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August 13, 2010

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

Re: FINRA's Presumption of Denial of Asensio & Company, Inc.'s ("ACO") New Membership Application ("NMA").

Dear Ms. Reid:

Separately ACO responds to FINRA's July 19, 2010 information and document request pertaining to the NMA's Section 3 and FINRA Rule 1014(b)(1). The response includes challenges to the validity of FINRA's bar and MC-400 decisions that underlie FINRA's decision with relation to its Standards for Admission under 1014(a) and otherwise rebuts FINRA's presumption of denial.

With this letter, we write to challenge FINRA's erroneous conclusion in its 2008 Decision in SD08003 that evidence introduced by Applicant, Manuel P. Asensio, to explain his conduct surrounding FINRA's Rule 8210 requests for information in 2003 was an impermissible collateral attack on the underlying litigation in which FINRA imposed a membership bar on Mr. Asensio. In this decision, FINRA stated in Footnote 9:

> "X provided evidence, including a letter from a psychiatrist, to argue that he had responded aberrationally and irrationally to FINRA's requests for information in 2003 because he was debilitated by highly stressful problems, including multiple litigations, the serious illness of his mother, and personal anger management issues. We do not consider this evidence as an attempt to excuse the misconduct for which the NAC barred X in 2006, as such would constitute an impermissible collateral attack on the underlying previously litigated statutorily disqualifying event that brings X before us now. *See Joseph Frymer*, 49 S.E.C. 1181, 1182 (1989)."

For the reasons that follow, presentation of this evidence did not constitute a collateral attack, and even if it did, it still should have been considered holistically by FINRA. As a result, the 2008 decision reached by FINRA was made without full and proper consideration of all of the information and evidence pertaining to the matter and must not

stand. Equally important, the fundamental legal and regulatory deficiency grievances that form the basis of ACO's application are also permissible.

Frymer Is Distinguishable and Therefore Not Authoritative

First, FINRA erred in relying on *Joseph Frymer*, 49 S.E.C. 1181, 1182 (1989), to ignore key information presented by Mr. Asensio. That case is totally irrelevant to this matter as it commented on the permissibility of a collateral attack on a prior criminal conviction entered in the New York State court system. In contrast, here, there is no underlying criminal conviction or even a civil judgment to form a foundation for estoppel of collateral arguments. Instead, we have mere allegations of misconduct based on a novel and questionable jurisdictional claim upon which FINRA based its decision to sanction Applicant. The facts of this case are distinguishable from *Frymer*, and consequently, as discussed below, the logic of that case is absent from the instant matter. Similarly, to the extent that FINRA would attempt to rely on *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994), that case is also inapposite because it involves the collateral attack of a criminal conviction and a civil injunction entered in the district court.

In light of the factual distinctions, application of *Frymer* by FINRA was too far of a reach. Reliance on this case, and the resultant conclusion to ignore Applicant's evidence, is unsupportable.

There Is No Avenue for Remedy or Relief Via Direct Appeal

Frymer and the majority of the other cases in which FINRA and the SEC have invoked a policy against collateral attacks on prior judgments surround settlements of law in the civil and criminal context in the state or federal court systems. In these situations, attacks have been ignored based on the existence of final, valid judgments made in court following litigation efforts or settlement.

The rationale behind prohibiting collateral attacks in these kinds of cases is that a collateral attack should be ignored because an applicant has another avenue for challenging the conviction or injunction at issue. In those cases, an applicant can file a direct appeal disputing the validity of the judgment through the normal court system. *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (petitioner must challenge his conviction through direct appeal); *see also In The Matter Of Benjamin G. Sprecher*, 52 S.E.C. 1296 (1997). Alternatively, as suggested in *Matter of John Gardner Black*, Admin. Proc. File No. 3-9599 (April 13, 2010), a Petitioner could request that the district court vacate the injunction on the grounds of "mistake" or other permissible reasons under Federal Rule of Civil Procedure 60(b). *See Black,* n. 14.

In contrast, in Applicant's NMA and MC-400 applications, and in ACO's pending NMA and MC-400 applications, where he is forced to combat FINRA's and NASD staff's use of FINRA's own erroneous findings, there is no option for the type of streamlined, neutral and independent state or federal court appellate process to review the findings at issue. The same remedy or relief available through the court system via direct appeals

procedures is not present in this context. Thus, while there is some legitimacy to say that an applicant should not be allowed to attack a valid judgment rendered in a civil or criminal court based on his potential for remedy of improprieties through the appellate process, the same is not true of a finding issued by a regulatory agency, especially whereas here, there is no legitimate avenue for appealing that decision in a neutral setting.

To appeal the erroneous findings of FINRA, Applicant would not have been able to take the same direct route that an appellant could take in a state or federal court setting where a court at the next level would make an independent, disinterested review of the matter. Instead, he would have had to bring his case first to the SEC, where many of the SEC officials who would review his arguments on appeal would be prior FINRA employees or well-known to current or former FINRA staff. Between the personal bias against this Applicant and the incestuous relationship between FINRA and SEC, Applicant would have no chance for a viable, independent appeal in a case that involves such troublesome issues to the interested parties. Thus, a significant policy rationale for prohibiting collateral attacks is absent from this type of case and clearly from this case in particular. It is irrelevant that Applicant could have appealed the 2006 bar to the SEC because he would not have been met with the same type of neutral review of his case contemplated by cases such as *Elliott*, *Sprecher*, and *Black*. The futility of any appeal which Applicant could make is demonstrable by the outcome of his 2009-2010 request for review of his membership application to the SEC. In June, 2010, the SEC rejected Applicant's request for review of FINRA's membership determination in his case on the basis that where FINRA had prevented Applicant from bringing forward his claim of bias because it had no procedural mechanism for considering such a claim, the SEC would not consider bias as an extraordinary circumstance in its review of the application. Thus, Applicant is caught in a vicious cycle with no legitimate opportunity for proper appeal or independent contemplation of his membership applications.

In the absence of an opportunity for direct appeal of this matter, FINRA should perform a full and complete review of all evidence to ensure proper administration of this matter and those like it.

No Valid Judgment Was Reached in This Matter

According to the doctrine of collateral estoppel, upon entry of a final and *valid* judgment, an issue cannot be again litigated between the same parties in future litigation. *Black's Law Dictionary*, 6th Ed. (West 1990) (*citing St. Joseph v. Johnston,* 539 S.W.2d 784, 785) (emphasis added). Critically absent from these proceedings is a valid judgment, and thus, this doctrine cannot apply.

The validity of any judgment entered by FINRA with respect to this Applicant, including the decisions concerning Rule 1014(a), is called into question by the overt bias in the language of its decisions and in all interactions with Applicant, the imposition of sanctions of a much greater severity than necessary in response to Applicant's alleged conduct, its refusal to consider information critical to the outcome of the case, and other

errors that have been referenced in Applicant's ongoing correspondence with this organization, including the absence of discovery rights, violations of due process, and legal and regulatory deficiencies. In the absence of a valid underlying judgment, FINRA may not invoke the doctrine of collateral estoppel to bar consideration of evidence which arguably surrounds its former decision.

A Collateral Attack May Be Made in Certain Circumstances

In *Frymer*, the SEC merely articulated that: "the Commission is *concerned* that the NYSE credited Frymer's collateral attacks on the convictions entered against him pursuant to the laws of New York." *Frymer,* 49 S.E.C. at 1181 (emphasis added). Similarly, in *Matter of John Gardner Black*, Rel. No. 3015, Admin. Proc. File No. 3-9599 (April 13, 2010), the SEC asserted its policy of disallowing collateral attacks, but did consider the actual arguments made by the petitioner, stating: "We note that it is, and was in 1998, our policy "not to permit a defendant . . . to consent to a judgment . . . or order that imposes a sanction while denying the allegations in the complaint . . . ." 17 C.F.R. § 202.5. We reaffirmed our policy in Marshall E. Melton, 56 S.E.C. 695, 712 (2003). In any event, Black's collateral attack is not persuasive. Although Petitioners assert that changes in applicable securities valuation methods exonerate them, they do not provide any evidentiary support for their claim nor do the briefs explain what differences the use of the alternative valuation method would have made in the district court's evaluation of Petitioners' conduct." *Id.* at n. 13. In yet another case, although the SEC later indicated that it did not "condone" this action, at a membership application hearing, the NASD District Committee permitted the applicant to collaterally attack a state agency decision and reached a decision in consideration of information presented in that attack. *BFG Securities, Inc.*, Rel. No. 44627, Admin. Proc. File No. 3-10202 (July 31, 2001).

The language of these cases makes it clear that there is no absolute bar to all attacks in all circumstances and that in certain instances, this information can and will be considered. In a case such as this, where there is no comparable direct appeal route for challenging FINRA's decision not to provide an appropriate rationale for refusing collateral arguments and where the underlying judgment is not valid, consideration of all of Mr. Asensio's evidence was imperative and should have been undertaken by FINRA in review of this matter. Furthermore, in light of the serious legal and regulatory deficiencies of FINRA which prevented him from bringing forth his very real and supported claim of bias, all evidence that he presented, including that which might be called a collateral attack in certain circumstances, should have been reviewed.

The Public Interest Necessitates Modification of FINRA's Prior Decision

Finally, this case merits reconsideration as a matter of public interest. Evidence which might otherwise be considered a collateral attack may be considered in support of modification of sanctions in light of the public interest. *See e.g.*, *Frymer*, 49 SEC at 1181; *Matter of John Gardner Black*, Admin. Proc. File No. 3-9599 (April 13, 2010).

There are numerous significant factors in this case that have been overlooked by FINRA that support reinstatement of Applicant's membership. Balanced against the wholly and inconsequential **minor misconduct** at the heart of this matter are compelling facts illustrating Applicant's commitment to his personal integrity and the integrity of this industry, his support by his peers, his proven benefit to securities regulation, and his knowledge and experience in this field. Applicant has worked tirelessly to combat securities fraud and to champion the rights of investors. He is a skilled professional who has been widely lauded for his work.

In contrast, the misconduct for which he was subjected to an unqualified membership bar was exceptionally minor. Upon independent review of this matter by Leicester Bryce Stovall, an attorney expert on federal regulatory and litigation issues, Mr. Stovall immediately identified that the adverse inferences upon which FINRA's decision to bar Applicant's membership had no basis in, and were actually contradicted by, the record in this case. *See* August 11, 2010 Letter of Mr. Leicester Bryce Stovall, Esq. to Ms. Allison Reid. Without any evidence to support its conclusions, FINRA imposed this bar based on mere inferences that Applicant engaged in a "cover up" of a fraud on investors regarding the PolyMedica research reports and that he lied about his ownership of asensio.com. As Mr. Stovall found, the record does not support that Applicant engaged in any attempt at concealment of fraud. It also shows that Applicant had transferred all interest in asensio.com to a trust that he did not control. That FINRA would jump to such conclusions based on inference shows a predisposition to infer Applicant's guilt and propensity to commit bad acts based on its own bias in the matter. These conclusions are flawed, incapable of substantiation, and contravene the truth. Applicant has provided evidence, in support of his actual innocence, to explain the personal circumstances which impacted his response to FINRA's questionable alleged "sweep" of the PolyMedica reports at the time of the initial proceedings in this matter and has shown that this conduct was an aberration with no adverse consequence to any party, which therefore cannot be at issue in the future.

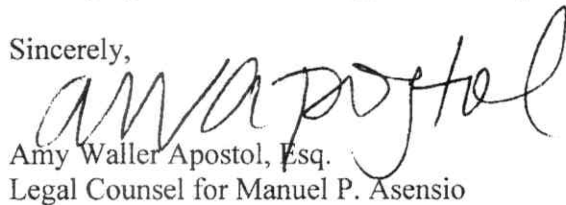
Applicant's passion, leadership, and unflinching commitment to the securities industry are all compelling factors that necessitate full and fair consideration by this organization. As a matter of public interest, all evidence presented by Applicant should be considered by FINRA, and its decision modified accordingly.

In conclusion, for the reasons asserted above, Applicant asserts that FINRA erred when it failed to fully and properly consider all evidence presented in this matter. By labeling Appicant's challenge to FINRA's actions and decisions, which FINRA has apparently used to make its Standards claim under Rule 1014(a), a "collateral attack" and preventing further discussion of his case on that basis, FINRA circumvents the real issue at the heart of this case: that the rules and procedures that FINRA has put in place make it impossible for Applicant to mount a claim of regulatory bias and for FINRA to consider his claim. There are real legal and regulatory deficiencies at work here that preclude appropriate resolution of enforcement and membership application determinations in not just this case, but in all others like it. Thus, whether or not information raised by Applicant could

arguably be deemed a collateral attack, under these circumstances, it should have been reviewed and afforded appropriate treatment by FINRA.

Based on the above error, and the evidence presented in the Applicant's NMA of his contributions to improving in the nation's securities regulatory system, and the Applicant's unblemished customer and sales practices compliance record, FINRA should disclose its decision making in finding that a presumption of denial is fair and in the best interest of investors in its particular case involving a unique member who is well known investor advocate where FINRA's own biases and conflicts of interest are central to underlying decisions that trigger such the presumption of denial.

Sincerely,



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Cc: Ms. Lorraine Lee
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