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October 9, 2005

Att: Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549 – 0609

Via Email: rule-comments@sec.gov

**Re: File No. 10-131; The Nasdaq Stock Market, Inc. -
Amended Application for Registration as an Exchange**

**SECOND SUPPLEMENTAL COMMENT IN OPPOSITION TO
REGISTRATION & REPORT OF APPLICANT'S UNLAWFUL ACTIVITY**

Dear Mr. Katz:

Preface

Thank you for the opportunity to comment on the amended Form 1 filed by the applicant, The NASDAQ Stock Market, Inc., a corporation organized for-profit under the laws of the State of Delaware (hereinafter “**The For Profit**”).

SEC approval of the Application would threaten to destroy basic investor protections put in place by Congress during the Great Depression. It would solidify **The For Profit's** transformation into a marketing organization structured to sell securities, as opposed to a “regulatory organization” designed to fulfill important governmental functions to assure the integrity of the marketplace.¹ Among other things, the makeup of the proposed Regulatory Oversight Committee (“ROC”), which includes two prominent individuals who were utilized by the Applicant to tout NASDAQ listed companies in violation of Section 17(b) of the Securities Act of 1933, *infra*, illustrates that the proposed operation of the NASDAQ market by **The For Profit** is fundamentally flawed.

¹ The use of self-regulation was employed by the framers of the 1934 Act in recognition of the fact that the federal government did not have the immediate resources or the expertise to carry out the task. See H.R. Rep. No. 75-2307, at 4-5 (1938).

This Comment supplements the undersigned's:

(a) October 4, 2002 Comment In Opposition To Registration;² and

(b) June 7, 2005 Supplemental Comment In Opposition To Registration & Report Of Applicant's Unlawful Activity.³

These prior Comments are incorporated herein by reference.

Subsequent to the June 7, 2005 Comment and Report Of Applicant's Unlawful Activity, *note 3*, on June 28, 2005, the undersigned filed with the SEC's Division of Enforcement, a report regarding the Applicant's alleged unlawful touting activity (**SEC File # HO1088311**). As of the date hereof, the undersigned has not been contacted by the SEC or asked to provide any documentary evidence. The undersigned is therefore presently unaware as to whether the SEC has actually commenced an investigation.

Proposed Regulatory Oversight Committee

SEC Release No. 34-52559 explains the purpose of the Applicants proposed Regulatory Oversight Committee (Oct. 4, 2005 at pg. 2):

“To oversee the performance of its regulatory obligations, NASDAQ has proposed to create a fully-independent committee of the exchange's Board of Directors, the Regulatory Oversight Committee (“ROC”). . . The ROC would, among other things, be responsible for monitoring the adequacy and effectiveness of NASDAQ's regulatory program.”

Exhibit J to **The For Profit's** Application, discloses: “The proposed Regulatory Oversight Committee of the NASDAQ Stock Market LLC will be populated with members of the Audit Committee of The NASDAQ Stock Market, Inc.” Under Tab 3 of **Exhibit J**, the members of **The For Profit's** four person audit committee, who are slated to become members of the proposed Regulatory Oversight Committee, include:

² Posted at: <http://www.sec.gov/rules/other/10-131/sweissman1.htm>

³ Posted at: <http://www.sec.gov/rules/other/10-131/siweissman060705.pdf>

(i) Stan O'Neal, Chairman; and

(ii) Dr. John D. Markese.

Stan O'Neal is the president and CEO of Merrill Lynch & Co., Inc. **The For Profit's** registration statement filed with the SEC on August 9, 2001, reveals that Merrill Lynch owned 1,875,000 shares of common stock in **The For Profit**, which it presumably acquired in a pre-IPO private transaction with the non-profit NASD. In addition, the company Mr. O'Neal heads is one of the largest underwriters and dealers in NASDAQ shares. Merrill is a major NASDAQ market maker. By any real world practical measure, the Chairman of Merrill Lynch is in no position to provide "fully-independent" regulatory oversight.

As explained in the June 7, 2005 Comment filed by the undersigned (see note 3, *supra*), on April 11, 2002, **The For Profit** took out a two full page spread advertisement in the Wall Street Journal discussing its policy for NASDAQ listed companies to provide accurate financial reporting in accordance with Generally Accepted Accounting Principals ("GAAP"), "supported by a Knowledgeable Audit Committee". On one page is a picture of the NASDAQ ticker with the slogan "**The Responsibilities We All Share**". On the opposite page under the headline "**Keeping Our Markets True - It Is All About Character**" is a list of the chief executives of the "good" NASDAQ listed companies under the sub-heading "**Our Beliefs Stand In Good Company**". Listed thereunder as an endorser of these NASDAQ policies is "Bernard J. Ebbers, President and Chief Executive Officer WorldCom, Inc." The message implicitly conveyed by the Ad is that WorldCom and its CEO: comply with Generally Accepted Accounting Principals; and, are endorsed by **The For Profit** as, *inter alia*, having good character, accounting done in accordance with GAAP, and a viable audit committee in accordance with NASDAQ listing requirements.

Within 20 days after the April 11, 2002 ad featuring Ebbers/WorldCom, Ebbers resigned and thereafter the fact that WorldCom's financial statements had been fraudulent and the massive fraud became public. During 2005, Ebbers was found guilty and convicted for his role.

To increase the impact of the April 11, 2002 WSJ Ad, the names of NASDAQ board members Stan O'Neal and Dr. John D. Markese, appear in the advertisement giving the impression that they too were endorsing WorldCom as having, among other things, financial statements in compliance with GAAP. In the pending civil litigation regarding the NASDAQ's alleged touting of WorldCom

stock, the Chief Judge of the District Court for the Southern District of Florida, issued a non-published Order holding that, based upon the alleged unlawful touting, including its WSJ Ad, **The For Profit** may be liable for WorldCom investor losses (copy attached, at pg 12):

“Defendants’ alleged conduct in touting, marketing, advertising, and promoting WorldCom in the hope of inflating the value of NASDAQ stock is not activity required or authorized by the Act or other regulatory statutes. Accordingly, the Court finds that Defendants do not enjoy immunity from the claims alleged . . .”

The For Profit filed an appeal from this Order which was argued before the Eleventh Circuit Court of Appeals on September 22, 2005; and, now resides in the bosom of the Court. A copy of the complaint and appellate briefs in this case are posted at: <http://ReformNasdaq.com>.

With respect to the WSJ Ad, the attached Order notes:

“. . . Nasdaq took out a full page advertisement in the Wall Street Journal on April 11, 2002 asserting its good character and its responsibility for ensuring truthfulness in the markets. ¶ 62. The ad contained a list of chief executives of Nasdaq companies who endorsed the principles espoused therein. On that list was the endorsement of Bernard J. Ebbers, the then President and Chief Executive Officer of WorldCom. *Id.* Weissman alleges that this advertising campaign was undertaken to increase trade volume of shares of WorldCom by associating the company with the confidence building name of Nasdaq. . . Nasdaq never disclosed its alleged direct financial stake in the sale and trade of WorldCom stock.”

Section 17(b) of the Securities Act of 1933; 15 USC § 77q (b), makes it unlawful to give publicity to any security “though not purporting to offer a security for sale” without disclosing any direct or indirect consideration received or to be received for same:

“(b) Use of interstate commerce for purpose of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate

commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.”

As the case law discussed in the June 7, 2005 Comment indicates (note 3, *supra*), individuals have been criminally prosecuted for significantly less aggressive touting than what NASDAQ is alleged to have done.

The WSJ advertisement (as well as each of **The For Profit’s** TV, print and internet touting, as described in the June 7, 2005 Comments, *supra* at note 3), were required by law to make the following minimum disclosure:

(a) THE NASDAQ STOCK MARKET, INC. is a for-profit corporation that receives income based on the trading volume of shares of the advertised NASDAQ companies;

(b) ___% of the income of THE NASDAQ STOCK MARKET, INC. is derived from the trading volume of the shares of the advertised companies;

(c) THE NASDAQ STOCK MARKET, INC. receives \$_____ per year in listing fees from the advertised companies;

(d) THE NASDAQ STOCK MARKET, INC. does not review the accounting or financial statements of the advertised companies and does not know whether: (i) their accounting practices comply with Generally Accepted Accounting Principles ("GAAP"); or, (ii) whether they comply with NASDAQ listing requirements, including the requirement of a qualified, independent audit committee;

(e) The advertised companies pay or contribute \$_____ to the cost of this Advertisement; and

(f) THE NASDAQ STOCK MARKET, INC. does not endorse or recommend any NASDAQ listed stock as an investment. [If as the NASDAQ apparently claims, this is the case.]

As explained in the June 7, 2005 Comment (*supra* at note 3), to show increasing profitability in anticipation of its IPO, **The For Profit** engaged in a three year \$100 million dollar advertising campaign to tout the stock of the high volume issuers. In doing so, it failed to comply with the law which requires anyone touting stock to make certain disclosures. If an SEC investigation determines these allegations to be correct, then the very individuals who **The For Profit** proposes to appoint to its Regulatory Oversight Committee (Stan O'Neal and Dr. John D. Markese), would have a record of personally participating in the unlawful touting and promotion of stocks by **The For Profit**. Such a committee, to the say the least, cannot provide reliable regulatory oversight to **The For Profit**.

The For Profit's Implicit Promise To Continue Touting

Exhibit H to **The For Profit's** Application, at Tab 6, attaches its Company Logo Authorization Form. This form is required to be completed by every company listed on the NASDAQ market. The form authorizes The NASDAQ Stock Market to utilize the listed company's logo "to publicize the company's listing with the NASDAQ Stock Market LLC" and to convey trading information regarding the company. The utilization of a listed company's logo for these market operation purposes is legitimate and not objectionable. However, the logo authorization form further authorizes the use of listed companies logos in advertising to promote the individual listed companies (as opposed to the Exchange), to investors:

"In addition, the company's approval allows NASDAQ to include the company's logo in other communication materials (video, audio, electronic broadcasts, print promotion and **advertising**) to **further increase awareness of the company among investors.**"

If the Application is approved, is it the intent of the SEC to permit **The For Profit** continue to advertise/tout listed companies, while disregarding the investor protection safeguards mandated by Section 17(b) of the Securities Act of 1933? The undersigned is aware of no authority which exempts **The For Profit** from the requirements of 17(b), *supra* at page 4. To the contrary, it is vital that 17(b) be scrupulously applied to operation of **The For Profit**, so that we do not have an SRO engaged in the very unlawful conduct it should be vigilantly policing.

Sat Cito Si Recte

The motto at the state supreme court in Florida translates from Latin into English as: "Soon enough if right." This Application process commenced nearly five years ago. The allegations of aggressive, unlawful advertising by **The For Profit** during the pendency of this Application, if verified after SEC investigation, would irrefutably establish that the NASDAQ's transformation is detrimental to the investing public.

The transfer of the NASDAQ market to NASD insiders and the creation of stock incentive plans for their officers and directors, has served to benefit certain individuals. However, throughout this application process, there has been scant explanation as to how the transfer of this valuable government franchise to for-profit ownership, benefits the investing public - - the true polestar of SEC review. The financial interests of NASD insiders who acquired shares of stock in **The For Profit** through private (pre-IPO) transactions with the non-profit NASD, must not be the driving consideration.

In harmony with congressional intent in authorizing the creation of SRO's, the non-profit NASD's letterhead states its motto and purpose for existence:

"Investor Protection. Market Integrity."

In sharp contrast with the non-profit NASD's reason for existence, **The For Profit's** Report of its Management Committee states that (2002): ". . . the most important measure of NASDAQ performance is the increase in long-term stockholder value, attained through operating income, revenue growth and market share."

The For Profit's April 30, 2001 registration statement filed with the SEC admits that:

"NASDAQ's branding strategy is designed to convey to the public that the world's innovative, **successful growth companies** are listed on NASDAQ."

The For Profit's 2001 registration statement discloses that:

The largest 50 Nasdaq-listed issuers . . . accounted for approximately 51% of total dollar volume traded on Nasdaq for the

year ended December 31, 2000. **The loss of one or more of these issuers would result in a significant decrease in revenues. . .**

The For Profit's allegedly unlawful advertising has focused on these 50 largest NASDAQ-listed issuers. With over 3000 listed companies, **The For Profit** touts only its largest income producers. The SEC must compel **The For Profit**, at a minimum, to comply with the law and make the same investor protection disclosures, as is required of every other marketing organization.

Conclusion

Transferring responsibility for regulatory enforcement, particularly of listing standards, from a non-profit, quasi-governmental SRO, to **The For-Profit**, is analogous to eliminating the US Food and Drug Administration and allowing the drug companies to make their own determination as to what drugs are safe to sell. The undersigned has delivered to the SEC, specific factual allegations of unlawful touting, marketing and advertising by the Applicant during the pendency of its present Application. Thorough investigation of these allegations is essential **prior to** ruling upon the Application.

Once again, it is requested that the SEC undertake an investigation of **The For Profit's** three year \$100 million dollar advertising campaign. Approval of the Application without such investigation will inevitably lead to future WorldComs and Enrons and undermine public confidence in the markets.

Please do not hesitate to contact the undersigned with any question or to request any documentation.

Respectfully,



Steven I. Weissman, Esq.

cc: via e-mail to: help@sec.gov; attn: SEC File # HO1088311

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-61107-CIV-ZLOCH

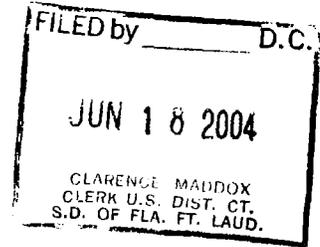
STEVEN I. WEISSMAN, as
custodian under the Florida
Uniform Transfer To Minors
Act, as Trustee and
individually,

Plaintiff,

vs.

THE NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., a
Delaware not for profit
corporation, and THE NASDAQ
STOCK MARKET, INC., a Delaware
corporation organized for
profit,

Defendants.



ORDER

THIS MATTER is before the Court upon Defendant, National Association of Securities Dealers, Inc.'s Motion To Dismiss The Complaint (DE 9), and Defendant, The Nasdaq Stock Market, Inc.'s Motion To Dismiss (DE 11). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

I. Background

Congress' program of regulation of the securities industry includes the Securities and Exchange Act of 1934, 15 U.S.C. § 78 (hereinafter the "Act"). ¶ 15.¹ The Act notes that securities exchanges and over-the-counter markets are affected with a national

¹ Unless otherwise noted, all paragraph citations are to Plaintiff, Steven I. Weissman's Complaint (DE 1).

34
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public interest, and are, therefore, in need of regulation and control. See 15 U.S.C. § 78b. Accordingly, Congress created the Securities and Exchange Commission (hereinafter "SEC") to carry out this regulation. ¶ 15. In 1938, Congress amended the Act to authorize the creation of national securities associations required to adopt and enforce rules covering virtually every aspect of the securities business. Id. Defendant, The National Association of Securities Dealers, Inc. (hereinafter the "NASD") was established under this amendment in 1939, and remains the only national securities association that was so created. ¶ 16. The NASD is a not-for-profit organization incorporated under the laws of Delaware. ¶ 13.

In addition to the aforementioned duties, the NASD owned and operated the Nasdaq Stock Market from its inception until 2000. ¶ 22. On July 9, 2000, pursuant to an agreement entitled Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (hereinafter the "Plan"), the NASD transferred certain operational responsibilities and powers relating to the Nasdaq Stock Market to Defendant, The Nasdaq Stock Market, Inc. (hereinafter "Nasdaq"). ¶ 23. Nasdaq is a corporation organized for profit under the laws of Delaware. Id. Pursuant to the Plan and SEC approval, all of Nasdaq's actions are subject to review and ratification by the NASD. ¶ 25.

The above-styled cause has its origin in purchases of

WorldCom, Inc. (hereinafter "WorldCom") common stock made by Plaintiff, Steven I. Weissman (hereinafter "Weissman"). Specifically, Weissman purchased 82,800 shares of WorldCom stock between December 29, 2000 and June 10, 2002 for \$610,401. ¶ 10. Following the well publicized accounting fraud and collapse of WorldCom, Weissman suffered an almost complete loss of his investment. ¶ 11. Weissman claims that the NASD and Nasdaq (hereinafter collectively "Defendants") share liability for this loss for two reasons. First, Weissman alleges a structural conflict of interest between the NASD's stated goal of maximizing Nasdaq's revenue, and its duty to protect the investing public. Second, Weissman alleges that Defendants fraudulently touted, marketed, advertised and promoted WorldCom as a sound investment vehicle when Defendants knew or should have known that WorldCom was in violation of certain audit committee rules that, in fact, rendered the company a risky investment vehicle.

A. Structural Conflict of Interest

Pursuant to Delaware law governing not-for-profit corporations, the NASD's Certificate of Incorporation states that "[t]he NASD is not organized and shall not be conducted for profit, and no part of its net revenues or earnings shall inure to the benefit of any individual, subscriber, contributor or member." ¶ 14. Weissman's Complaint alleges that, in order to "evade the letter and the spirit" of this prohibition, the NASD began the

aforementioned transfer of responsibility for the operation of the Nasdaq Stock Market to Nasdaq. ¶ 29. Individual members of the NASD began a program of personally obtaining Nasdaq shares at pre-issuance, insider prices before taking Nasdaq public. Id. The Complaint alleges that the NASD and Nasdaq had a number of common officers and directors who aided this process. ¶ 36. As of May, 2002, the two corporations had the same chairman and four other persons were members of the boards of both corporations. Id. Weissman alleges that the same NASD directors who voted to transfer responsibility for the Nasdaq Stock Market to Nasdaq were subsequently able to use their positions on the board of Nasdaq to award stock options to themselves at their own discretion. ¶ 39.

Because the members of the NASD board allegedly obtained for themselves large amounts of Nasdaq stock, Weissman alleges that they had an interest in the performance of Nasdaq. Their specific interest was that good performance by Nasdaq would increase the value of their stock holdings. A 2002 report of Nasdaq's Management Compensation Committee on Executive Compensation recognized this in stating that "the most important measure of Nasdaq's performance is the increase in long-term stockholder value." ¶ 40. Another indicator of the value of Nasdaq stock was articulated in its filings with the SEC: "Nasdaq's growth and operating results are directly affected by the trading volume of Nasdaq-listed securities and the number of companies listed on the

Nasdaq Stock Market.” ¶ 41. The Complaint further alleges that the Nasdaq Stock Market was in steep competition with other exchanges, particularly the New York Stock Exchange, and that the loss of even one of the Nasdaq Stock Market’s major stock issuers would result in a significant loss of revenues for Nasdaq. Id. The more companies listed on Nasdaq, and the higher the trading volume of those companies, the more the Nasdaq stock owned by the members of NASD was worth. Weissman alleges that the NASD board members’ status as beneficiaries of strong performance by Nasdaq establishes a conflict with their duty in running the NASD to protect investors and enforce securities laws. ¶ 44.

B. Defendants’ Fraudulent Touting of WorldCom

Among the responsibilities transferred to Nasdaq as of July 9, 2000 was the duty to “develop, adopt and administer rules governing listing standards applicable to securities traded on the Nasdaq Stock Market and the issuers of those securities.” ¶ 48. Among the rules Nasdaq was responsible for enforcing were those detailing the requirements of the audit committees of companies listed on Nasdaq. ¶¶ 46, 49. The Complaint alleges that because of its oversight and enforcement role, Nasdaq was aware that WorldCom was in violation of the audit committee requirements. ¶ 52. Specifically, the audit committee rules require that WorldCom certify that it had a committee of three financially literate and independent directors. ¶ 53. Additionally, WorldCom was required

to certify to Nasdaq that at least one member of its audit committee possessed specific financial expertise. Id. Weissman alleges that Nasdaq was aware that WorldCom was not in compliance with these provisions because the company expressly stated as much to Nasdaq. ¶ 55.

Despite its alleged knowledge of WorldCom's failure to fulfill the above requirements, the Complaint alleges that Nasdaq touted, marketed, advertised and promoted WorldCom as a "great company" and a sound investment vehicle. ¶ 56. Nasdaq's alleged intention to do so was articulated in a registration statement filed with the SEC on April 30, 2001, which stated that "Nasdaq's branding strategy is designed to convey to the public that the world's innovative, successful growth companies are listed on Nasdaq." ¶ 60.

To convey this principle, Nasdaq spent \$27 million in 2002 on a "marketing campaign featuring [Nasdaq]-listed companies." Id. Weissman alleges that a key message conveyed by Nasdaq's campaign was that WorldCom is a "successful growth company." ¶ 61. As an example of the manner in which Nasdaq advertised, the Complaint describes television advertisements run during prime time beginning September 24, 2001 in which Nasdaq touted its 100 Index Trust. Id. The ads listed a group of companies included in the trust, and specifically featured WorldCom. Id. The message conveyed by the ads, Weissman alleges, was that the companies in this trust,

including WorldCom, met Nasdaq's description of a "successful growth company." Id. The Complaint alleges a second instance of fraudulent advertising by Nasdaq that occurred following the well-publicized revelation of accounting fraud by the Enron Corporation. In the wake of that scandal, Nasdaq took out a full page advertisement in the Wall Street Journal on April 11, 2002 asserting its good character and its responsibility for ensuring truthfulness in the markets. ¶ 62. The ad contained a list of chief executives of Nasdaq companies who endorsed the principles espoused therein. On that list was the endorsement of Bernard J. Ebbers, the then President and Chief Executive Officer of WorldCom. Id. Weissman alleges that this advertising campaign was undertaken to increase trade volume of shares of WorldCom by associating the company with the confidence building name of Nasdaq. ¶ 64.

Weissman further alleges that a joint marketing campaign was undertaken to promote WorldCom. Specifically, Nasdaq allegedly encouraged WorldCom to create a link from its website to Nasdaq's website. ¶ 66. The Complaint further alleges that Nasdaq also created a link from its website to WorldCom's website, and to the fraudulent financial statements contained thereon. ¶ 67. Weissman claims that in creating this link, Nasdaq failed to disclose that it had not reviewed the material on WorldCom's site for accuracy, and in fact created the opposite impression by stating on its website that "[a]ll information contained herein is obtained by

[Nasdaq] from sources believed by [Nasdaq] to be accurate and reliable.” ¶ 70. In this joint marketing campaign, as well as the above advertisements, Nasdaq never disclosed its alleged direct financial stake in the sale and trade of WorldCom stock. ¶ 68. Furthermore, Weissman alleges in the Complaint that he relied on these endorsements and advertisements in making all of the purchases he made of WorldCom stock. ¶¶ 8, 56, 64. Finally, Weissman alleges that under the Plan by which NASD delegated responsibility to Nasdaq and retained supervisory control over its decisions, all of Nasdaq’s expenditures, specifically including advertising expenses, were controlled by NASD. ¶ 60.

Based on the above factual allegations, Weissman filed his Complaint (DE 1) alleging diversity jurisdiction and four state law claims: (1) Violation of Fla. Stat. ch. 517.301 for fraudulent transactions and falsification or concealment of facts against Nasdaq; (2) Violation of Fla. Stat. ch. 517.12 for selling shares of WorldCom without registering as required under Florida law against Nasdaq; (3) Common Law Fraud against the NASD and Nasdaq; and (4) Negligent Misrepresentation against NASD and Nasdaq. The NASD filed its Motion To Dismiss The Complaint (DE 9) claiming that there is no private right of action under the Act, that it is absolutely immune from state common law claims, and that Weissman failed to state a claim under Florida law. Nasdaq filed its Motion To Dismiss (DE 11) based on the same grounds as the NASD, with the

additional claim that Weissman failed to exhaust administrative remedies.

II. Standard of Review

Only a generalized statement of facts needs to be set out to comply with the liberal pleading requirements of Federal Rule of Civil Procedure 8. A classic formulation of the test often applied to determine the sufficiency of the Complaint was set out by the United States Supreme Court in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), wherein the Court stated:

. . . In appraising the sufficiency of the Complaint we follow . . . the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

III. Discussion

A. Private Right of Action Under the Act

Defendants seek dismissal of Weissman's Complaint because there is no private right of action under the Act for violation of duties and responsibilities articulated in the same. This is a well settled point of law. See Thompson v. Smith Barney, Harris Upham & Co., Inc., 709 F.2d 1413, 1419 (11th Cir. 1983). The Court notes, however, that Weissman has not attempted to state a claim under the Act, but has rather alleged two state common law claims against both the NASD and Nasdaq and two state statutory claims against Nasdaq only. A close similarity is seen between

Defendants' argument in the above-styled cause and the arguments made in Shapira v. Charles Schwab & Co., Inc. and Nat'l Ass'n of Sec. Dealers, Inc., 187 F. Supp. 2d 188, 191-92 (S.D.N.Y. 2002), wherein the NASD made the same argument regarding the lack of a private right of action under the Act when sued under common law tort theory. The court therein stated that

[t]he NASD's contention that there is no private cause of action against it for performance of its statutory role, which is correct, is beside the point . . . [P]laintiff does not claim that there is. Rather, he sues the NASD on a common law tort theory. The absence of an implied federal cause of action therefore is immaterial.

Accordingly, the Court finds that Defendants' contentions regarding any lack of a private cause of action under the Act are immaterial when considering the instant Complaint (DE 1).

B. Immunity of the NASD and Nasdaq

The Court notes that "immunity doctrines protect private actors when they perform important governmental functions." Barbara v. New York Stock Exch., Inc., 99 F.3d 49, 58 (2d Cir. 1996). It is well settled that self regulatory organizations, established under the Act and subject to SEC oversight, enjoy absolute immunity from state common law claims when acting in the regulatory and disciplinary role that would normally be reserved for government. See D'Alessio v. New York Stock Exch., Inc., 258 F.3d 93, 105 (2d Cir. 2001), cert denied, 534 U.S. 1066 (2001) (holding stock exchange immune from tort claims arising from its

disciplinary decision to bar the plaintiffs from the floor of the exchange); Sparta v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1215 (9th Cir. 1998) (holding that the NASD is immune when performing regulatory functions); Barbara, 99 F.3d at 58-59 (holding that defendant is "absolutely immune from damages claims arising out of the performance of its federally mandated conduct of disciplinary proceedings"); Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 757 F.2d 676, 692 (5th Cir. 1985) (holding that the NASD is absolutely immune for actions taken within its disciplinary duties as prosecutor). Thus, "a party has no private right of action [against a self regulating organization] for violating its own rules . . . [and] to the extent that [a plaintiff] seeks private relief for NASD or NASDAQ's breach of their own rules, its claims are barred." Sparta, 159 F.3d at 1213.

The Court further notes, however, that self regulatory organizations "do not enjoy complete immunity from suits; . . . [w]hen conducting private business, they remain subject to liability. Id. at 1214; see also Austin, 757 F.2d at 692 (holding that the NASD is not absolutely immune for general administrative functions or operation of the NASDAQ automated quotations system). As the Court found above, Weissman does not allege claims based upon any breach of Defendants' responsibilities under the Act, but instead alleges injury based upon fraudulent conduct in violation of state law undertaken for the personal gain of certain board

members. Specifically, Defendants' alleged conduct in touting, marketing, advertising, and promoting WorldCom in the hope of inflating the value of Nasdaq stock is not activity required or authorized by the Act or other regulatory statutes. Accordingly, the Court finds that Defendants do not enjoy immunity from the claims alleged by Weissman.

C. Failure to Properly Plead Fraud and Negligent Misrepresentation

Defendants claim that Weissman failed to plead all of the elements of common law fraud and negligent misrepresentation under Florida law, and that Weissman's fraud claim was not alleged with sufficient particularity. The Court notes that the elements of common law fraud under Florida law are 1) a false representation of fact known by the party making it to be false at the time it was made; 2) that the representation was made for purpose of inducing another to act in reliance on it; 3) actual reliance on the representation; and 4) resulting damage to the plaintiff. See Ball v. Ball, 36 So. 2d 172, 177 (Fla. 1948).

Based on the aforementioned factual allegations, the Court finds that Weissman sufficiently plead all of the elements of fraud. Weissman alleged that Defendants, acting in concert, represented to the public that WorldCom was a "great company" and a sound investment vehicle, when they knew, due to their oversight and enforcement capacity, that WorldCom's audit committee was in

violation of certain expertise requirements. ¶¶ 96-98. Weissman alleges that Defendants knew that these violations revealed WorldCom's nature as a flawed company and risky investment vehicle, but that they continued to make positive representations regarding WorldCom to increase WorldCom's trade volume and increase the value of the Nasdaq stock held by some of Defendants' board members. Id. Weissman also alleges that he would not have purchased WorldCom stock except for Defendants' representations and that he suffered the loss of that investment when the true information about WorldCom was discovered. Accordingly, the Court finds that Weissman plead each element of fraud in his Complaint.

The Court notes that Federal Rule of Civil Procedure 9 requires that fraud be plead with particularity. The call for particularity in Rule 9(b)

requires a plaintiff to allege fraud with sufficient particularity to permit the person charged with fraud . . . [to] have a reasonable opportunity to answer the complaint and adequate information to frame a response.

Amerifirst Bank v. Bomar, 757 F. Supp. 1365, 1381 (S.D. Fla. 1991) (internal citations omitted). The Court further notes that "Rule 9(b) must not be read to abrogate Rule 8 [A] court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directive of Rule 9(b) with the broader policy of notice pleading." Friedlander v. Nims, 755 F.2d 810, 813 n. 3 (11th Cir. 1985). In

his Complaint, Weissman provides the specific dates that Defendants' alleged misrepresentations were made through advertisements, as well as the specific statements he alleges were fraudulent. It is difficult to imagine what doubt could be left on the part of Defendants as to the conduct that Weissman complains of. Accordingly, the Court finds that Weissman has plead fraud with sufficient particularity to satisfy Rule 9(b).

The Court notes that common law misrepresentation has the same elements as fraud, but instead charges that the Defendants negligently made the misrepresentations instead of knowingly. See Hoon v. Pate Constr. Co., 607 So. 2d 423, 427 (Fla. 4th Dist. Ct. App. 1992). Based upon the above analysis, and the facts alleged in the Complaint, the Court finds that Weissman plead each element of common law negligent misrepresentation.

D. Failure to Exhaust Administrative Remedies

Nasdaq seeks to dismiss Weissman's Complaint because Weissman failed to exhaust mandatory administrative remedies prior to bringing suit. The Court notes that pursuant to 15 U.S.C. §§ 78s(h) and 78u(f), a party aggrieved by acts or omissions of a self regulating organization in the performance of its statutorily defined duties must exhaust administrative remedies available through appeal to the SEC. See Cook v. NASD Regulation, Inc., 31 F. Supp. 2d 1245, 1248 (D. Colo. 1998). As the Court noted above, however, Weissman does not make allegations based upon Nasdaq's

acts or omissions in the performance of its statutorily defined duties. As such, Weissman has no obligation to appeal to the SEC, and failure to do so does not merit dismissal of his Complaint. See Shapira, 187 F. Supp. 2d at 192.

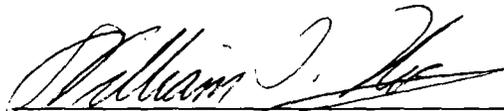
Accordingly, and after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant, National Association of Securities Dealers, Inc.'s Motion To Dismiss The Complaint (DE 9) be and the same is hereby **DENIED**; and

2. Defendant, The Nasdaq Stock Market, Inc.'s Motion To Dismiss (DE 11) be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 18th day of June, 2004.



WILLIAM J. ZLOCH
Chief United States District Judge

Steven I. Weissman, Esq.
For Plaintiff
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David S. Mandel, Esq.
For Defendants