

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 9377 / December 21, 2012

SECURITIES EXCHANGE ACT OF 1934

Release No. 68524 / December 21, 2012

INVESTMENT ADVISERS ACT OF 1940

Release No. 3526 / December 21, 2012

INVESTMENT COMPANY ACT OF 1940

Release No. 30315 / December 21, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-15154

In the Matter of

**Top Fund Management, Inc.
and
Barry C. Ziskin,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE AND
CEASE-AND-DESIST PROCEEDINGS PURSUANT
TO SECTION 8A OF THE SECURITIES ACT OF
1933, SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, SECTIONS 203(e), 203(f),
AND 203(k) OF THE INVESTMENT ADVISERS ACT
OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY ACT OF 1940, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against Top Fund Management, Inc. (“TFM”) and pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act against Barry C. Ziskin (“Ziskin”, and together with TFM, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

Summary

These proceedings arise out of TFM’s management of the Z Seven Fund, Inc. (“ZSF” or the “Fund”), a mutual fund. ZSF’s prospectuses and statements of additional information described ZSF as a stock fund seeking long-term capital appreciation, and restricted the Fund’s use of options. Beginning in September 2009, TFM and its principal, Ziskin, pursued a strategy of buying options for speculative purposes contrary to ZSF’s stated investment policy that was only changeable by shareholder vote (“fundamental investment policy”). ZSF had net assets of \$5.3 million on October 1, 2009, but over the next fifteen months realized \$3.7 million in losses from options. These losses, and the ensuing redemptions, ultimately led to ZSF’s liquidation in December 2010. By deviating from ZSF’s fundamental investment policy, TFM and Ziskin breached their fiduciary duty to ZSF. TFM and Ziskin also misled investors by misrepresenting in a shareholder report that the options trading was for hedging purposes.

Respondents

1. **TFM** is a New York corporation based in Mesa, Arizona that registered with the Commission as an investment adviser on December 28, 1983. During all relevant periods, TFM had only one client, ZSF, which had net assets of \$3 million as of March 2010, the date of TFM’s last Form ADV filing. TFM withdrew its registration with the Commission effective February 17, 2011.

2. **Ziskin**, age 60, resides in Mesa, Arizona. Ziskin is TFM’s founder, president, and sole control person. At all relevant times, Ziskin was responsible for the

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

management of TFM's business and held Series 2 and 65 licenses. In addition to his role at TFM, Ziskin served as president, treasurer, and interested director of ZSF. In 1987, the Commission brought administrative proceedings against Ziskin and TFM's predecessor, The Opportunity Prospector, Inc. ("TOP"), charging Ziskin with aiding and abetting TOP's violations of Sections 204 and 205(2) of the Advisers Act and Rule 204-2(a) thereunder. *See Barry Ziskin*, Advisers Act Release No. 1084, 1987 SEC LEXIS 3596 (Sept. 29, 1987); *The Opportunity Prospector, Inc.*, Advisers Act Release No. 1087, 1987 SEC LEXIS 3570 (Sept. 30, 1987).

Other Relevant Entity

3. **ZSF**, incorporated in Maryland on July 29, 1983, became registered as an investment company on October 13, 1983. From its inception until August 1, 2007, ZSF operated as a closed-end management company and listed its shares under the ticker symbol "ZSEV." Thereafter, ZSF operated as a non-diversified, open-end management company and sold its shares under the ticker symbol "ZSEVX." During all relevant periods, ZSF's stated investment objective was "long-term capital appreciation." ZSF was administratively dissolved by the Maryland Department of Assessments and Taxation on October 2, 2009, and ceased trading on December 29, 2010.

Background

A. ZSF's Disclosure Documents Limited Options Trading in the Fund

4. Since 2008, ZSF's prospectuses and statements of additional information described ZSF's investment objective as long-term capital appreciation and its principal investment strategy as investing, under normal market conditions, at least 80% of its total assets in common stocks and securities immediately convertible into common stocks of domestic and foreign issuers. ZSF's principal investment strategy, as described in its prospectuses, made no mention of options trading and none of the principal risks involved options.

5. Disclosures in ZSF's prospectuses and statements of additional information, which ZSF's Board had approved and by which TFM was bound pursuant to the advisory agreement, provided that options trading was to be used for hedging purposes only. In addition, the statements of additional information specified, both as one of ZSF's investment restrictions and as a policy that cannot be changed without shareholder authorization, that the fund may not purchase options other than for hedging purposes.

6. Ziskin was responsible for the statements contained in ZSF's certified shareholder report for the period ending June 30, 2010 ("Shareholder Report") that was filed with the Commission. The Shareholder Report similarly described the use of options as a means of hedging. Specifically, the Shareholder Report included statements such as: "Because of the unusual market risks faced during a secular bear market, it has been our intention to rely not only on our risk-adverse 7 stock selection criteria but to also hedge our portfolio through the use of put options. . ."; and "Should the secular bear market continue and intensify as we expect, the hedging program has the potential to greatly reduce market risk . . ."

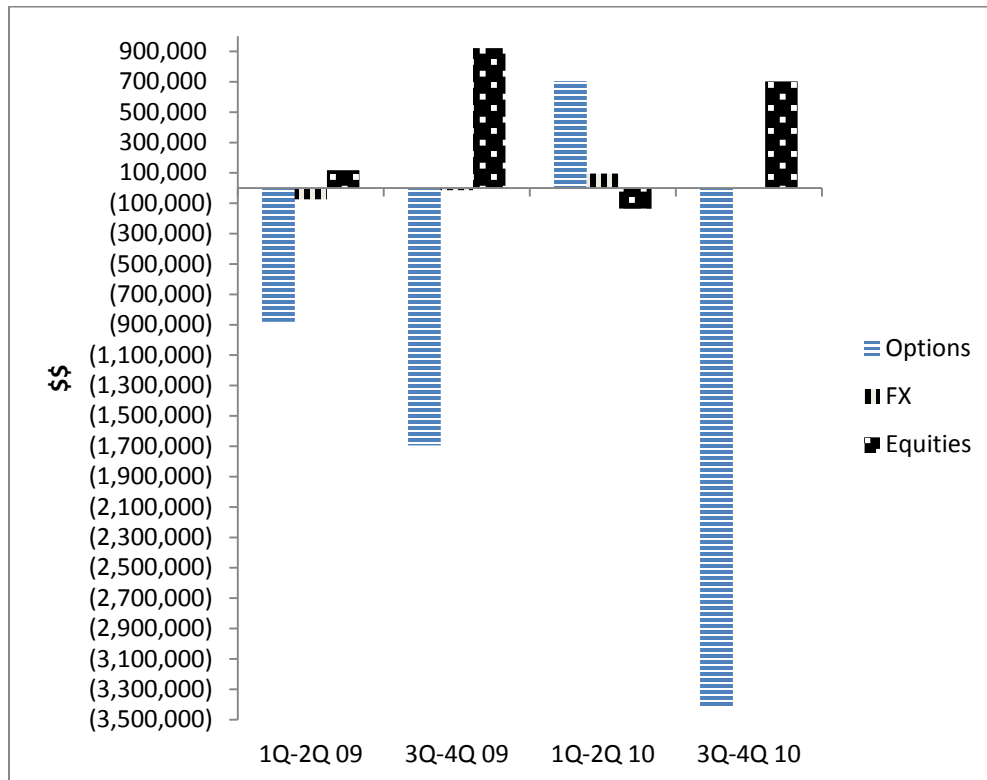
B. During 2009 and 2010, the Fund’s Options Trading Deviated from Its Disclosures

7. Notwithstanding ZSF’s disclosures about the use of options for hedging purposes, TFM and Ziskin committed a large amount of the fund’s assets to purchases of put options on stock index ETFs or stock index futures (collectively, “securities indexes”) - \$22 million in 2009 and \$27 million in 2010, whereas ZSF’s equity purchases in those years amounted to only \$646,062 and \$194,091, respectively. With respect to sales over these two years, ZSF sold \$44 million in options but only \$7.7 million in equities.

8. Similarly, the market value of ZSF’s options portfolio, when analyzed on a month-end basis, was significant when compared to ZSF’s total net assets – as high as 21% of total net assets in 2009 and 75% in 2010. When compared to ZSF’s common stock assets, ZSF’s options portfolio constituted an even higher percentage – as high as 44% of common stock assets in 2009 and 161% in 2010.

9. ZSF’s options trading had a significant – and detrimental – effect on its performance. In 2009 and 2010, ZSF lost \$2,573,730 and \$2,715,149, respectively, from options trading. In the same periods, ZSF gained \$949,213 and \$659,466 from investments in other assets. As a result, ZSF’s options trading had a more significant effect on its performance than did any other investment class. Furthermore, the poor performance was primarily attributable to losses from trading in options.

Gains and Losses From Options vs. Other Asset Classes



10. Contrary to ZSF's disclosures, the Fund's options trading went well beyond hedging and amounted to speculation because the quantity of put options purchased was incompatible with a hedging strategy when considering the size of ZSF's equity portfolio. For example, on September 30, 2009, ZSF's equity portfolio had a market value of \$4,747,385. At the same time, ZSF held enough option contracts to protect a portfolio worth (hereinafter "notional value") \$12,334,000, or 2.6 times the value of the equity portfolio. In 2010, TFM and Ziskin expanded ZSF's option investments. On May 17, 2010, ZSF's equity portfolio had a market value of \$2,276,790 but the notional value of the option positions was \$19,412,400, or 8.53 times the value of the equity portfolio. Just two months later, on July 6, 2010, ZSF's equity portfolio had a market value of \$1,835,607, but the notional value of the option positions was \$32,858,000, or 17.9 times the value of the equity portfolio.

11. Not only did the magnitude of the option investments exceed what would be required to hedge the equity portfolio, the amount spent on option purchases was also incompatible with a hedging strategy. For example, ZSF's equity portfolio on December 31, 2009 had a cost basis of \$1,936,328, while ZSF spent \$307,658 for its option positions, or 16% of the cost of the equity portfolio for options that expired the following month. Similarly, ZSF's equity portfolio on June 30, 2010 had a cost basis of \$1,645,143, but ZSF spent \$932,416 for its option positions, or 57% of the cost of the equity portfolio. Because of the amount spent on option purchases, ZSF's assets were quickly depleted.

Violations

12. As a result of the conduct described above, TFM and Ziskin willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients or engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

13. As a result of the conduct described above, TFM and Ziskin willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8(a) thereunder, which prohibit fraudulent conduct by advisers to "pooled investment vehicles" with respect to investors or prospective investors in those pools.

14. As a result of the conduct described above, TFM and Ziskin willfully violated Section 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer or sale of securities and in connection with the purchase or sale of securities.

15. As a result of the conduct described above, TFM and Ziskin willfully violated Section 34(b) of the Investment Company Act, which prohibits any person from making any untrue statement of a material fact in any report filed pursuant to the Investment Company Act.

16. As a result of the conduct described above, TFM and Ziskin caused violations of Section 13(a)(3) of the Investment Company Act by ZSF, which provides that no registered investment company, unless authorized by the vote of a majority of its outstanding

voting securities, shall deviate from any policy which it considers changeable only if authorized by shareholder vote.

Civil Penalties

17. Respondent TFM has submitted a sworn Statement of Financial Condition dated July 1, 2012 and other evidence and has asserted its inability to pay a civil penalty.

18. Respondent Ziskin has submitted a sworn Statement of Financial Condition dated July 1, 2012 and other evidence and has asserted his inability to pay a civil penalty.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(e), 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents TFM and Ziskin cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8(a) thereunder, and Sections 13(a)(3) and 34(b) of the Investment Company Act.

B. Respondent TFM is censured.

C. Respondent Ziskin be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

D. Any reapplication for association by Respondent Ziskin will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for

the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

E. Based upon Respondent TFM's sworn representations in its Statement of Financial Condition dated July 1, 2012 and other documents submitted to the Commission, the Commission is not imposing a penalty against TFM.

F. Based upon Respondent Ziskin's sworn representations in its Statement of Financial Condition dated July 1, 2012 and other documents submitted to the Commission, the Commission is not imposing a penalty against Ziskin.

G. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent TFM or Respondent Ziskin provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondents was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary