

**NASD  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

DAVID J. LEYSHON,  
CRD No. 1146050,

RESPONDENT.

DISCIPLINARY PROCEEDING  
No. E3A20040356-01

HEARING OFFICER:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent David J. Leyshon ("Leyshon" or "Respondent") was associated with members of NASD from June 1983 until July 1985, from November 1990 until March 1992 and from July 2001 until December 2004. His most recent association terminated in December 2004. Although Leyshon is not presently associated with a member, NASD has jurisdiction to issue this Complaint pursuant to Article V, Section 4 of the NASD By-laws.

**CAUSE ONE OF COMPLAINT**

**NASD Conduct Rules 2110 and 2310, Unsuitable Recommendations  
Resulting in Excessive Trading, by Respondent Leyshon**

2. Paragraph number 1, above, is realleged and incorporated herein by reference.

***Customer BJB and the BJB Account***

3. During the period from on or about February 1, 2002, through on or about August 31, 2003, Respondent was the representative assigned to the BJB account maintained at Synergy

Investment Group, LLC ("Synergy"), his employer-member. At the time the account was opened, BJB was in her mid-fifties, married and the owner of a beauty salon. For the year prior to the establishment of the account, BJB's income was approximately \$13,000.00 and her husband's income was approximately \$47,000.00. The investment objectives set forth on her Synergy new account documentation were income, long-term growth with safety and long-term growth with greater risk. The account was approved for covered call writing. It was not approved for other options transactions or for day-trading.

4. The funds in the BJB account represented approximately 75% of BJB's retirement assets. Her investment objectives and previous investments were conservative. BJB could not afford the loss of her investment.

5. The BJB account was an "on-line" account. Synergy. The firm's on-line accounts were intended to allow customers to submit unsolicited transactions electronically to Synergy's clearing firm or to communicate such orders to firm representatives for electronic entry. On-line accounts were not intended for customers like BJB from whom transactions were solicited.

Further, BJB was neither willing nor able to direct the trading in her account or submit orders electronically. BJB was not aware that she had an on-line account. Respondent entered orders in the account using a password purported to be that of BJB. Respondent was aware of Synergy's purpose and intent in establishing and permitting on-line accounts. Respondent did not inform Synergy that he, not BJB, was entering orders for the BJB account.

6. On or about May 1, 2002, the equity in the BJB account was approximately \$82,018.00. On or about July 31, 2003, the equity in the BJB account was approximately \$35,213.00. The average monthly equity over the period from May 1, 2002, through July 31, 2003 (the "relevant period") was approximately \$52,768.00.

### ***BJB Account Activity and Expenses***

7. During the relevant period, while exercising effective control over the BJB account, Respondent recommended and executed, or caused the execution of, approximately 1,000 transactions (the "Transactions") in the BJB account. For most of the relevant period, Respondent "day traded" the BJB account, which was identified as a "pattern day trader" by the clearing broker through which the Transactions were executed.

8. The Transactions consisted of approximately 475 purchases and opening transactions. The aggregate cost of these transactions to the account was approximately \$16,242,000.00. During the relevant period, there were approximately 525 sales and closing transactions. The account was credited with proceeds of approximately \$16,187,000.00 for these transactions.

9. During the relevant period, the BJB account paid commissions of approximately \$43,740.00, other transaction charges of approximately \$4,847.00 and margin interest of approximately \$600.00. Total charges were approximately \$49,187.00.

10. The BJB account was turned over approximately 307 times during the relevant period, which annualizes to a turnover rate of approximately 246. The cost-to-equity ratio over the relevant period was approximately 93%, which annualizes to a cost-to-equity ratio of approximately 74%.

### ***Respondent's Control of the BJB Account and Compensation for the Transactions***

11. As more fully described in Cause Two, Respondent executed or caused the execution of approximately 80% of the Transactions without first obtaining the authorization of BJB. With respect to the remaining Transactions, Respondent recommended them to BJB and BJB consistently followed his recommendations. By executing transactions without authorization and by making recommendations that BJB consistently followed, Respondent controlled the activity in the BJB account.

12. Respondent received transaction-based compensation of approximately \$24,000.00 as a result of the Transactions. This represented from 35% to 55% of his compensation on a monthly basis over the relevant period.

***Recommended Transactions Were Unsuitable***

13. The Transactions were unsuitable for BJB because they were excessive in number and frequency. As a result of the expenses associated with that level of activity, the BJB account would have to realize a return of approximately 75% to break even, a rate of return that was unlikely to be achieved; therefore, the loss of some or all of BJB's principal reasonably could be foreseen.

14. Respondent did not have a reasonable basis for believing that his express and implicit recommendations to BJB were suitable in light of her financial circumstances and needs, her investment objectives and her other security holdings. Each unsuitable recommendation he made constituted a separate and distinct violation of NASD Conduct Rule 2310 by Respondent. Further, each such recommendation was inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110 by Respondent.

**CAUSE TWO OF COMPLAINT**

**Section 10(b) of the Securities and Exchange Act, SEC Rule 10b-5 and NASD Conduct Rules 2120 and 2110, Churning, by Respondent Leyshon**

15. Paragraphs 1 and 3-14, above, are realleged and incorporated herein by this reference.

16. In connection with the course of conduct described in Cause One, above, Respondent, directly or indirectly, by the use of the means or instrumentalities of interstate commerce or of the mails, knowingly or recklessly used or employed, in connection with the purchase or sale of

securities, manipulative or deceptive devices or contrivances; and knowingly or recklessly effected transactions in, or induced the purchase or sale of, securities by means of manipulative, deceptive or other fraudulent devices or contrivances.

17. These acts, practices and conduct constituted separate and distinct violations of Section 10(b) of the Securities and Exchange Act of 1934, Rule 10b-5 of the Securities and Exchange Commission promulgated thereunder and NASD Conduct Rules 2120 and 2110.

### **CAUSE THREE OF COMPLAINT**

#### **NASD Conduct Rule 2110, Unauthorized Transactions, by Respondent Leyshon**

18. Paragraphs 1, 3-14, 16 and 17, above, are realleged and incorporated herein by this reference

19. As noted above, the Transactions were executed by transmitting orders directly to Synergy's clearing firm using an on-line trading platform provided by Synergy. Synergy provided Respondent with a password for BJB to use in accessing her account and entering orders.

Respondent did not provide the password to BJB. Instead, he used the password to enter orders and cause the execution of transactions in the BJB account without BJB's prior authorization.

20. During the relevant period, in the manner described in paragraph 15 above, Respondent caused the execution of approximately 80% of the Transactions without receiving prior authorization from BJB. BJB received confirmations and statements reporting the transactions.

At various times, she instructed Respondent to stop executing transactions that she had not authorized; however, Respondent continued to trade without her authorization.

21. Entering orders and causing the execution of transactions in the BJB account without BJB's prior authorization constituted conduct inconsistent with high standards of commercial honor and

just and equitable principles of trade. Each instance in which a transaction was executed without BJB's prior authorization constituted a separate and distinct violation of NASD Conduct Rule 2110.

#### **CAUSE FOUR OF COMPLAINT**

##### **NASD Conduct Rule 2110, Submission of Falsified Records, by Respondent Leyshon**

22. The allegations of paragraphs 1, 3-14, 16, 17 and 19-21, above, are realleged and incorporated herein by this reference.

23. On or about June 23, 2003, Synergy requested that Respondent obtain BJB's signature on three documents relating to day trading that were required by the clearing broker executing the Transactions. The three documents were a "Day Trading Acknowledgement," a "Day-Trading Risk Disclosure" document and a "Remote User Agreement." Synergy sent the documents to Respondent by facsimile. Respondent did not return executed documents to the firm.

24. On or about July 18, 2003, Synergy again sent the three day-trading documents to Respondent by facsimile and, on that same day, Respondent returned them to Synergy by facsimile. Each document bore what purported to be BJB's signature; however, BJB did not sign the documents. Respondent knew, or should have known, that BJB had neither reviewed nor signed the documents and, further, knew, or should have known, that the firm would rely upon the genuineness of the signatures in concluding that BJB was aware of the risks associated with day-trading and, in fact, was responsible for the activity in her account. By submitting the forms to Synergy, Respondent implicitly represented the signatures to be genuine when he knew, or

should have known, that they were not. In so doing, Respondent submitted a falsified document to the firm and caused its records to be falsified.

25. The submission of each falsified record constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a separate and distinct violation of NASD Conduct Rule 2110 by Respondent.

### **CAUSE FIVE OF COMPLAINT**

#### **NASD Conduct Rules 3110 and 2110, Causing Synergy to Maintain Inaccurate Records, by Respondent Leyshon**

26. The allegations of paragraphs 1, 3-14, 16, 17, 19-21 and 23-25, above, are realleged and incorporated herein by this reference.

27. NASD Conduct Rule 3110(a) requires NASD members to make and preserve records in accordance with, *inter alia*, SEC Rule 17a-3 and 17a-4 and NASD rules. Pursuant to NASD Rule 0115, this obligation extends to persons associated with members.

28. NASD Conduct Rule 2360 establishes requirements for the opening of non-institutional accounts by members who, directly or indirectly, promote day-trading strategies. Such members must provide prospective customers with a risk-disclosure document and, if the member approves an account for day-trading, prepare a record setting forth the basis for approval. Rule 2360(d) provides that any record or written statement prepared or obtained by a member pursuant to the Rule be preserved in accordance with Conduct Rule 3110 (a).

29. Synergy based its approval of the BJB account for day-trading in part upon the receipt of the executed risk disclosure document referenced in paragraphs 23 and 24 above. Therefore, the

executed risk disclosure document constituted a record obtained by Synergy pursuant to Conduct Rule 2360 and was required to be preserved in accordance with Conduct Rule 3110(a).

30. By submitting a falsified executed risk disclosure document, Respondent caused Synergy's records to be inaccurate and misleading and, in so doing, committed a separate and distinct violation of Conduct Rule 3110, himself. Further, his violation of Conduct Rule 3110 constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110 by Respondent.

### **CAUSE SIX OF COMPLAINT**

#### **NASD Procedural Rule 8210 and NASD Conduct Rule 2110, Failure to Provide Information, By Respondent Leyshon**

31. The allegations of paragraphs 1, 3-13, 15-17, 19-21, 23-25 and 27-30, above, are realleged and incorporated herein by this reference.

32. Between November 19, 2004, and February 24, 2005, NASD staff sent four written requests for information pursuant to Procedural Rule 8210 to Respondent. The first two requests sought information about the conduct described in Causes One, Two and Three above. The third and fourth requests sought information about the complaint of another former customer of Respondent. Each request was sent by first-class and certified mail to Respondent's two addresses of record with NASD. Those addresses are [REDACTED] [REDACTED] (the "Arizona address") and [REDACTED] [REDACTED] (the "North Carolina address"). Each request included a date by which the information was to be provided.

33. The first request was sent on November 19, 2004, and a response was required by December 3, 2004. Both the certified and first-class mailings to the North Carolina address were returned to the staff undelivered. The first-class mailing to the Arizona address was not returned to the staff. The staff did not receive either a certified mail delivery receipt or the returned certified mailing prior to the due date for the receipt of the information. No information was received in response to that request.

34. The second request was sent on December 9, 2004. The response was due on or before December 22, 2004. The certified and first-class mailings to the North Carolina address were returned undelivered. The first-class mailing to the Arizona address was not returned to the staff. The staff did not receive either a certified mail delivery receipt or the returned certified mailing prior to the due date for the receipt of the information; however, on or about January 4, 2005, the staff received certified mail delivery receipts for the certified mailings of both requests to the Arizona address. Each receipt bore what appears to be Respondent's signature. No information was provided in response to the requests.

35. The third request was sent on January 31, 2005. The requested information was to be provided on or before February 14, 2005. The certified and first-class mailings to the North Carolina address were returned undelivered. The first-class mailing to the Arizona address was not returned to the staff. The staff received a certified mail delivery receipt indicating that delivery of the certified mailing to the Arizona address was accepted on February 4, 2005. The receipt appears to bear Respondent's signature. No information was provided in response to the request.

36. The fourth request was sent on February 24, 2005. The information was to be provided on or before March 11, 2005. The certified and first-class mailings to the North Carolina address were

returned undelivered. The first-class mailing to the Arizona address was not returned to the staff. The staff received a certified mail delivery receipt indicating that delivery of the certified mailing to the Arizona address was accepted on March 9, 2005. The receipt appears to bear Respondent's signature. No information was provided in response to the request.

37. Respondent knew that NASD staff was requesting information pursuant to NASD Procedural Rule 8210 because he received the requests for information at the Arizona address. Respondent was required to provide the information because his most recent association with a member was terminated within two years of the dates of the requests. Respondent knowingly failed to provide the requested information.

38. Each failure to provide information in response to a Rule 8210 request, as described in paragraphs 32-37 above, constituted a violation of NASD Procedural Rule 8210 by Respondent. Further, each such failure was inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110 by Respondent.

### **PRAYER FOR RELIEF**

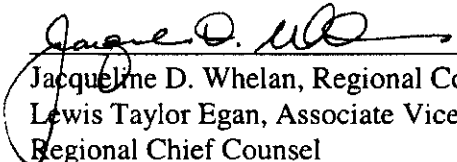
WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310.
- C. An order requiring Respondent to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and

E. An order imposing any other fitting sanction.

**NASD DEPARTMENT OF ENFORCEMENT**

Date: March 13, 2006

  
Jacqueline D. Whelan, Regional Counsel  
Lewis Taylor Egan, Associate Vice President &  
Regional Chief Counsel  
NASD Department of Enforcement  
525 Market Street  
Suite 300  
San Francisco, CA 94105-2711  
(415) 882-1200; Fax No. (415) 357-9831

**NASD Associate Vice President and  
District Director**

Joseph M. McCarthy  
NASD, District 3A  
370 – 17<sup>th</sup> Street, Suite 2900  
Denver, CO 80202  
(303) 446-3190; Fax No. (303) 620-9450

**Of Counsel**

Rory C. Flynn, Of Counsel  
NASD Department of Enforcement  
1801 K Street, N.W., Suite 800  
Washington, D.C. 20006  
(202) 974-2974; Fax No. (202) 721-8318

Roger D. Hogoboom, Of Counsel  
NASD Department of Enforcement  
370 17<sup>th</sup> Street, Suite 2900  
Denver, CO 80202  
(303) 446-3114; Fax No. (303) 620-9540