U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

OFFICE OF
PROCEEDINGS

DAN MEYERS,
Complainant,

v.

VISION LIMITED PARTNERSHIP,
EDWARD THOMAS TRADING COMPANY,
EDWARD THOMAS GOMES,
and WORTHINGTON CORPORATION,
Respondents.

CFTC Docket No. 99-R136

INITIAL DECISION

Appearances:

Walter Bajak, Esq., and Alex Arreaza, Esq, Ft. Lauderdale, Florida,
for Dan Meyers

Kenneth Berg, Esq., Chicago, Illinois,
for Vision Limited, Edward Thomas Trading and Edward Gomes

John Tuffnell, Esq., Des Moines, Iowa,
for Worthington

Meyers' principal allegation is that Edward Gomes convinced him to open a managed futures account by falsely promising to limit any losses to no more than 30 percent, and by failing to disclose the commodity trading advisor's recent, substantial trading losses. Meyers seeks to recover his $8,350 trading losses. In response, respondents assert that Gomes never promised to limit losses and that

Gomes explicitly discussed the recent losses. Respondents otherwise deny any violations, and seek dismissal of the complaint.[1]

After reviewing the parties' documentary evidence and weighing their oral testimony, it has been concluded that Meyers has failed to establish any violations. This conclusion reflects the determination that Gomes' testimony was generally more convincing and plausible than Meyers' testimony.

Factual Findings

The parties

1. Dan Meyers is a 49 year-old resident of Webster City, Iowa, who is employed as an interstate truck driver. He was previously employed as a carpet layer and automobile restorer. Meyers attended, but did not complete, junior college. Meyers' testimony established that he is an intelligent and well-spoken individual.

Meyers stated in his account application that his gross annual income was $47,000, and that his liquid net worth was $90,000. Meyers had never traded commodity futures or options, but had taken the Ken Roberts commodities course and was generally aware that they were considered risky. Meyers also had minimal experience with stocks and bonds. [*See* pages 5-7 of hearing transcript; Meyers' replies to respondents' interrogatories 1, 3, 4 and 6; pages 3 and 4 of customer application; and ¶¶ 1-3 of complaint.]

[1] *See* pages 198-209 of hearing transcript.

2. Edward Thomas Trading Company is an introducing broker located in Fairfield, Iowa. The bulk of Edward Thomas Trading's business involves soliciting funds for managed accounts. Edward Thomas Trading recommends several commodity trading advisors to its customers, and had been recommending Worthington Corporation for about two years before Meyers opened his account.

3. Vision Limited Partnership is a registered futures commission merchant located in New York, New York. Vision acted as the guarantor of Edward Thomas Trading, and in that capacity carried Meyers' account.

4. Edward Thomas Gomes has been a registered principal and associated person of Edward Thomas Trading Company since 1992. He was previously registered as an associated person with International Trading Group for four-and-a-half years; International Futures Strategists for three months; The Sage Group for three months; The Winner Group for four months; D.M. McKenzie for eight months; and Shaner Trading Partners for one-and-a-half years. Gomes solicited Meyers' account, and traded Meyers' account after Meyers revoked Worthington Corporation's power of attorney. [NFA records; pages 96-105 of hearing transcript; letter dated May 27, 1997, from Gomes to Meyers.]

5. Worthington Corporation is a registered commodity trading advisor and commodity pool operator located in Dundas, Minnesota. Worthington traded for Meyers' account under a power of attorney granting discretionary trading authority from April 10 to October 24, 1997. Stanley Stevens is the president and sole owner of Worthington, whose communications with Meyers were limited to two letters, dated May 27 and July 29, 1997. [NFA records; *see* pages 19-23, 102-105, 176-

181, and 190-192 of hearing transcript; page 2 of Worthington's and Stevens' joint answer; and Worthington affidavit (attachment to answer).]

The first conversation:

6. In late March 1997, Meyers was looking to diversifying his investments. At this time, Meyers contacted Gomes, in response to a print advertisement. According to Meyers, after Gomes discussed the advantages of managed accounts and discussed trading grain markets, Meyers told Gomes that he was interested and Gomes sent him various promotional and account-opening documents: an Edward Thomas Trading promotional package, a Vision account-opening package, and a Worthington CTA disclosure document.

The account-opening documents:

7. The Edward Thomas Trading promotional package featured a thirty-page promotional brochure titled "Managed Futures – A Balanced Approach." Gomes also inserted a series of press clippings concerning Worthington, and a one-page composite performance table, apparently prepared by Gomes, that represented that for Worthington's managed futures trading system "from January 1992 through December 1996, a continuous $1,000 investment with all profits reinvested would have produced an estimated net cumulative return after fees and commissions of: 748%." Meyers has not alleged either that this statement was false or misleading, and has not asserted that this statement was a significant factor in his decision to invest. [*See* pages 73-75 of hearing transcript.]

8. The Vision account application included the following documents: a standard risk disclosure statement for futures and options; a customer information sheet; a customer agreement;[2] a limited power of attorney granting discretionary trading authority to Worthington; and an advisory agreement with Worthington ("Worthington agreement").

9. The 12-page Worthington CTA disclosure document -- dated December 1, 1996 -- contained: a standard risk disclosure statement; a description of Worthington's trading strategy; and a capsule summary of Worthington's trading performance for almost five years, from January 1992 to September 1996.

The disclosure document described Worthington's trading program as a fundamental system with a focus on the grain and oilseed markets. [Pages 5-6 of Worthington's December 1, 1996, CTA Disclosure Document; *see* pages 183-194 of hearing transcript, and Worthington's July 29, 1997, letter to clients.]

The capsule performance summary reported that the greatest net loss for a month in a year was: 44% in 1992; 13% in 1993; 42% in 1994; 27% in 1995; and 40% in 1996. The capsule performance summary also reported seven instances, over a four-and-a-half-year period, where losses in a month or series of months exceeded 30 percent. Each year, losses in a month or series of months were

[2] Paragraphs 20 through 23 of the agreement were separately set-off with blanks for initials before each paragraph and with a bold-face, underlined heading that stated that "Special Attention" was called to these provisions. Paragraph 20, titled "Risk Acknowledgment," included an acknowledgment that Meyers had received no guarantees <u>from Vision</u>. (Emphasis added.) Paragraph 22, titled "Limitation of Actions," provided a one-year contractual limitations period. However, Vision has not raised that as a defense in this case. Paragraph 23, titled "Indemnification," provided that Vision could recover its attorneys fees and related costs if it prevailed in a legal action initiated by Meyers, but did not provide that Meyers could recover his attorneys fees and cost if he prevailed. Vision has not sought recovery of its attorneys fees and costs.

consistently and quickly recouped. For example, in 1992, 37% in losses in January, February and March were recouped by a 44% gain in March; in 1995, a 27% loss in September was recouped by a 40% gain in October; and in 1996, a 40% loss in August was recouped by a 80% gain in September. As result, the Worthington trading program had realized positive annual net returns for five straight years: 91% in 1992; 6% in 1993; 47% in 1994; 50% in 1995; and 88% in 1996.[3]

Worthington's performance from October 1996 to April 1997:

10. Set out below is the performance of the program from October 1996 through April 1997 -- when Meyers opened his account – which was not reported in the December 1996 Worthington disclosure document, but would be reported in the next update of the disclosure document:

October	10%
November	(09%)
December	11%
January	(02%)
February	(55%)
March	(17%)
April	(02%)

[*See* pages 186-190 and 194-197 of hearing transcript.] The 55% loss in February 1997 was the largest monthly loss in the history of the Worthington program, and the 74% loss for January through March was the largest loss over a three month period in the history of the Worthington program.[4] [*See* pages 194-197 of hearing transcript.]

[3] Percentages have been rounded to the nearest whole percentage point.

[4] The second worst monthly performance was a 42% loss in June 1994, and the second worst three-month performance was a 38% loss in 1993.

The account-opening:

11. Myers and Gomes spoke a second time and discussed Worthington in more detail. However, Meyers testified that while he read the Worthington disclosure document, he and Gomes did not discuss either Worthington's trading performance as reported in the disclosure document, or Worthington's more recent performance which was not reported in the disclosure document.

Meyers also testified that he told Gomes that he preferred to limit any losses to 30%, and that Gomes assured him "Don't worry" because he would limit loses to 30%. However, the reliability of Meyers' testimony was undermined by the fact that he could not recall – in response to questions by his counsel, by respondents' counsels and by the undersigned -- any other general or specific statements by Meyers or Gomes that would have formed the basis for a binding oral agreement. Meyers' testimony was also further undermined by the fact that his understanding of the agreement was vague and internally inconsistent. For example, in the complaint he alleged that he told Gomes that he "could only tolerate a 30%, or $3,000 drawdown." However, at the hearing, Meyers testified that the 30% figure was never fixed, but related to the account value at any given time. Meyers conceded that they did not discuss at length or in any detail how the losses would be limited, conceded that he never expressly communicated with Worthington his desire to limit losses, and conceded that he merely assumed that Gomes would take the necessary steps to limit losses to 30%. [*See* pages 12-13, 16-18, 26; 58-60, 78-80, and 92-95 of hearing transcript.]

In contrast, Gomes credibly testified that he discussed Worthington's trading performance as reported in the disclosure document, as well as during the more recent months that were not reported in the disclosure document. Gomes pointed out to Meyers that Worthington had consistently recouped previous losses, and for that reason, he thought that it would be a good opportunity for Meyers to begin trading since Worthington had just experienced a stretch of losses. Gomes also credibly testified that Meyers made a generalized statement that he did not want to lose more than half of investment, but that Gomes explicitly told Meyers that he could not guarantee that losses could be avoided or limited. [Pages 124-128, and 161-163 of hearing transcript.]

12. On April 10, 1997, Meyers opened the account by signing the various account-opening documents, and depositing $11,000. Under the terms of the Worthington agreement, Meyers agreed to grant Worthington "complete investment and trading discretion" unrestricted by any drawdown restriction; Meyers acknowledged that he had relied solely upon the Worthington CTA disclosure document and not on any "statements in addition to, or inconsistent with, those contained in the Disclosure Document"; and Meyers agreed that the Worthington agreement was the "final and complete agreement between the parties and may not be altered or modified without the signed written consent of the parties." [Paragraphs 4, 7, 11, 16 of Worthington agreement.]

13. During the tape-recorded account-opening compliance review, Meyers confirmed that Gomes had not made any guarantees:

ETTC: Also, we here at Edward Thomas Trading have not guaranteed you any degree of trading profits, and indeed have not guaranteed you against any specific degree or limit of account loss. Is that your understanding?

Meyers: Yes.

Trading the account:

14. On May 22, 1997, trading by Worthington began with the purchase of three December corn options and three November soybean options. These purchases resulted in a debit of $983. No additional trades would be made until August.

15. On July 29, 1997, Stevens sent a letter to each Worthington client. Stevens' letter discussed market conditions, and stated that Worthington would soon begin a more risky strategy that involved buying futures and selling put options. The letter also mentioned that "the severe drawdown of February 1997 was traumatic." [*See* pages 186-188 of hearing transcript.]

Meyers claims that the July 29 letter was the first time that he became aware of the losses in February. Nonetheless, Meyers was sufficiently indifferent to this news that he never mentioned it to Gomes. [*See* pages 34-43 of hearing transcript.]

The July monthly account statement – issued just after the July 29 letter -- reported that the account had a $8,868 cash balance, and that the two option positions had a liquidation value of $319, which represented a loss of about $664. [*See* pages 40-42 of hearing transcript.]

16. On August 15, and September 16, 17, 22, and 29, 1997, Worthington sold corn options as had been anticipated in the July letter. The September monthly account statement reported: (1) that these transactions had generated credits that increased the cash balance to $13,269; (2) that the options purchased in May had lost almost all of their value; (3) that the unused margin was $6,538, that the account liquidation value was $9,832, and thus that 33.55% of the equity was committed as margin. [See § III of Worthington's answer.]

17. In mid-October, Gomes informed Meyers that the corn market had rallied against Meyers' short positions and that he had experienced a drawdown over 50%. At Gomes' suggestion, Meyers revoked Worthington's power of attorney, and let Gomes trade the account. After Gomes had unwound all of the Worthington trades, the account liquidation value was $3,693. Thus, Meyers had lost $7,307 on the Worthington trades, which represented about 65%, of his $11,000 investment.

18. Gomes traded the account until January 1998, when Meyers decided to stop trading. Meyers' losses on the Gomes' trades totaled $1,243, which represented about 30% of the account balance when Gomes began trading.

Conclusions

Meyers has failed to establish by a preponderance of the evidence any violations of the CFTC rules governing CTA disclosure documents. First, Meyers' argument that Worthington was required to update its performance data every three months is not supported by the plain language of the applicable rules. CFTC rules

4.35(a)(4) and 4. 36(a), which govern the disclosure of performance data, do not require that a CTA update the disclosure document every three months. Rather these rules plainly and simply require that the performance information presented in a CTA disclosure document "must be current as of a date not more than three months preceding the date of the [disclosure] document." [Emphasis added.] Here, Worthington's disclosure document was dated December 1, 1996, and reported performance information through September 30, 1996, and thus satisfied the three-month requirement of CFTC rules 4.35(a)(4) and 4.36(a). CFTC rule 4.36(b) provides that that a CTA may not provide a disclosure document "dated more than nine months prior to the date of its use." Here, Worthington provided the disclosure document – dated December 1, 1996 -- in early April 1997, well within the nine-month limitation of rule 4.36(b). Second, Meyers has failed to show that the 55% drawdown in February 1997, or the 74% drawdown for January through March, by themselves, rendered the disclosure document materially inaccurate. CFTC rule 4.36(c) provides, in pertinent part:

> If the commodity trading advisor knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to . . . [a]ll existing clients in the trading program within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect.

Thus, at the end of February or March 1997, Worthington would have been obligated to revise its disclosure document, if it had determined that the 55% drawdown in February 1997, or the 74% drawdown for January through March, had rendered the performance disclosure materially inaccurate. However, the fact that

Worthington characterized these drawdowns as "traumatic," and admitted that these drawdowns were the greatest in its history, by itself, is insufficient to establish materiality. Most significantly, Meyers has produced no compelling evidence, such as a meaningful statistical analysis, that the early 1997 losses represented a significant deviation from the previous performance history, which included one monthly loss of 40%, and included seven instances in less than five years where losses in a month or series of months exceeded 30 percent. Meyers' conduct – especially his decision to keep trading after he purportedly first became aware of the losses in early 1997 – underscores the conclusion that those losses did not materially alter the mix of information in the Worthington disclosure document or materially alter Meyers' decisional process.

Finally, Meyers has failed to show that Gomes made a fraudulent promise to limit drawdowns to 30%. Among other things, it is hard to square Meyers' assertion that Gomes assured Meyers that drawdowns would not exceed 30%, with Meyers' assertion that they never discussed Worthington's past performance – which featured regular drawdowns over 30%. Meyers also undercut the reliability of his testimony by altering his description of the agreement and by conceding that he had no idea how Gomes would limit the drawdown. In contrast, Gomes' convincing testimony that he did not make such a promise was supported by the tape-recorded conversation in which Meyers affirmed that Gomes had not promised to limit any drawdowns.

ORDER

No violations having been established, the complaint is DISMISSED

Dated May 26, 2000.

Philip V. McGuire,
Judgment Officer