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December 18, 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. - Application for Registration as an Exchange

REPLY TO NASDAQ'S DECEMBER 13, 2005 RESPONSE & RENEWED REQUEST FOR INVESTIGATION OF UNLAWFUL ADVERTISING

Dear Mr. Katz:

This is in reply to the NASDAQ's December 13, 2005 response to the comments of the undersigned (hereinafter referred to as "NASDAQ's Response," http://www.sec.gov/rules/other/10131/esknight3192.pdf, at pages 12-13).[1]

The NASDAQ completely ignores the specific factual allegations that, while under the control of the NASD, it engaged in an unlawful multimedia advertising campaign to tout and sell NASDAQ listed securities. Instead, as if the SEC is

[1] The comments of the undersigned consist of the following:

(a) October 4, 2002 Comment In Opposition To Registration (http://www.sec.gov/rules/other/10-131/sweissman1.htm);

(b) June 7, 2005 Supplemental Comment In Opposition To Registration & Report Of Applicant's Unlawful Activity (http://www.sec.gov/rules/other/10-131/siweissman060705.pdf); and

(c) October 9, 2005 Second Supplemental Comment In Opposition To Registration & Report Of Applicant's Unlawful Activity (http://www.sec.gov/rules/other/10-131/siweissman100905.pdf).

neither required nor expected to exercise regulatory oversight, The NASDAQ Market makes the wholly unsupported, naked pronouncement that its advertising campaign was not unlawful (NASDAQ's Response at note 29):

> ". . . the elements of 17(b) are not satisfied by the actions Mr. Weissman describes."

Ironically, on December 13, 2005 (the same date as NASDAQ's Response), the United States Court of Appeals for the District of Columbia (*NASD v. SEC*, Case No. 04-1154; 2005 WL 3370058), rendered a decision in a case which illustrates the NASD and NASDAQ's misperception of their place in the regulatory scheme established by Congress. In *NASD v. SEC*, the NASD sought to appeal an SEC ruling which overturned a NASD disciplinary action. The NASD argued that SEC oversight was disruptive to the NASD's market oversight (decision at page 12):

> ". . . NASD's concern is that its Market Regulation Department will be frustrated in its mission, because it will be unable to take disciplinary action against members and associated persons, except in the very narrow circumstances covered by the decision of the SEC.

In rejecting the NASD's position as meritless, the Court of Appeals noted (decision at page 7):

> "The authority it [the NASD] exercises ultimately belongs to the SEC, and the legal views of the self-regulatory organization must yield to the Commission's view of the law."

It is not possible for the NASD or NASDAQ to provide an impartial legal opinion as to whether their own advertising campaign violates 17(b); thereby subjecting themselves to potential criminal sanctions. The undisputed fact is that throughout the period of alleged unlawful advertising, the NASDAQ Market was under the control of the NASD. Neither the NASD nor NASDAQ Market can be expected to seek indictment of themselves. Accordingly, the only line of defense for the investing public is independent SEC review. In light of The NASDAQ Market's refusal to address its own massive, systemic, facial violations of 17(b), its request for expeditious approval of its application for Exchange status, is unconscionable.

The Unlawful Advertising Campaign

In its December 13, 2005 Response (at note 30), NASDAQ admits that one member of its proposed Regulatory Oversight Committee ("ROC"), is Dr. John D. Markese. As fully explained at subparagraph (iii), page 5, *infra*, Dr. Markese participated in an unlawful NASDAQ advertisement and such participation, unless without his consent or prior knowledge, should disqualify him from serving on any ROC.

The balance of this section below discusses pertinent 17(b) precedents and standards while setting forth six (6) examples of unlawful NASDAQ advertising. (This section is substantially excerpted from the undersigned's June 7, 2005 Supplemental Comment, *supra*.)

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."

The following are just six (6) examples of ongoing NASDAQ advertising which violates Section 17(b):

(i). Several months before **The NASDAQ Stock Market, Inc.** delisted WorldCom shares and it filed for bankruptcy, **NASDAQ** repetitively ran National television commercials, which on numerous occasions touted WorldCom as one of the "Companies leading the world forward:"

(ii). The For Profit NASDAQ also utilized its website to disseminate WorldCom's fraudulent financial statements and, in general, to tout NASDAQ listed securities, at least implying same were endorsed or approved by the Exchange. Without reviewing the fraudulent financial statements or disclosing its financial stake in sales as required by Section 17(b), NASDAQ represented on its website that it believed the information to be accurate and reliable:

> "All information contained herein is obtained by NASDAQ from sources believed by NASDAQ to be accurate and reliable."

The NASDAQ Market should have placed on the NASDAQ web-site a disclaimer similar to that provided by "non-official" information providers such as Yahoo, which states at its financial web-site:

> Data and information is provided for informational purposes only, and is not intended for trading purposes. . . .**Yahoo! has not reviewed, and in no way endorses the validity of such data. [Emphasis added]**

Contrary to the Yahoo site, which clearly states that it serves merely as a conveyor of third party information, the NASDAQ and NASD had a financial stake in promoting shares of WorldCom and conveyed the false impression that the financial information provided on the official NASDAQ site was reviewed by them in their official capacities.[2]

[2] The New York Stock exchange web-site also provides an example of the type of disclosure required of NASDAQ if it had not made a decision to invite investors to rely on the WorldCom financial information linked to the Nasdaq web-site:

"Disclaimers and Limitation of Liability

(iii). On April 11, 2002, The For Profit NASDAQ Market 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 NASDAQ 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. In order to increase the impact of the April 11, 2002 Ad, the names of the following 18 prominent members of the board of directors of The NASDAQ Market several of whom were also directors of the NASD, appear in the advertisement giving the impression that they too were vouching for the fact that WorldCom's financial statements were in accordance with GAAP and that it satisfied NASDAQ listing requirements:

Hardwick Simmons
Chairman and Chief Executive Officer
The NASDAQ Stock Market, Inc.

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* * *

Dr. Josef Ackermann
Chairman, Corporate and
Investment Banking
Deutsche Bank AG

H. Furlong Baldwin
Chairman
Mercantile Bankshares Corporation

Frank E. Baxter
Chairman Emeritus
Jefferies Group, Inc.

Michael Casey
Executive Vice President
Chief Financial Officer and Chief
Administrative Officer
Starbucks Corporation

William S. Cohen
Chairman and CEO
The Cohen Group

Michael W. Clark
Managing Director and Head of
Global Equity Trading
Credit Suisse First Boston

F. Warren Hellman
Chairman
Hellman & Friedman LLC

Richard G. Ketchum
President and Deputy Chairman
The NASDAQ Stock Market, Inc.

Dr. John D. Markese
President
American Association of Individual Investors

Stan O'Neal
President and Chief Operating Officer
Merrill Lynch & Co., Inc.

Vikram S. Pandit
Co-President and Chief Operating Officer
Morgan Stanley

Kenneth D. Pasternak
Retire, Chairman and Chief Executive Officer
Knight Trading Group, Inc.

David S. Pottruck
President and Co-Chief Executive Officer
The Charles Schwab Corporation

Arthur Rock
Principal
Arthur Rock & Co.
Richard C. Romano
President
Romano Brothers & Co.

Arvind Sodhani
Vice President and Treasurer
Intel Corporation

Sir Martin S. Sorrell
Group Chief Executive and Director
SPP Group PLC

(iv). The For Profit NASDAQ Market regularly runs National television Ads for prominent NASDAQ listed companies. As one example, a commercial for Cisco, Intel and Staples, ran at least through 2004.[3] These Ads all provide publicity to the featured companies, are designed to support sales of shares and all fail to comply with Section 17(b). In these Ads, among other things, the CEO's

[3] This Ad was previously posted on the NASDAQ website but apparently has now been removed.

are portrayed as "Visionaries" who can foresee the future and operate "great" companies:

Intel - - Craig Barrett, CEO.

"if you love what you do I think it gives you the ability to see what might be in the future"

"we're at the center of the world's economy for the decades to come"

Cisco - - John Chambers, CEO.

"changing the way the world works, lives, plays, and learns"
"great companies learn how to manage during growth but they also learn how to manage during the tough times"

Visionaries.
Listed On NASDAQ"

(v). On March 22, 2000, the NASDAQ Market placed a full page advertisement in the Wall Street Journal welcoming Aeroflex to the NASDAQ Market (at *Journal* page C-9). This advertisement aggressively touts Aeroflex and its business prospects, without any 17(b) disclosure, stating:

"Worldwide demand for communication capacity, speed and mobility – Aeroflex's core business – is increasing at geometric rates.

Demand is expected to continue to accelerate as data traffic is anticipated to surpass voice traffic in the early part of the next decade.

Aeroflex – having positioned itself to be in the mainstream of this growth – is developing and marketing products that support and enhance bandwith, speed and mobility for global communications systems.

That its mission is on course is evidenced by Aeroflex's 32% sales growth in 1999.

* * *

> Aeroflex is trading under stock symbol ARXX on NASDAQ, and can be visited at www.aeroflex.com, and at www.nasdaq.com."

(vi). On October 18, 2000 the NASDAQ Market placed a full page advertisement in the Wall Street Journal welcoming Marconi (trading symbol: MONI) to the NASDAQ Market (at page C-11). The Ad touts Marconi as:

> "A company bringing it all together through better value broadband solutions."

One year later, on November 13, 2001, *Forbes* reported that Marconi suffered a "massive $7.4 billion" loss and was trading at 98 cents. The company subsequently underwent a bankruptcy restructuring and was delisted. Here as with all NASDAQ Market advertisements touting listed companies, the disclosure required by Section 17(b) was omitted.

Section 17(b) prohibits publicizing any stock where the publisher fails to "fully disclose" direct or indirect compensation for the promotion. The concept of Section 17(b) is to prevent advertising, promotion, or favorable publicity about specific securities, from masquerading as "public service" or "educational" announcements - - which is exactly what The For Profit NASDAQ now asserts.

There is a wealth of authority illustrating application of Section 17(b), in criminal, SEC and administrative proceedings. In *U.S. v. Wenger*, 292 F.Supp.2d 1296 (D. Utah, 2003), Mr. Wenger challenged his indictment on the grounds that Section 17(b) violated his First Amendment rights and is unconstitutionally vague and overbroad. He was convicted. Wenger's crime was that he failed to disclose in his newsletter and radio interviews that he owned the stock of *Panworld* and had a lucrative contract with that company to promote its stock. What the NASDAQ is alleged to have done in concealing its financial stake in touting shares of NASDAQ listed companies, is the same conduct for which Wanger was convicted, only the NASDAQ and NASD (which controls it), are alleged to have done it on a far grander scale.

An administrative example of the enforcement of Rule 17(b) is the SEC's Cease and Desist Order with respect to the conduct of John Black, an employee of an investor relations firm. SEC Release No. 7885/September 6, 2000. Mr. Black posted two positive messages about a company on a public internet bulletin board

without disclosing that his employer had promised him a bonus for promoting the stock. The SEC found that:

> "The respondent violated Section 17(b) by touting SNLV on Raging Bull without disclosing the fact that he was promised compensation for doing so."

Ironically, the NASD's disciplinary actions against stockbrokers and their firms have frequently involved violation of Rule 17(b). For example, NASD Letter Of Acceptance, Waiver And Consent No. CAF030022, dated April 24, 2003 (at pgs 16-17), reflects that the NASD imposed sanctions in the amount of $80,000,000 against UBS for violations which include:

> "Violation of NASD Conduct Rules by Receiving and Not Disclosing Payments for Initiating Research. Section 17(b) of the Securities Act of 1933 . . ."

Among other things, UBS failed to disclose that certain issuers had paid for "research reports" the firm had published.

During a keynote address at the Institutional Investors Forum 2004, Gayle Essary, Chair/CEO of Investrend Communications, noted that the SEC recently affirmed its intention to strictly enforce 17(b):

> "In an email to FinancialWire as recently as January 5, 2004, John J. Nester, a spokesperson for the U.S. Securities and Exchange Commission confirmed that regulators interpret 17(b) to mean that specific compensation information must be contained in press releases . . . He further stated that the compensation disclosure required by the SEC includes 'amounts and sources in any press release mentioning the company . . .'
>
> The SEC had previously told FinancialWire that it intends to enforce these provisions so that investors may have a fully transparent understanding of any potential agenda or lack thereof."

The NASDAQ Market's touting of NASDAQ listed stocks is far more insidious than the conduct of a lone individual like Mr. Wenger, *supra,* who published a small newsletter and made a few innocuous comments on a radio program, or the conduct of Mr. Black, who posted two positive comments touting a

stock on an internet bulletin board, or even the conduct of UBS in failing to disclose compensation for "research reports" recommending various companies. Members of the public may harbor suspicion or exercise caution as to favorable comments by such individuals or firms. However, with respect to the NASDAQ Market**,** in light of the concealment of its financial stake in sales in direct violation of 17(b), the public is much more vulnerable to influence. [4]

The Availability Of Evidence

The Applicant has apparently removed television commercials it previously posted from its website. However, the undersigned has a copy of, *inter alia*, the TV commercial quoted above and would be glad to supply a copy to the SEC. The undersigned will also supply upon SEC request, a copy of various newspaper advertisements described above.

NASDAQ's Implicit Admission & Continued Recent Touting

Implicitly admitting the misleading nature of prior advertisements, NASDAQ's recent *Wall Street Journal* Ads have begun incorporating the following disclaimer (albeit in virtually unreadable small typeface):

> "NASDAQ makes no representation about the financial condition of any company."

Just **two weeks ago**, NASDAQ used this disclaimer in a *Wall Street Journal* Ad (November 29, 2005 at page A-8), in which NASDAQ makes the explicit affirmative representation to the investing public that *Harmony Gold Mining Company* (NASDAQ symbol HMY), is: ". . .one of the leading gold producers in

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[4] Also *see*, *S.E.C. v. Liberty Capital Group, Inc.*, 75 F.Supp.2d 1160 (W.D. Wash., 1999), which in construing § 17(b) of the Securities Act of 1933 held that describing a company satisfies the statutory element of describing a security; and, that payments need not be explicitly conditioned on the provision of publicity as long as there is some form of "a quid pro quo." Also, *S.E.C. v. Gane*, 2005 WL 90154 (S.D. Fla., 2005), noting:

> "Section 17(b) of the Securities Act makes it unlawful for any person to tout a stock for compensation without fully disclosing the receipt, either past or prospective, of compensation. . . A per se violation of Section 17(b) occurs when a promoter fails to disclose fully its compensation. Scienter is not required to establish a violation of the statute."

the world . . ." Presumably, NASDAQ has not audited the quantity of *Harmony's* gold production and is not intending to provide any guarantee to investors - - if it turns out that *Harmony's* gold production reports are as fraudulent as WorldCom's financial statements. Nonetheless, NASDAQ does not even qualify its statement by attributing it to any source (i.e. according to ____ Harmony is one of the leading gold producers in the world). NASDAQ's direct, affirmative representation as to *Harmony's* gold production is promotional sales talk or puffery constituting an "unwarranted superlative" in violation of NASD Rule 2200, note 5, *infra*. Moreover, the disclaimer in the *Harmony* advertisement falls far short of the requirements of 17(b), in that NASDAQ fails to make any disclosure whatsoever as to it's financial stake in selling shares of *Harmony*. NASDAQ was required by 17(b) to disclose in its *Harmony* Ad, information which is vitally important to potential investors, such as:

> (a) THE NASDAQ STOCK MARKET, INC. is a for-profit corporation that receives income from each share of *Harmony* traded on the Exchange;
>
> (b) THE NASDAQ STOCK MARKET, INC. receives $____ per year in listing fees from *Harmony*;
>
> (c) THE NASDAQ STOCK MARKET, INC. does not review *Harmony's* accounting or financial statements and does not know whether: (i) its accounting practices comply with Generally Accepted Accounting Principles ("GAAP"); (ii) whether it complies with NASDAQ listing requirements, including the requirement of a qualified, independent audit committee; or, (iii) the quantity of gold it produces;
>
> (d) *Harmony* paid or contributed, directly and indirectly, $_____ to the cost of this Advertisement; and
>
> (e) THE NASDAQ STOCK MARKET, INC. does not endorse or recommend *Harmony* stock as an investment [which apparently is the position taken by NASDAQ.]

Finally, as NASDAQ's Response states, the District Court's ruling in *Weissman v. NASDAQ,,* 2004 WL 3395190 (S.D. Fla.), arises from a private civil action which <u>will not</u> adjudicate the criminal violations of 17(b) alleged *sub judice. Copy attached.* Nonetheless, in response to the NASD and NASDAQ's assertion

of regulatory immunity from this civil action, the court held that they may be held civilly liable for touting shares, to the same extent as any citizen:

> "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 undersigned again requests that the SEC undertake a comprehensive investigation of the Applicant's violations of Section 17(b) and take appropriate action, including seeking criminal sanctions, if warranted, and denial of the NASDAQ's Application. In addition, the NASDAQ Market should be enjoined from continuing its ongoing advertisements which deceptively tout the shares of listed companies as if public service announcements, without the minimal disclosures required of all market participants and promoters. These advertisements contain unsupported and unwarranted superlatives which improperly imply endorsement of these investments by the Exchange.[5]

To date the undersigned has received no request for documents or information from the SEC. On December 14, 2005 (via fax and e-mail), the undersigned requested a meeting with the SEC to discuss the undersigned's comments, which is a courtesy that the SEC has afforded other parties who have submitted comments.[6]

Respectfully submitted,

Steven I. Weissman, Esq.

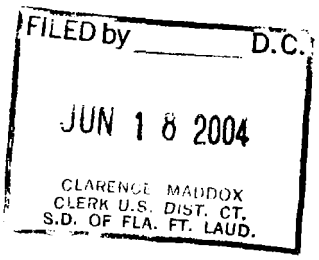
cc: via e-mail to: help@sec.gov; attn: SEC File # HO1088311; via e-mail and fax (*chairmanoffice@sec.gov; **Fax** No. 202-772-9200)* to: Hon. Christopher Cox, Chairman; Peter Uhlmann, Senior Advisor to the Chairman

[5] NASD Rule 2200, which governs communications with the public and advertising, specifically prohibits: "Exaggerated or unwarranted claims or unwarranted superlatives". NASD members are also prohibited from making any reference to the NASD which "could imply endorsement or approval by the association."

[6] See, for example, SEC meeting with NYSE regarding its comments: http://www.sec.gov/rules/other/10-131/nyse120805.htm.

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.
_____/

O R D E R

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. Backsround

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).

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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 cite 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

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