prior* to detection and intervention by the employing firm or a regulator.³⁴ Here, Asensio did not voice his acceptance of responsibility until this appeal, which is too late to be mitigating. Finally, Asensio points to several other cases in which respondents who failed to respond to NASD requests for information were fined and suspended, but not barred. The SEC, however, has “held consistently that the appropriate sanction depends on the facts and circumstances of each particular case and cannot be determined by comparison with action taken in other proceedings.” *Elliot M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99, at *13 (Jan. 19, 2006).

In light of the above considerations and the absence of mitigating evidence, we bar Asensio for his violations of Rule 8210.

B. Rule 2210 and 2711 Violations

For the inadvertent use of misleading communications, the Guidelines recommend a fine between \$1,000 and \$20,000, a suspension of the firm of up to six months, and a suspension of the responsible individual for up to two years.³⁵ Like the Hearing Panel, we shall apply these same recommended sanctions for negligent failures to comply with Rule 2711. Although NASD recently adopted Guidelines for violations of NASD Rule 2711, the recommended sanctions contained therein do not apply here because the Hearing Panel issued its decision before the effective date of the new Guidelines. *NASD Notice to Members 05-17* (making effective date March 15, 2005). Nevertheless, because the Guidelines’ principal considerations in determining sanctions are “illustrative, not exhaustive,” we have considered the principal considerations in the new Guidelines for Rule 2711 violations in determining the seriousness of respondents’ research report violations.³⁶

Considering the recommended Guidelines on which it relied, the Hearing Panel’s decision implies that it found respondents’ research report violations to result from negligent and inadvertent conduct.³⁷ We agree. Moreover, the evidence does not suggest that the Rule 2711(h)

³⁴ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

³⁵ *Guidelines*, at 85. The *Guidelines* recommend stronger sanctions for cases involving intentional or reckless use of misleading communications with the public.

³⁶ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions).

³⁷ *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13), 99 (Principal Considerations in Determining Sanctions, No. 1).

violations were of a systemic nature.³⁸ At the same time, however, the violations occurred in six Polymedica reports issued over a period of five months and, therefore, were not isolated.³⁹ In addition, as explained above, both the Firm and Asensio have relevant disciplinary histories.

For these violations, the Hearing Panel fined the Firm \$20,000, which we think is appropriately remedial. We also agree that it would be appropriate to fine Asensio \$20,000 and suspend him in all capacities for 60 days, especially given his past disciplinary history. In light of the bar imposed on Asensio for his Rule 8210 violations, however, we consider the suspension redundant and do not impose it. In light of our policy determination that, in certain cases involving the imposition of a bar, no further remedial purpose is served by the additional imposition of a monetary sanction, we also do not impose a fine for Asensio's violations of Rules 2711(h), 2210(d)(1)(B), and 2110. *See NASD Notice to Members 99-86.*

VI. Conclusion

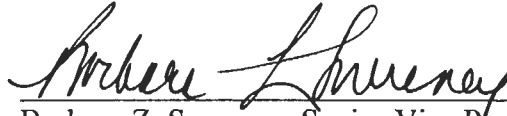
We affirm the Hearing Panel's findings that respondents issued research reports that failed to define ratings or disclose the distribution of the Firm's rating, and that included misleading statements, in violation of NASD Conduct Rules 2711(h)(4) and (h)(5), 2210(d)(1)(B), and 2110. We affirm the Hearing Panel's findings that Asensio failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We reverse, however, the Hearing Panel's findings that the research reports failed to disclose the price chart required by Conduct Rule 2711(h)(6). For the Rule 8210 violations, we bar Asensio. For the violations concerning the research reports, we fine Asensio Brokerage \$20,000. Finally,

³⁸ *Guidelines*, at 99 (Principal Considerations in Determining Sanctions, No. 3).

³⁹ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

we affirm the Hearing Panel's imposition of \$3,147.16 in costs against respondents, jointly and severally, and we assess respondents costs on appeal of \$2,504.11, jointly and severally.⁴⁰

On Behalf of the National Adjudicatory Council,



Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁴⁰ We have considered and reject without discussion all other arguments advanced by respondents.

Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment.