

# Re Leede & Bergen

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory  
Organization of Canada (IIROC)**

**and**

**Brian Douglas Bergen**

**and**

**Leede Financial Markets Inc.**

2015 IIROC 37

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Alberta District)

Heard: August 24, 2015

Decision: August 24, 2015

Reasons: October 28, 2015

**Hearing Panel:**

Stephen D. Gill (Chair); Kathleen Jost and Bill Welton

**Appearances:**

David McLellan for IIROC.

Matthew Epp for Bergen and Leede (the “Respondents”).

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## REASONS FOR DECISION (SETTLEMENT AGREEMENT HEARING)

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¶ 1 This Panel was convened in respect of a Settlement Agreement negotiated by IIROC Enforcement staff with Brian Douglas Bergen (“Bergen”) and Leede Financial Markets Inc. (“Leede”). The Panel heard submissions from David McLellan, Senior Enforcement Counsel with IIROC, and from Matthew Epp, Counsel for the Respondents. The procedures with respect to settlement hearings are set forth in IIROC Rules 20.36 to 20.40. According to Rule 20.36, upon conclusion of the settlement hearing, the Hearing Panel may either accept the Settlement Agreement, or reject the Settlement Agreement. Upon acceptance, the Settlement Agreement shall become effective and binding, and the Respondents shall be deemed to have been penalized pursuant to Rule 20.33 or Rule 20.34.

¶ 2 At the conclusion of the settlement hearing, the Panel accepted the Settlement Agreement and indicated that we would provide the Reasons for our decision in due course. These are those Reasons. A copy of the Settlement Agreement is attached as Appendix “A” to these Reasons.

¶ 3 Staff and the Respondents jointly recommend that the Hearing Panel accept the Settlement Agreement.

¶ 4 In the Settlement Agreement, the Respondents admit the following contraventions of IIROC Dealer Member Rules:

**Bergen**

- (a) Between approximately December 2008 and May 2012, while the Branch Manager at Leede Financial Markets Inc., he failed as the Tier 1 Supervisor to properly supervise registered representative Grant Patrick Matthews (“Matthews”) contrary to IIROC Dealer Member Rules 38.4(a) and 2500.
- (b) Bergen failed to report a client complaint which client LZ forwarded to him on July 29, 2010 that had previously been sent to Mathews on July 5, 2010. This is contrary to Dealer Member Rules 3100(1) and 29.1.

**Leede Financial Markets Inc.**

- (a) Between approximately December 2008 and May 2012, Leede, through the action of its designated Tier 2 Compliance Officer, failed to properly supervise registered representative Matthews, contrary to IIROC Dealer Member Rules 38.1, 38.4, 1300.2 and 2500.

¶ 5 In the Settlement Agreement, Staff and the Respondents agreed to the following terms of settlement:

**Brian Bergen**

- A. Payment of a fine to IIROC in the sum of fifty thousand dollars (\$50,000.00);
- B. Prohibition from acting in a supervisory capacity for one year;
- C. Successful re-write of the Branch Manager’s Course, in the event of a return to a supervisory role; and
- D. Payment of costs to IIROC in the sum of two thousand five hundred dollars (\$2,500.00).

**Leede Financial Markets Inc.**

- A. Payment of a fine to IIROC in the sum of ninety thousand dollars (\$90,000.00); and
- B. Payment of costs to IIROC in the sum of ten thousand dollars (\$10,000.00).

**DUTY OF A HEARING PANEL UPON A SETTLEMENT HEARING**

¶ 6 The obligation upon a Hearing Panel considering a settlement agreement is well known and the authorities are not in dispute. In *Re Deutsche Bank Securities Ltd.*<sup>1</sup> the Panel stated:

“9 It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry. We cite from the recent decision of the Hearing Panel in *Re CIBC World Markets Inc.*, [2011] IIROC No. 38:

13 Finally, hearings panels will not lightly interfere with a negotiated settlement. As was said in *Re Milewski*, [1999] IDACD No. 17,

...a District Counsel considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

14 Or, as put by Winkler, J. (albeit in another context) in *Gilbert v. CIBC*, [2004] O.J. 4260:

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<sup>1</sup> 2013 IIROC 7

There is a presumption of fairness when a proposed class settlement negotiated at arms length...is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable...This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.”

¶ 7 In *Re Clark*<sup>2</sup>, the Panel stated:

“It was submitted by staff and accepted by the panel that its role under By-law 20.26 is not the same as its role under By-law 20.10 following a hearing. In considering a settlement under By-law 20.26 the panel should not simply substitute its discretion for that of staff who negotiated the settlement. The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. In our view, as a result, panels must also be careful in using previous settlements as precedent. The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a hearing where similar findings are made.”

¶ 8 At the Hearing on August 24, 2015, the Panel received the joint submissions of Counsel for IIROC, and for the Respondents, Bergen and Leede Financial Markets Inc. IIROC Counsel took the Panel through the background to the Settlement Agreement, and also reviewed the facts and circumstances, including the appropriateness of the penalties set forth in the Settlement Agreement. Mr. Epp, Counsel for the Respondents, stated that he agreed fully with the submissions of Counsel for IIROC, and submitted that the Settlement Agreement reflected significant negotiations between the parties, and should be accepted by the Panel.

¶ 9 The Registered Representative that was involved with the four clients was Matthews. As can be seen from the facts in the Settlement Agreement, Matthews employed an aggressive trading strategy with respect to four clients (EF, LZ, JS and DS) which resulted in suitability, discretionary trading and excessive trading (churning) violations. The clients were all retired or approaching retirement, and sustained losses in their accounts ranging from 8% to 28%.

¶ 10 The panel notes that while there were errors and omissions the above three violations are evident enough to warrant the penalties. Bergen’s duties, as Branch Manager, included the review and approval of new client application forms (NCAFs) and client account updates, as well as the review of Tier 1 daily and monthly trading summary reports.

¶ 11 The Tier 2 CO’s supervision duties essentially duplicated those of the Branch Manager, with the exception of NCAF approvals which were the Branch Manager’s responsibility.

¶ 12 As can be seen from the agreed facts, through Matthews’ own research, investment ideas and trading activity, he pursued an aggressive trading strategy which involved a high degree of risk. The recommendations Matthews made were not suitable for the clients in light of their age, employment status, investment knowledge and experience.

¶ 13 Between January 2009 and April 2011, Matthews executed 593 trades in the accounts of JS-DS. During this time period, the trades in their accounts had a total purchase value in excess of \$6,000,000.00, while the average value of assets in the clients’ accounts totalled approximately \$177,000.00. During this time period the value of their holdings decreased by over \$78,000.00 reflecting a loss of over 28%. The S&P TSX Index

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<sup>2</sup> [1999] I.D.A.C.D. No. 40

increased by 60% during the same time period.

¶ 14 Although the JS-DS accounts comprised only 4% of the total assets managed by Matthews, the commissions charged to these clients comprised between 37% and 56% of his total gross commissions, depending on the time frame. Matthews knowingly executed an excessive number of trades in order to increase commissions without conferring a tangible net benefit to the clients.

¶ 15 The supervisory failures of Bergen (Tier 1) and Leede (Tier 2) are set forth in paragraphs 93 to 99 of the Settlement Agreement. Notwithstanding numerous red flags with respect to the clients' accounts, Bergen as Branch Manager, and the Tier 2 CO failed to take any action to investigate.

¶ 16 In respect of the numerous red flags that were present, the Respondents failed to effectively perform their respective supervisory responsibilities. There is no written record of a single query by Bergen or by the Tier 2 CO with respect to any of the clients.

¶ 17 As Branch Manager, Bergen failed to report a client complaint that client LZ had made to Matthews, and later sent to Bergen. Bergen did not ensure that the client complaint was reported to IIROC, contrary to Rule 3100(1). Instead he took over the client (from Matthews) as his own client, and pursued a more conservative investment strategy.

¶ 18 It is acknowledged that Bergen has not been the subject of any prior disciplinary proceedings.

¶ 19 In his submissions, Counsel for IIROC reviewed the IIROC Sanction Guidelines (February 2, 2015) and all the "key factors" in determining sanctions, as they related to the facts of this case. Sanction Principle No. 1 is particularly apt in this case: "Disciplinary sanctions are preventative in nature and should be designed to protect the investing public, strengthen market integrity and improve overall business standards and practices".

¶ 20 There are mitigating factors present in this case, and they are set out in paragraphs 105 to 107 of the Settlement Agreement.

¶ 21 Counsel referred the Panel to a number of cases; in *Re Milewski*, [1999] IDACD No. 17, the Panel stated:

"...Although a settlement agreement must be accepted by a District Counsel before it can become effective, the standards for acceptance are not identical to those applied by a District Counsel when making a penalty determination after a contested hearing. In a contested hearing the District Counsel attempts to determine the correct penalty. District Counsel considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Counsel will reflect the public interest benefits of the settlement process in its consideration of specific settlements." (Page 14)

¶ 22 Counsel referred the Panel to the case of *Re Lang*, [2013 IIROC 37]. This was a case involving a settlement agreement. In that case, the Respondent, as branch manager, failed to adequately supervise an RR and the sanctions were a fine of thirty-five thousand dollars (\$35,000.00); a suspension in any supervisory capacity for a period of two (2) years; and costs of two thousand dollars (\$2,000.00).

¶ 23 Counsel referred the Panel to the case of *Re Burnet*, [2013 IIROC 34], another case where a Panel accepted a settlement agreement. In that case, the Respondent admitted that in a period of five (5) years he did not use due diligence and failed to handle supervision duties adequately relative to two RRs. The Respondent had delegated his supervisory responsibilities to a credit compliance officer which he was permitted to do, but failed to ensure that the tasks thus delegated were performed adequately. The penalty was a fine of forty thousand dollars (\$40,000.00); a three (3) year prohibition from approval as a supervisor; required to successfully complete the branch managers course before applying for re-approval as a supervisor; and costs of

five thousand dollars (\$5,000.00).

¶ 24 Counsel referred the Panel to the cases of *Re MacDonald*, [2012 IIROC 68], *Re Floyd*, [2013 IIROC 27], *Re Donnelly*, [2010 IIROC 32] and *Re Youden* [2005 IDACD 52] being further examples of cases where a branch manager had failed to adequately supervise the trading activity of RRs. In each case there was a significant fine and an award of costs.

¶ 25 In our view this case has important mitigating factors. As set forth in the Settlement Agreement, Bergen has not previously been subject to disciplinary sanction, and he cooperated with IIROC staff during the investigation. By the Settlement Agreement he has admitted his wrong doing, and that also is a mitigating factor.

¶ 26 Having carefully considered the submissions of counsel, the authorities, and the facts and circumstances (regardless of obvious errors and omissions in the accounting thereof) and penalties set forth in the Settlement Agreement, this Panel concluded that the Settlement Agreement, and particularly the penalty agreed upon by the parties, were within a reasonable range of appropriateness, and for that reason we accepted the Settlement Agreement.

¶ 27 These Reasons made and signed in counterpart.

Stephen D. Gill

**Panel Chair**

Kathleen Jost

**Panel Member**

Bill Welton

**Panel Member**

## SETTLEMENT AGREEMENT

### I. INTRODUCTION

1. IIROC Enforcement Staff (“Staff”) and the Respondents, Brian Douglas Bergen and Leede Financial Markets Inc., consent and agree to the settlement of this matter by way of this agreement (the “Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) into the conduct of Brian Douglas Bergen and Leede Financial Markets Inc.
3. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (the “Hearing Panel”).

### II. JOINT SETTLEMENT RECOMMENDATION

4. Staff and the Respondents jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondents admit to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

#### *Bergen*

1. Between approximately December, 2008 and May, 2012, while the Branch Manager at Leede Financial Markets Inc., he failed to properly supervise Registered Representative Grant Patrick Matthews, contrary to IIROC Rules 38.4 (a) and 2500;
2. Between approximately July and August, 2010, he failed to report a client complaint with respect to client LZ, contrary to IIROC Rules 3100(I) and 29.1;

***Leede Financial Markets Inc.***

1. Between approximately December, 2008 and May, 2012, Leede, through the actions of its designated Tier 2 compliance officer, failed to properly supervise Registered Representative Grant Patrick Matthews, contrary to IIROC Rules 38.1, 38.4, 1300.2 and 2500.
6. Staff and the Respondents agree to the following terms of settlement:

**Brian Bergen**

- a. pay a fine to IIROC in the sum of fifty thousand dollars (\$50,000.00);
- b. prohibition from acting in a supervisory capacity for one year;
- c. successful rewrite of the Branch Manager's Course, in the event of a return to a supervisory role; and
- d. pay costs to IIROC in the sum of two thousand five hundred dollars (\$2,500.00).

**Leede Financial Markets Inc.**

- a. pay a fine to IIROC in the sum of ninety thousand dollars (\$90,000.00); and
- b. pay costs to IIROC in the sum of ten thousand dollars (\$10,000.00).

**III. STATEMENT OF FACTS**

**(i) Acknowledgment**

7. Staff and the Respondents agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

**(ii) Factual Background**

8. At all material times, the Respondent Bergen was the Branch Manager and Tier 1 supervisor with the Respondent, Leede Financial Markets Inc. ("Leede"), a duly registered member firm, in Calgary.
9. From approximately December 2008 to May 2012 ("Relevant Period"), Tier 1 and Tier 2 supervisors failed to properly supervise Registered Representative ("RR") Grant Patrick Matthews ("Matthews"). Matthews employed an aggressive trading strategy with respect to four clients – EF, LZ, JS and DS ("Clients") – and resulted in suitability, discretionary trading and excessive trading (churning) violations.
10. The Clients were all retired or approaching retirement, and sustained losses in their accounts ranging from 8% to 28%.

**Matthews – Disciplinary Contraventions**

11. Following a September, 2014 disciplinary hearing, an IIROC Hearing Panel found that Matthews contravened IIROC Rules when he:
  - a) Engaged in discretionary trading (clients EF, DS);
  - b) Recommended unsuitable investments (clients EF, LZ, JS, DS); and
  - c) Engaged in excessive trading (churning) (clients LZ, JS, DS).

**Background**

12. Matthews was employed as a RR with Leede from 1999 until October, 2014. At all material times, Matthews was supervised by Tier 1 and Tier 2 supervisors.
13. Tier 1 supervision was performed by Bergen, the Branch Manager, who was Matthews' direct supervisor. Leede also employed an onsite Compliance Officer ("CO") to conduct Tier 2 supervision.
14. As Branch Manager, Bergen's duties included the review and approval of new client application forms

(NCAF's) and client account updates, as well as the review of daily and monthly trading summary reports.

15. With the exception of NCAF approvals (which were Bergen's responsibility), the Tier 2 CO's supervision duties essentially duplicated those of the Branch Manager – the review of daily and monthly commission reports. She also reviewed credit issues.

#### **Client - EF**

##### *KYC information*

16. EF is currently a 72 year old retired widow. She has a high school education, and was a homemaker for much of her working life. She also worked at one time as a franchisee operator of a lottery booth.
17. Her late husband, RF, worked as a custodian at a local high school before he retired. Prior to that, he managed a gas station.
18. EF and RF first opened an account with Matthews in 2001. RF followed financial news and markets, and communicated with Matthews regularly. EF generally left the household financial affairs and investment decisions to her husband.
19. A March 2004 New Client Account Form ("NCAF") for EF's RRSP account stated that EF earned \$40,000 per year from the lottery booth, and RF earned \$32,000 per year as a custodian. Their stated liquid assets were \$100,000, and their fixed assets were listed as \$300,000. The stated investment objectives were 50% long term growth, 50% short term speculative, and their stated risk tolerance parameters were 50% medium and 50% high. At the time, EF was 60 years old and her investment knowledge was listed as "fair".
20. RF died in May 2010. Following her husband's death, in June 2010, EF, met with Matthews to sign estate documentation and discuss his future handling of her accounts. She was then 67 years old.
21. She completed an NCAF to open her TFSA account, which stated that EF was retired, with an income of \$32,000 per year. The investment objectives were 25% income/50% long term growth/25% short term speculative, and the risk tolerance parameters were changed to 33% low/33% medium/33% high. The stated assets remained the same, as did the description of her investment knowledge as "fair".
22. Following her husband's death, EF completed an NCAF for the TFSA, but not for her other accounts. There are no account updates between June, 2010, and EF's transfer of her accounts to another firm in May, 2012.

##### *Suitability*

23. EF relied upon and followed Matthews' recommendations for the investments in her accounts. This was particularly evident during the time period of June 2010 onward, following her husband's death.
24. In general, the nature of the trading in the RRSP account was focused on frequent trades in medium to high risk securities. The medium risk securities were primarily resource issuers trading on the TSX, and the high risk securities were primarily commodity-based leveraged exchanged traded funds ("LETF").
25. All of the securities traded in the account were medium or high risk securities, with no low risk holdings. In general, profitable positions in these securities were held for short time periods while unprofitable positions were held for longer periods of time.
26. From May 2010 to April 2012, the average hold period for all securities was approximately 5 months. The average hold period was just 38 days for positions in which gains or losses were actually realized.
27. In addition, although there were some purchases made in the accounts of dividend-paying securities, in many cases the securities were not held long enough to be eligible to receive dividends.
28. Between January 2009 and October 2010, there were 66 LETF transactions, which resulted in losses of \$14,999 (including \$7,805 in commissions).

29. The majority of the LETF positions were held for short time periods, on average 2.74 days. However, there were 5 LETF trades which were held for a much longer period, an average of 178 days, and resulted in losses of \$17,485.
30. Between June 2010 and May 2012, the total value of EF's accounts declined from \$115,478 to \$106,159, reflecting a loss of 8%. This included the payment of commissions of \$13,378. During the same time period, the S&P TSX Composite Index increased by 5.29%.
31. During this time period, the performance of her holdings was very volatile in comparison to the overall market performance. The total value of her accounts ranged between approximately \$160,000 to \$100,000.
32. Through Matthews' own research, investment ideas and trading activity, he pursued an aggressive trading strategy which involved a high degree of risk that was unsuitable for this client.

#### *Discretionary trading*

33. During the period from June 2010 (after her husband's death) to May 2012, Matthews made 113 trades in EF's accounts.
34. EF says that she instructed Matthews to "take care of her", and that she "left everything up to him". She wanted him to continue the type of trading activity that he had carried out with RF, as she had limited investment knowledge.
35. Many of the trades in the accounts involved an aggressive trading strategy of frequent trades in medium risk issuers, and LETFs.
36. During the material time, Matthews executed many trades in EF's accounts without confirming the details of the trades with EF prior to their execution.
37. Matthews did not obtain EF's written authorization for discretionary trading. EF's accounts were not designated as discretionary by Leede.

#### **Client - LZ**

##### *KYC information*

38. LZ first opened an account with Matthews in 2003, after accepting early retirement from his job as an oilfield operator. He was then 52 years old and earning \$75,000 per year, and planned to fully retire by age 60. He knew little about investing and was relying on Matthews for his expertise.
39. A January 2003 NCAF for an RRSP account stated that he had "fair" investment knowledge, with investment objectives of 15% income, 30% long term growth, 25% short term speculative and 30% venture speculative. The risk tolerance parameters were 50% medium, and 50% high. The assets and income portions of the form were left blank.
40. As part of the early retirement package received from his employer, he transferred pension monies of approximately \$80,000 into a LIRA account.
41. In November 2003, an NCAF for the LIRA account states that LZ had liquid assets of \$250,000, fixed assets of \$175,000 and "fair" investment knowledge. His annual income was \$30,000 per year as he was then working as a self-employed oilfield consultant, and his wife was earning \$30,000 per year as a bookkeeper. His investment objectives were 50% income and 50% long term growth with 0% short term speculative. His risk tolerance parameters were indicated as "low", but no percentage allocations were provided.
42. In August 2006, an NCAF update for the RRSP account stated that he had liquid assets of \$300,000, and fixed assets of \$200,000. The stated income levels for LZ and his wife remained the same. His investment objectives were now 20% income, 10% long term growth, and 70% short term speculative. His risk tolerance parameters were 20% low, 50% medium, and 30% high. His investment knowledge is now listed as "good".

43. There are no other account updates, until August 2010, when LZ's accounts were transferred to another RR at Leede.

#### *Suitability*

44. LZ relied upon and followed Matthews' recommendations relating to the investments in his accounts.
45. In general, the nature of the trading in the accounts was focused on frequent trades in medium to high risk securities. The medium risk securities were primarily resource issuers trading on the TSX, and the high risk securities were primarily commodity-based leveraged ETFs.
46. Although the LIRA account had a stated investment objective of 50% income and a risk tolerance of "low", it contained virtually no low risk holdings (other than a small cash position). Nearly all of the securities traded in the account were medium or high risk securities. In general, profitable positions in these securities were held for short time periods while unprofitable positions were held for longer time periods.
47. In addition, although there were some trades made in the account in dividend paying securities, in many cases the securities were not held long enough to be eligible to receive dividends.
48. Between January 2009 and May 2010, there were 212 LETF transactions in LZ's accounts, which resulted in losses of \$45,671 (including \$26,953 in commissions).
49. The average LETF hold period was approximately 7 days. There were 5 LETF trades which were held for a longer term, an average of 70 days, and resulted in losses of \$25,627.
50. Between January 2009 and July 2010, the total value of LZ's accounts declined by \$81,762 (a 27.75% loss). During the same time period, the S&P TSX Composite Index increased by 35%.
51. Through Matthews own research, investment ideas and trading activity, he pursued an aggressive trading strategy which involved a high degree of risk.
52. The holdings in LZ's accounts were speculative, and in combination with the nature of the trading in these securities, reflected a degree of risk which was contrary to the client's true circumstances. As such, these recommendations were not suitable for this client in light of his age, employment status, investment knowledge, and financial circumstances.

#### *Churning*

53. Between January 2009 and July 2010, Matthews executed 519 trades in LZ's accounts.
54. During this time period, trades in the accounts had a total purchase value of \$6,010,860, while the average value of assets in the client's accounts totaled just \$257,522. This annual turnover rate of 14.74 (total purchases/average account value) reflects an extremely high volume of trading.
55. Between January 2009 and July 2010, the total value of LZ's accounts declined by \$81,762 (a 27.75% loss). This decline includes commissions of \$67,384, which includes \$26,951 in commissions relating to LETF trades.
56. The commission to equity ratio of 16.56% also reflects a very high volume of trading.
57. Between January 2009 and July 2010, LZ's accounts comprised approximately 5% of the total assets managed by Matthews. However, the commissions charged to LZ comprised approximately 43% of his total gross commissions for all of his client accounts.
58. Profitable trades were closed quickly, at an average of 9 days. Unprofitable trades were held for much longer, an average of 20 days. Commissions charged on profitable trades represented an average of 52.9% of the profit earned on the trade.
59. Matthews knowingly executed an excessive number of trades in order to increase commissions without conferring a tangible net benefit to the client.

## Clients – JS/DS

### *KYC information*

60. In 2004, DS, a 50 year old municipal employee, took early retirement. His wife, JS, aged 49, was a homemaker and generally left management of the family's financial affairs to her husband.
61. DS and JS met with Matthews to discuss their financial affairs and in particular their intention to rely on their investments for income. DS had been injured many years before in a workplace accident, and received \$1,000 per month in disability benefits. In addition to the disability benefit, they required an additional \$2,000 per month withdrawal from their investments for living expenses, and they didn't intend to draw CPP benefits until age 65.
62. Matthews advised them that it was reasonable to make the \$2,000 monthly withdrawal from their investments.
63. In order to achieve the \$2,000 monthly investment return necessary, DS/JS borrowed \$100,000 pursuant to a home equity line of credit against the equity in their unencumbered home and provided \$90,000 to Matthews to invest. Matthews was aware that these funds were borrowed.
64. An August 3, 2004 NCAF for the joint account states that DS had "good" investment knowledge. Investment objectives are stated as 25% low income; 50% long term growth; and 25% short term speculative. The risk tolerance parameters are 25% low, 50% medium and 25% high risk. DS is listed as "retired", with a stated income of \$36,000 per year. JS has no stated income and her occupation is listed as "homemaker". Their stated assets are \$300,000 in liquid assets and \$250,000 in fixed assets.
65. Shortly thereafter, on August, 30, 2004, there was an NCAF update for the joint account. In addition, there are NCAFs for three other accounts completed on this date - an RRSP, a LIRA, and a RRIF. All four of these documents contain identical information.
66. All state the clients' investment knowledge is "good". Investment objectives are stated as 75% income, 15% long term growth; and 10% short term speculative. The risk tolerance parameters are 50% low, 30% medium and 20% high risk. Their assets are now stated to be \$450,000 liquid assets, and \$300,000 in fixed assets. The stated annual income/employment of the client remains at \$36,000 and retired.
67. An NCAF dated February 21, 2005, to convert the LIRA to a LIF states that DS has "good" investment knowledge. The stated investment objectives are 50% income, 35% long term growth and 15% short term speculative. The stated risk tolerance parameters are 50% low, 40% medium, and 10% high. The stated assets are \$300,000 liquid, and \$250,000 fixed. The income/employment information for DS remains at \$36,000 (retired), and is now at \$25,000 for JS.
68. An additional NCAF for the RRSP account dated February 21, 2005 was completed for JS. It states that she has "fair" investment knowledge. The stated investment objectives are 50% income, 35% long term growth, and 15% speculative. The stated risk tolerance parameters are 50% low and 50% medium. The stated assets and income information are \$300,000 liquid, and \$250,000 fixed. The income/employment information for DS remains at \$36,000 (retired), and is \$25,000 for JS.
69. In December 2008 DS suffered serious health problems and spent more than a month in hospital. As a result, he sustained permanent brain and organ damage which has resulted in lasting cognitive impairment.
70. In late 2009, JS/DS received a Canada Revenue Agency "hardship" form in the mail from Matthews concerning withdrawals from DS' LIF account. Matthews advised JS that it was necessary to permit additional trading in the accounts. The form was completed and returned.
71. In late 2010, JS/DS received a second "hardship" form in the mail. She telephoned Matthews, who explained that it was necessary in order to permit continued monthly \$2,000 withdrawals from their accounts. The form was completed and returned.
72. JS became concerned with the nature of the hardship withdrawals and the accounts' performance, and

brought her son to a meeting with Matthews to express her unhappiness. Shortly thereafter, JS transferred her accounts out of the firm.

### *Suitability*

73. JS/DS relied upon and followed Matthews' recommendations for the investments in their accounts.
74. Despite limited speculative investment objectives and risk tolerance parameters in the NCAFs, Matthews employed an aggressive trading strategy of frequent trades in and out of medium to high risk securities with a short term time horizon.
75. Although the accounts had a 75% allocation to income, the accounts did not actually hold any income-paying securities. The accounts held shares in medium to higher risk issuers, as well as LETFs, and in combination with the high frequency nature of the trading in these securities, presented a very high degree of risk.
76. Although there were some trades made in the accounts in dividend-paying securities, in many cases the securities were not held for long enough to be eligible to receive dividends.
77. Between January 2009 and April 2011, Matthews executed 593 trades in the accounts of JS/DS. Many of these trades were purchases of LETFs.
78. The average LETF hold period was approximately 9 days. Six LETF trades which were in negative positions were held longer, an average of 89 days, and resulted in losses of \$36,326.
79. Between January 2009 and April 2011, the total value of the JS/DS accounts declined by \$78,622 (or 28.11%). During the same time period, the S&P TSX Composite Index increased by 60%.
80. Through Matthews' own research, investment ideas and trading activity, he followed an aggressive trading strategy which involved a high degree of risk.
81. The degree of risk was apparent in light of the hardship withdrawals, and was compounded by the use of leverage from their home equity to invest. As such, the recommendations were not at all suitable for these clients in light of their age, employment status, investment knowledge, and experience.

### *Discretionary Trading*

82. While DS was in the hospital as a result of his December 2008 health problems, JS learned that DS had been calling Matthews and speaking incoherently. JS informed Matthews of DS's condition, and told Matthews to only deal with her.
83. During the month of December, 2008, Matthews executed approximately 31 trades in DS' LIF account while DS was incapacitated and in hospital due to a medical emergency. These trades were conducted without confirming the details of the trades prior to their execution.
84. Many of the trades in the accounts involved an aggressive trading strategy of frequent trades in medium risk issuers, and high risk LETFs.
85. Matthews did not obtain written authorization from DS for discretionary trading. DS' accounts were not designated as discretionary by Leede.

### *Churning*

86. Between January 2009 and April 2011, Matthews executed 593 trades in the accounts of JS/DS.
87. During this time period, the trades in their accounts had a total purchase value of \$6,183,218, while the average value of assets in the clients' accounts totaled \$176,685. This annual turnover rate of 15 (total purchases/average account value) reflects an extremely high volume of trading.
88. During this time period, the value of their holdings decreased by \$78,622 (including commissions paid of \$71,931), reflecting a loss of 28.11%. The S&P TSX Index increased by 60% during the same time period.

89. The commission to equity ratio of 18% also reflects a very high volume of trading.
90. Although the JS/DS accounts comprised just 4% of the total assets managed by Matthews, the commissions charged to these clients comprised between 37-56% of his total gross commissions, depending on time frame.
91. Profitable trades were closed quickly, at an average of 12.18 days. Unprofitable trades were held for much longer, an average of 33.77 days. Commissions charged on the profitable trades represented an average of 53.9% of the profit earned on the trade.
92. Matthews knowingly executed an excessive number of trades in order to increase commissions without conferring a tangible net benefit to the clients.

### **Bergen (Tier 1) and Leede (Tier 2) - Supervisory Failures**

93. During the Relevant Period, Tier 1 supervision of Matthews was being conducted by Bergen.
94. As Branch Manager, Bergen had certain duties and responsibilities including the supervision of Matthews, the approval of new account applications and updates, and the supervision of daily and monthly trading activity in order to identify issues such as suitability, concentration and excessive trading.
95. As Tier 2 supervisor, the CO was assigned certain duties and responsibilities by Leede, including the supervision of all personnel, the supervision of trading activity, and credit issues.
96. There were numerous red flags with respect to the Clients' accounts for which both Bergen, and the Tier 2 CO, failed to take the necessary action to investigate. These red flags included the following:
  - (a) the Clients were retired, or nearing retirement, and vulnerable with very little investment knowledge;
  - (b) Leede's policy required NCAF updates at least every 3 years, but many of the NCAF's in this case were not updated as required;
  - (c) the nature of the trading reflected an aggressive and speculative trading strategy of attempting to capture small gains;
  - (d) significant trading in higher risk securities including LETFs;
  - (e) the trade volume was extraordinarily high for retirement accounts (approximately 1225 total trades in the 4 client accounts over less than 2 years);
  - (f) common account ratios were indicative of possible churning. The turnover ratio was approximately 15 times, the cost to equity ratio was approximately 17%, and the commission to profit ratio was approximately 53% in the LZ, and JS/DS accounts;
  - (g) the Clients represented approximately 13% of Matthews' book of business by asset size, but they comprised approximately 87% of his total gross commissions over a 2 year period of January, 2009 to December, 2010;
  - (h) the Clients appeared on the commissions over 1500 reports at least 40 times, and the commissions over \$3,000 report 19 times, and in addition, appeared very frequently on the daily commission report;
  - (i) Some of the funds invested by JS/DS were borrowed, and upon Matthews' urging and assistance, they made a very unique application for hardship withdrawals to access additional funds in locked in accounts.
97. Despite the presence of many red flags, the Tier 1 and Tier 2 supervisors:
  - (a) failed to ensure that the Clients' NCAF updates were up to date in accordance with firm policy;
  - (b) failed to use due diligence to ensure that the Clients' stated investment objectives and risk

tolerance parameters were consistent with their true financial situation, investment knowledge, investment objectives and risk tolerances;

- (c) failed to make the necessary queries to ensure that Matthews was trading with the necessary authority and without discretion;
- (d) failed to question the trading activity in the accounts and whether the trades and holdings were suitable for the Clients;
- (e) failed to question the appropriateness of high commissions charged to the Clients in light of extremely high turnover, cost to equity and cost to profit ratios;
- (f) failed to give due regard to the risks to the Clients, and allowed Matthews to pursue a highly aggressive strategy which was not suitable for the Clients and ultimately resulted in substantial losses to the Clients.

98. During the Relevant Period, there is no written record of a single query by Bergen, or by the Tier 2 compliance officer, with respect to any of the Clients.

99. In failing to adequately question the account activity in light of the above noted red flags, the Respondents failed to effectively perform their respective supervisory responsibilities.

#### **Bergen - Failure to Report Client Complaint**

- 100. Pursuant to IIROC Dealer Member Rule 3100(I), all registrants must report all written customer complaints to IIROC, within 2 business days. All Dealer Member firms have a designated complaints officer who handles client complaints.
- 101. On or about July 29, 2010, LZ forwarded Bergen an email that he had sent to Matthews on July 5, 2010 in which LZ complained about the handling of his account and high commissions.
- 102. Instead, in or about August, 2010, Bergen took over LZ from Matthews as his own client, and pursued a more conservative investment strategy.
- 103. Staff only became aware of the LZ complaint in or about July, 2013. Leede subsequently filed the LZ complaint on COMSET.
- 104. Bergen did not ensure that the client complaint was reported to IIROC, contrary to Rule 3100(I). In addition, his handling of the client complaint by taking over the client for his own benefit was an attempt to prevent the client from pursuing his complaint, and as such constitutes conduct unbecoming, contrary to IIROC Rule 29.1.

#### **Mitigating Factors**

- 105. Bergen has not been the subject of any prior disciplinary proceedings.
- 106. In May of 2013, Leede strengthened its policies regarding Leveraged Exchange Traded Funds (“LETF’s”).
- 107. Leede also requires clients who trade in LETF’s to have a high level of investment knowledge, along with a minimum value of liquid assets.

#### **IV. TERMS OF SETTLEMENT**

- 108. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.
- 109. The Settlement Agreement is subject to acceptance by the Hearing Panel.
- 110. The Settlement Agreement shall become effective and binding upon the Respondents and Staff as of the date of its acceptance by the Hearing Panel.
- 111. The Settlement Agreement will be presented to the Hearing Panel at a hearing (“the Settlement Hearing”) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may

either accept or reject the Settlement Agreement.

112. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
113. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondents may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
114. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
115. Staff and the Respondents agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
116. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondents are payable immediately upon the effective date of the Settlement Agreement.
117. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondents at the City of Calgary in the Province of Alberta, this 24 day of June, 2015.

“Witness” \_\_\_\_\_

**Witness**

“BRIAN BERGEN” \_\_\_\_\_

**BRIAN BERGEN**

“Witness” \_\_\_\_\_

**Witness**

“R. HARRISON” \_\_\_\_\_

**LEEDE FINANCIAL MARKETS INC.**

Per: R. Harrison - President

AGREED TO by Staff at the City of Calgary in the Province of Alberta, this 14 day of July, 2015.

“Witness” \_\_\_\_\_

**Witness**

“DAVID MCLELLAN” \_\_\_\_\_

**DAVID MCLELLAN**

Enforcement Counsel on behalf of Staff of  
the Investment Industry Regulatory  
Organization of Canada

ACCEPTED at the City of Calgary in the Province of Alberta, this 24 day of August, 2015, by the following Hearing Panel:

Per: “Stephen Gill” \_\_\_\_\_

Panel Chair

Per: “Kathleen Jost” \_\_\_\_\_

Panel Member

Per: “William Welton” \_\_\_\_\_

Panel Member

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