

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DAVID J. LEYSHON
(CRD No. 1146050),

Respondent.

Disciplinary Proceeding
No. E3A2004035601

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

August 23, 2006

Respondent is barred from associating with any NASD member firm in any capacity for: (i) effecting unsuitable recommendations, in violation of NASD Conduct Rules 2110 and 2310; (ii) fraudulent conduct and excessive trading, in violation of Section 10(b) of the Securities and Exchange Act, SEC Rule 10b-5 and NASD Conduct Rules 2120 and 2110; (iii) effecting unauthorized transactions, in violation of NASD Conduct Rule 2110; (iv) submitting falsified records to his employer, in violation of NASD Conduct Rule 2110; (v) causing his employer to maintain inaccurate records, in violation of NASD Conduct Rules 3110 and 2110; and (vi) failing to provide information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

Jacqueline D. Whelan, Regional Counsel, San Francisco, CA (Rory C. Flynn, Chief Litigation Counsel, Washington, D.C., and Mark P. Dauer, Regional Counsel, New Orleans, LA, Of Counsel) for the Department of Enforcement.

No appearance by or for David J. Leyshon.

DECISION

I. INTRODUCTION

The Department of Enforcement ("Enforcement") filed a Complaint on March 13, 2006, charging that Respondent David J. Leyshon ("Leyshon" or the "Respondent"): (i) effected

unsuitable recommendations, in violation of NASD Conduct Rules 2110 and 2310; (ii) engaged in fraudulent conduct and excessive trading (churning), in violation of Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110; (iii) effected unauthorized transactions, in violation of NASD Conduct Rule 2110; (iv) submitted false records to his firm, Synergy Investment Group, LLC ("Synergy"), in violation of NASD Conduct Rule 2110; (v) caused Synergy to maintain inaccurate records, in violation of NASD Conduct Rules 3110 and 2110; and (vi) failed to respond to four written requests for information issued by NASD staff, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. A copy of the Complaint is attached to this Decision as Exhibit A.

The Respondent did not answer or otherwise respond to the Complaint. Consequently, on June 27, 2006, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the Declaration of Jacqueline D. Whelan ("Declaration") and five exhibits. Leyshon did not respond to the Motion.

For the reasons discussed below, the Hearing Officer grants Enforcement's Motion.¹

II. RESPONDENT'S DEFAULT

On March 13, 2006, Enforcement sent the Complaint and Notice of Complaint to the Respondent by certified and first-class mail to both of his residential addresses shown in the Central Registration Depository (the "CRD addresses").² The Respondent did not file an Answer.³

¹ The factual findings in this Default Decision are based on the attached Complaint, the factual allegations of which are deemed admitted pursuant to Procedural Rule 9215(f), and on the Declaration and exhibits Enforcement filed with the Motion.

² Decl. ¶¶ 8, 9; Ex. 2 at 2.

³ Decl. ¶ 9.

On April 17, 2006, Enforcement served the Respondent with copies of the Complaint and Second Notice of the Complaint at his CRD addresses.⁴ The Respondent did not file an Answer.⁵

The Hearing Officer finds that Enforcement properly served the Respondent with the Notice and Second Notice of Complaint in accordance with Rule 9134(b)(1) and that the Respondent thereby received valid constructive notice of this proceeding. Thus, the Respondent defaulted by failing to file an Answer or otherwise respond to the Complaint.⁶

III. JURISDICTION

The Respondent was associated with various NASD members from June 1983 until July 1985, and again from November 1990 until March 1992.⁷ Most recently, the Respondent was associated with Synergy from July 2001 until December 2004.⁸ The Respondent has not been registered with NASD since December 8, 2004.⁹

Although the Respondent is no longer registered with NASD, he nonetheless remains subject to NASD jurisdiction for purposes of this proceeding pursuant to Article V, Section 4 of NASD's By-Laws because: (1) the Complaint was filed within two years after the termination of his registration; and (2) the Complaint charges him with misconduct while he was associated with Synergy and registered with NASD as a General Securities Representative and with failing to respond to requests for information during the two-year period.

⁴ *Id.* ¶ 8.

⁵ *Id.* ¶ 10.

⁶ *See, e.g., Department of Enforcement v. Paul Zdzieblowski*, No. C8A030062, 2005 NASD Discip. LEXIS 3, at *8-9 (N.A.C. May 3, 2005).

⁷ Compl. ¶ 1.

⁸ Compl. ¶ 1; Decl. ¶ 5.

⁹ Compl. ¶ 1; Ex. 1.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Synergy, a broker-dealer located in Kannapolis, NC, offered its brokers both a traditional and an electronic business model.¹⁰ Brokers who elected the traditional model received customary brokerage commissions and worked out of the firm's offices. Typically, such brokers would provide investment advice and solicit transactions. On the other hand, those who elected the electronic model received a flat fee of between \$25 and \$50 per trade. Their business constituted self-directed and day-trading accounts, and the brokers who elected this business model usually worked from their homes. Synergy prohibited the brokers who elected the electronic model from recommending or soliciting trades.¹¹

Synergy expected that all electronic business either would be entered directly by customers from their own computers or by Synergy's brokers from their computers upon receipt of an unsolicited order. Synergy provided separate electronic platforms and different passwords for customers and brokers. However, Synergy's system did not provide safeguards to detect if a broker placed trades posing as a customer.¹²

When Leyshon joined Synergy, he elected to do business using the electronic model. Accordingly, Synergy permitted him to work from his home with minimal direct supervision. Synergy did not permit Leyshon to make any recommendations to his customers.¹³ Nonetheless, Leyshon did just that in connection with BJB's account. In addition, Leyshon enrolled BJB's account for on-line access without her knowledge and then used that account to effect unauthorized and unsuitable trades.¹⁴

¹⁰ Synergy used different clearing firms for each type of business.

¹¹ Decl. ¶ 12.

¹² *Id.* In addition, the firm provided password information to customers through their brokers. Thus, the brokers had access to their customers' passwords.

¹³ Decl. ¶ 13.

¹⁴ Compl. ¶¶ 5, 20.

In February 2002, BJB opened a securities account at Synergy with an initial deposit of \$90,000.¹⁵ This account comprised 75% of her total retirement assets.¹⁶ Leyshon was BJB's broker on the account.

According to the new account documentation, when BJB opened the Synergy account, she was 56 years old, married, and the owner of a beauty shop. Her 2001 federal tax return showed that her annual income was approximately \$13,000 and that her husband's was approximately \$47,000.¹⁷ The new account form for BJB's account listed her liquid net worth as \$30,000 and stated that her investment objectives were income, long-term growth with safety, and long-term growth with greater risk.¹⁸ The account was opened as a margin account and was approved for limited options trading.¹⁹ The account documentation stated that BJB was not approved to day trade.²⁰ BJB lacked significant investment experience.

A. Leyshon Violated NASD Conduct Rules 2310 and 2110 by Making Unsuitable Recommendations and Unauthorized Trades in BJB's Account (First and Third Causes)

The first and third causes of the Complaint charge that, for the 15 months between May 2002 and August 2003, Leyshon recommended unsuitable transactions to BJB and executed unauthorized trades in her account, in violation of NASD Conduct Rules 2110 and 2310.²¹

The supporting papers submitted by Enforcement establish that there were 20 transactions in March and April 2002, which BJB authorized based on Leyshon's

¹⁵ Ex. 5 (BJB Aff.); Decl. ¶ 15.

¹⁶ Compl. ¶ 4; Decl. ¶ 15. She also had a small IRA account.

¹⁷ Compl. ¶ 3; Decl. 14.

¹⁸ Compl. ¶ 3.

¹⁹ The new account form states that she had no options experience; hence, the account was limited to covered option contracts. Decl. ¶ 14.

²⁰ Compl. ¶¶ 3, 7; Decl. ¶ 14.

²¹ Conduct Rule 2110 requires observation of "high standards of commercial honor and just and equitable principles of trade," and Conduct Rule 2310 requires members to have reasonable grounds for believing that a recommendation is suitable for customers based on their financial situation and needs. Procedural Rule 115(a) imposes on associated persons all duties and obligations of members.

recommendations.²² Then, in May 2002, Leyshon made 33 trades in her account, most of which were unauthorized.²³ When BJB received her account statement reflecting this activity, she complained to Leyshon, who agreed not to make any further trades without first notifying BJB.²⁴ BJB believed that Leyshon would adhere to her instructions, but he did not.

Despite BJB's complaint, between May 1, 2002, and July 31, 2003, Leyshon made more than 1,000 trades in BJB's account.²⁵ Most of the activity was "in-and-out"²⁶ trading and short selling. In addition, there were a few options trades. During the same period, Leyshon traded many of the same securities in his personal account. Between May 1, 2002, and July 31, 2003, the value of BJB's account decreased from \$82,296 to \$35,213.²⁷ Commission charges for the same period were \$43,740.²⁸ The total value of the purchases Leyshon made in the account was \$16,242,144, and he turned the account over approximately 307 times in 15 months, which equates to an annual turnover rate of 246.²⁹

Leyshon initiated all of the trades in BJB's account.³⁰ He was able to make those trades without BJB's knowledge because Synergy gave Leyshon the on-line access password when he opened her account. In addition, Leyshon set up the account with his own email address as the "contact address." Leyshon never gave BJB the password for the account.³¹

²² Decl. ¶ 15.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* ¶ 19.

²⁶ "The term 'in-and-out' trading denotes the sale of all or part of a customer's portfolio, with the money reinvested in other securities, followed by the sale of the newly acquired securities." *Costello v. Oppenheimer & Co., Inc.*, 711 F.2d 1361, 1369 n.9 (7th Cir. 1983).

²⁷ *Id.*

²⁸ *Id.* ¶ 20. Ninety percent of the losses in the account were attributable to commissions and expenses.

²⁹ Decl. ¶ 22.

³⁰ *Id.* ¶ 23.

³¹ *Id.*; Compl. 19.

Between May 1, 2002, and July 31, 2003, BJB repeatedly attempted to contact Leyshon to halt the unauthorized trading in her account, but she could not reach him. Finally, in August 2003, she complained to Synergy, and the firm froze the account.³²

The Hearing Officer finds that Leyshon's recommendations were unsuitable for BJB's account based on the account's turnover rate, the short-term nature of the trading, and the cost-to-equity ratio. Moreover, as discussed below, the Hearing Officer concludes that Leyshon violated Conduct Rules 2110 and 2310.

NASD Conduct Rule 2310(a) requires that, in recommending the purchase or sale of a security, an associated person must have a reasonable basis for believing that the recommendation is suitable for the customer, based on the facts disclosed by the customer as to her other security holdings and her financial situation and needs. Rule 2310(b) requires that an associated person "make reasonable efforts to obtain information concerning: (1) the customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such ... registered representative in making recommendations to the customer." Moreover, an associated person's recommendations must be consistent with his customer's best interests.³³

Conduct Rule 2310 can be violated in a number of ways.³⁴ Most often, the Rule is violated based on the quality of the recommended transactions when compared to the customer's financial situation and needs. However, the Rule also can be violated if a representative's recommendations are quantitatively unsuitable, *i.e.*, the representative excessively trades the account.³⁵ "In either case, a representative may make only such recommendations—or effect

³² Decl. ¶ 18.

³³ *Wendell D. Belden*, Exchange Act Release No. 47,859, 2003 SEC LEXIS 1154, at *11 (May 14, 2003).

³⁴ See, e.g., *Department of Enforcement v. Daniel Richard Howard*, No. C11970032, 2000 NASD Discip. LEXIS 16, at *15 (N.A.C. Nov. 16, 2000), *aff'd* Exchange Act Release No. 46,269, 2002 SEC LEXIS 1909 (July 26, 2002), *Howard v. S.E.C.*, No. 02-1939, 2003 U.S. App. LEXIS 19454 (1st. Cir. Sept. 19, 2003).

³⁵ *Id.* at *16. See also *Paul C. Kettler*, 51 S.E.C. 30, 32 (1992) ("Excessive trading represents an unsuitable frequency of trading and violates NASD suitability standards.").

such transactions in cases where the representative controls the account—as would be consistent with the customer’s financial situation and needs.”³⁶

Here, the evidence establishes that Leyshon recommended and executed an excessive number of trades in BJB’s account between May 2002 and July 2003. Enforcement calculated the cost-to-equity ratio for the applicable period to be 93%, or an annualized rate of 75%.³⁷ The cost-to-equity ratio measures the amount of income that an account would have to generate in order merely to break even. Thus, in this case, BJB would have had to earn a 75% return in the account to break even. A cost-to-equity ratio of 20% generally has been found to indicate that excessive trading has occurred.³⁸ Accordingly, the Hearing Officer finds that the cost-to-equity ratio in BJB’s account indicates that Leyshon engaged in excessive trading.

In addition, the short holding periods that Leyshon employed for many of the securities that he purchased indicates that he engaged in excessive trading. Leyshon engaged in a pattern of in-and-out trading, often not holding a security overnight. This type of trading is very difficult to justify.³⁹ Here, the evidence shows that the Respondent engaged in this pattern of trading for his own benefit.

Leyshon’s recommendations also were unsuitable due to the frequency of trades caused by the short holding periods. “[E]xcessive trading occurs when a registered representative has control over trading in an account and the level of activity in that account is inconsistent with the customer’s objectives and financial situation.”⁴⁰ Without question, the extremely high turnover rate in this case supports the finding that Leyshon engaged in unsuitably excessive trading.⁴¹ In

³⁶ *Department of Enforcement v. O’Hare*, No. C9B030045, 2005 NASD Discip. LEXIS 39, at *12 (Apr. 21, 2005) (citation omitted). As discussed below at Part IV.B.1), Leyshon exercised *de facto* control of the account.

³⁷ Decl. ¶ 22.

³⁸ See, e.g., *Daniel Richard Howard*, 2002 SEC LEXIS 1909, at *8.

³⁹ See *Harry Gliksman*, Exchange Act Release No. 42,255, 1999 SEC LEXIS 2685, at *12 (finding that “in-and-out” trading indicates excessiveness).

⁴⁰ *Department of Enforcement v. O’Hare*, 2005 NASD Discip. LEXIS 39, at *15 (citation omitted).

⁴¹ *Daniel Richard Howard*, Exchange Act Release No. 46,269, 2002 SEC LEXIS 1909, at *8 (July 26, 2002) (a turnover rate of six generally indicates that excessive trading has occurred).

addition, the evidence shows that Leyshon controlled BJB's account. Many trades were unauthorized, and he simultaneously effected identical trades in his own account.⁴² The reasonable inference is that Leyshon directed these trades, not that he was following BJB's decisions.

Based on the foregoing, the Hearing Officer concludes that Leyshon excessively traded BJB's account in violation of Conduct Rules 2110 and 2310. In addition, the Hearing Officer finds that Leyshon effected unauthorized trades in BJB's account, in violation of Conduct Rule 2110. Synergy provided Leyshon with a password for BJB's on line account, which Leyshon was supposed to give to BJB, but he never did.⁴³ Indeed, Leyshon never informed BJB of its existence. Instead, he used the password himself in order to effect transactions without BJB's consent.⁴⁴

B. Leyshon Violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2020 and 2110 by Churning BJB's Account (Second Cause)

The second cause of the Complaint charges that Leyshon churned BJB's account and thereby violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Conduct Rule 2120, which prohibit fraudulent and deceptive practices in connection with the offer, purchase, or sale of a security.⁴⁵ In addition, the Complaint charges that Leyshon violated Conduct Rule 2110.

Churning occurs when a securities broker buys and sells securities for a customer's account for the purpose of generating commissions and in disregard of the customer's interests.⁴⁶ Three elements are necessary to find churning: (1) control of the trading in the account by the

⁴² Decl. ¶ 23.

⁴³ Compl. ¶ 19.

⁴⁴ *Id.*

⁴⁵ *Alvin W. Gebhart*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *59 (Jan. 18, 2006). *See also Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

⁴⁶ *See, e.g., Michael T. Studer*, Exchange Act Release No. 50543A, 2004 SEC LEXIS 2828, at *17 (Nov. 30, 2004).

broker; (2); trading in the account that is excessive in the light of the customer's investment objectives; and (3) scienter, which is established through evidence that the broker acted with intent to defraud or with reckless disregard for the customer's interests.⁴⁷ Here, the evidence establishes that Leyshon's handling of BJB's account satisfies these criteria.

1) Control

Control is established if the account is discretionary,⁴⁸ or if the broker exercises *de facto* control of the account. *De facto* control of an account may be shown when the client does not understand the trading activity in his account,⁴⁹ or "habitually follows the advice of the broker."⁵⁰ Here, Leyshon effected approximately 80% of the transactions without BJB's authorization.⁵¹ And, BJB regularly followed Leyshon's recommendations for the transactions she did authorize.⁵² These facts establish that Leyshon controlled the trading in BJB's account.

2) Excessive Trading

The second step after showing control of the account is to determine whether the trading activity was in fact excessive. Although there is no single test for making this determination, there are a number of factors, such as the turnover ratio, the cost-to-equity ratio, the use of in-and-out trading, and the number and frequency of trades in an account, that may provide a basis for a finding of excessive trading.⁵³ Generally, excessive trading is indicated by a turnover rate in excess of six,⁵⁴ or a cost-to-equity ratio in excess of 20%.⁵⁵ In addition, in-and-out trading by

⁴⁷ *Id.*

⁴⁸ *Peter C. Buccheiri*, Exchange Act Release No. 37218, 1996 SEC LEXIS 1331 (May 14, 1996).

⁴⁹ *District Bus. Conduct Comm. v. Gliksman*, No. C02960039, 1999 NASD Discip. LEXIS 12, at *24 (N.A.C. Mar. 31, 1999).

⁵⁰ *J. Stephen Stout*, Exchange Act Release No. 43410, 2000 SEC LEXIS 2119, at *75 (Oct. 4, 2000).

⁵¹ Compl. ¶ 11.

⁵² *Id.*

⁵³ *Gliksman*, 1999 NASD Discip. LEXIS 12, at *25.

⁵⁴ *David Wong*, Exchange Act Release No. 45,426, 2002 SEC LEXIS 339, at *14, n.18 (Feb. 8, 2002). *Bucchieri*, 1996 SEC LEXIS 1331, at *11, n.11, citing *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 821 (9th Cir. 1980). The turnover rate is calculated using the "Looper Formula," named for *Looper & Co.*, 38 SEC 294 (1958), which divides the total cost of purchases made during a given period by the average monthly investment. In accounts that

itself can provide a basis for finding excessive trading.⁵⁶ Here, the evidence conclusively shows that Leyshon engaged in excessive trading in BJB's account.

3) Scienter

In order to find a violation of Section 10(b) of the Exchange Act,⁵⁷ Exchange Act Rule 10b-5, and NASD Conduct Rule 2120,⁵⁸ there must be a showing that the respondent, with scienter.⁵⁹ Scienter is established by a showing that the respondent acted intentionally or with severe recklessness.⁶⁰ Here, Leyshon intentionally effected and recommended excessive trading in BJB's account, in complete disregard for her interests. Thus, the Hearing Officer finds that Leyshon acted with scienter.

In summary, the Hearing Officer finds that Leyshon churned BJB's account in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110. The level of trading activity in BJB's account was excessive and at odds with her financial situation, needs, and objectives. The high turnover rate and the cost-to-equity ratio support this conclusion.

primarily hold securities rather than cash, a modified Looper formula is used, which divides the total cost of purchases by the average monthly equity. See *Department of Enforcement v. Stein*, No. C07000003, 2001 NASD Discip. LEXIS 38, at *16, n.15 (N.A.C. Dec. 3, 2001), citing *Allen George Dartt*, 48 SEC 693 (1987).

⁵⁵ See, e.g., *Rafael Pinchas*, Exchange Act Release No. 41816, 1999 SEC LEXIS 1754, at *18 (Sept. 1, 1999).

⁵⁶ *Id.* at *15 (holding that in-and-out trading is a practice extremely difficult for a broker to justify).

⁵⁷ Section 10(b) of the Exchange Act provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors."

⁵⁸ Rule 2120 provides that "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

⁵⁹ *Aaron v. SEC*, 446 U.S. 680, 686-87 n.5 (1980); *Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

⁶⁰ *The Rockies Fund, Inc. v. SEC*, No. 04-1255 (D.C. Cir. Nov. 15, 2005), 2005 U.S. App. LEXIS 24521, at *12 (citing *Steadman v. SEC*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977))). Proof of scienter is not required to establish a violation of Conduct Rule 2110.

C. Leyshon Submitted False Records to Synergy (Fourth and Fifth Causes)

The fourth and fifth causes of the Complaint allege that the Respondent submitted forged documents to Synergy, in violation of Conduct Rule 2110, and that he thereby caused Synergy's records to be inaccurate, in violation of Conduct Rules 3110 and 2110.

According to the Complaint, in June 2003, Synergy requested that the Respondent obtain BJB's signature on three documents its clearing firm needed because BJB's account was classified as a day trading account.⁶¹ The Respondent did not obtain BJB's signature on the documents. Nevertheless, in July 2003, Leyshon submitted the three documents to Synergy. Each bore BJB's forged signature.⁶² Following BJB's complaint about Leyshon's unauthorized trading in her account, the firm questioned Leyshon about the documents. Leyshon represented that the signatures were genuine even though BJB said she had never seen the documents. Although Leyshon told the firm he would provide proof that BJB had signed the documents, he never did.⁶³

The Hearing Officer finds that the allegations in the Complaint are sufficient to establish that Leyshon intentionally submitted false customer records to Synergy, which resulted in Synergy maintaining inaccurate records, in violation of NASD Conduct Rule 3110(a) and Exchange Act Rules 17a-3 and 17a-4. Accordingly, the Hearing Officer finds that Leyshon violated NASD Conduct Rules 2110 and 3110.

D. Failure to Provide Information (Sixth Cause)

The sixth cause of this Complaint alleges that between November 19, 2004, and February 24, 2005, pursuant to NASD Procedural Rule 8210, NASD staff sent four written requests for information to the Respondent.⁶⁴ The first two requested information regarding the first three causes of the Complaint.⁶⁵ The latter two requested information regarding another customer

⁶¹ Compl. ¶ 23.

⁶² Decl. ¶ 24.

⁶³ *Id.*

⁶⁴ *Id.* at 32.

⁶⁵ *Id.*

complaint.⁶⁶ The staff sent each letter to the Respondent's CRD addresses by certified and first-class mail.⁶⁷ Nevertheless, the Respondent did not respond to any of the requests.

The Hearing Officer finds these allegations sufficient to establish that the Respondent failed to respond to the staff's requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.⁶⁸

V. SANCTIONS

The NASD Sanction Guidelines ("Guidelines") recommend a fine of \$2,500 to \$75,000 and a bar for egregious cases of unsuitable recommendations, in violation of Conduct Rules 2110 and 2310.⁶⁹ For excessive trading and violation of NASD Conduct Rule 2110, the Guidelines recommend a fine of \$5,000 to \$75,000, a 10-day suspension, or in egregious cases a bar.⁷⁰ Enforcement seeks a bar for the Respondent's unsuitable recommendations and churning. The Hearing Officer agrees that the Respondent's misconduct in this case was egregious. Leyshon intentionally engaged in fraudulent conduct for his own benefit. The cumulative purchases in BJB's account totaled more than \$16 million, and the account had a turnover rate of approximately 246. Accordingly, Leyshon will be barred for making unsuitable recommendations, in violation of NASD Conduct Rules 2110 and 2310, and for churning, in violation of Section 10b of the Exchange Act, Exchange Rule 10b-5, and NASD Conduct Rules 2120 and 2110.

The NASD Sanction Guidelines recommend a fine of \$5,000 to \$75,000, along with a suspension in any or all capacities for a period of ten business days to one year, when an associated person engages in an unauthorized transaction in a customer's account, in violation of

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See, e.g., *Department of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (N.A.C. May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004).

⁶⁹ NASD Sanction Guidelines 99 (2006 ed.).

⁷⁰ *Id.* at 82.

NASD Conduct Rule 2110.⁷¹ The relevant considerations in determining the appropriate sanction within the recommended range are whether the respondent misunderstood his authority or the terms of the customer's orders, or whether the conduct was egregious.⁷² In egregious cases, the Guidelines recommend consideration of a suspension of up to two years or a bar.⁷³

The Respondent's conduct was egregious judged by the number of transactions he effected in BJB's account.⁷⁴ In addition, Leyshon's conduct was "qualitatively egregious."⁷⁵ Two factors have been used to determine when conduct is qualitatively egregious: (1) "the strength of the evidence that the trades at issue were unauthorized;" and (2) "the evidence relating to the respondent's motives."⁷⁶ Qualitatively egregious conduct is usually found when the respondent is driven by a desire to make money for himself.⁷⁷ Here also, the allegations support a finding that Leyshon's conduct was egregious. He effected more than 1000 transactions in BJB's account, most of which were unauthorized. In addition, he concealed his activity by enabling on-line access to her account without her knowledge. His motive was his own financial gain. The Hearing Officer agrees with Enforcement that the conduct is deserving of a bar. There are no mitigating factors in the Respondent's favor. Accordingly, the Respondent will be barred for unauthorized transactions, in violation of NASD Conduct Rule 2110.

For falsification of records, in violation of NASD Conduct Rule 2110, the Guidelines recommend a fine of \$5,000 to \$100,000 and a suspension of up to two years. In egregious cases, a bar should be considered.⁷⁸ The principle considerations for determining sanctions for this

⁷¹ *Guidelines* at 103.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See District Bus. Conduct Comm. v. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22, at *15-18 (N.A.C. June 15, 1999).

⁷⁵ *Id.* at *17.

⁷⁶ *Id.* at *18.

⁷⁷ *Id.*

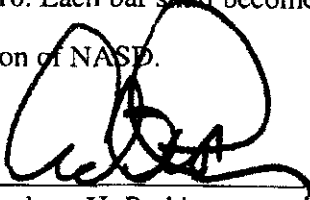
⁷⁸ *Guidelines* at 39.

violation are the nature of the documents forged or falsified and whether respondent had a good faith, but mistaken, belief of express or implied authority.⁷⁹ Here, Leyshon knowingly submitted three false documents to Synergy to permit him to continue day trading in BJB's account. Accordingly, the Respondent also will be barred for falsification of records, in violation of NASD Conduct Rules 2110 and 3110.

Finally, when a respondent fails to respond in any manner to a request made pursuant to Procedural Rule 8210, the Guidelines recommend a bar as the standard sanction.⁸⁰ Here, the Respondent failed to respond to four written requests for information. There are no mitigating factors that would justify a lesser sanction than a bar. Accordingly, the Hearing Officer will bar Leyshon from associating with any NASD member firm in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

VI. ORDER

David J. Leyshon is barred from association with any member firm in any capacity for: (1) making unsuitable recommendations, in violation of NASD Conduct Rules 2110 and 2310; (2) churning, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110; (3) effecting unauthorized transactions, in violation of NASD Conduct Rule 2110; (4) submitting false customer records, in violation of NASD Conduct Rule 2110; (5) causing Synergy to maintain inaccurate records, in violation of NASD Conduct Rules 3110 and 2110; and (6) failing to respond to written requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Each bar shall become effective once this Default Decision becomes the final disciplinary action of NASD.



Andrew H. Perkins
Hearing Officer

⁷⁹ *Id.*

⁸⁰ *Id.* at 35.

Copies to:

David J. Leyshon (by FedEx, overnight delivery, and first-class mail)
Jacqueline D. Whelan, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)
Mark P. Dauer, Esq. (by first-class and electronic mail)

**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

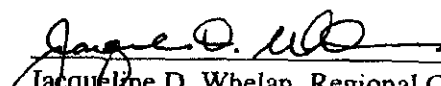
WHEREFORE, Complainant respectfully requests:

- 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 – 17th 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 17th Street, Suite 2900
Denver, CO 80202
(303) 446-3114; Fax No. (303) 620-9540