UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 03-61107-CIV-ZLOCH/SELTZER

STEVEN I. WEISSMAN,

Plaintiff,

vs.

THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and THE NASDAQ STOCK MARKET, INC.,

Defendants.

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR RECONSIDERATION**

Defendants, the National Association of Securities Dealers, Inc. and The Nasdaq Stock Market, Inc., respectfully submit this reply memorandum in support of their joint motion for reconsideration of this Court's June 21, 2004 Order denying their motions to dismiss (DE #34).[1]

Plaintiff invites the Court to commit legal error: to accept Plaintiff's conclusory legal allegations as true. Under Plaintiff's theory, no motion to dismiss could ever be granted. Plaintiff's invitation simply underscores that the entire Complaint is an exercise in artful pleading, impermissibly seeking to evade Defendants' well-established immunity.

Plaintiff never contests the legal standards set forth in the motion for reconsideration regarding the broad scope of Defendants' SRO activities and of their corresponding immunity.

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[1] Defendants filed a notice of appeal in this matter on July 16, 2004. As explained in Defendants' Joint Notification of Notice of Appeal Filing, filed with this Court on July 19, 2004, the Eleventh Circuit has provided guidelines for district courts to resolve motions for reconsideration after the filing of a notice of appeal.

Instead, Plaintiff relies on legal conclusions inserted into the Complaint to assert, *ipse dixit*, that the conduct alleged does not relate to Defendants' SRO activities. That, however, is the legal question that *this* Court must answer for itself, in resolving the motion to dismiss; referring to the Complaint's legal conclusions will not suffice, and cannot supplant the Court's own analysis.

## ARGUMENT

### I. The Complaint's Legal Conclusions And Allegations Of Bad Motive Do Not Undermine Defendants' Well-Established Immunity

Plaintiff leaps from one conclusory legal allegation to another in his argument that Defendants' immunity does not apply. For example, Plaintiff refers the Court to Paragraph 6 of the Complaint—which contains only his naked and self-serving assertion that the Complaint "makes no claim" on the basis of Defendants' SRO activities—no fewer than four times. Opp. at 3, 3 n.1, 5.[2]

Plaintiff's reliance on the Complaint's legal generalizations is forbidden by controlling principles that guide resolution of motions to dismiss, and by the artful pleading doctrine. This Court must disregard the Complaint's conclusory allegations in deciding a motion to dismiss. *See, e.g., Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("[C]onclusory allegations, unwarranted deductions of facts, or legal conclusions masquerading as facts will not prevent dismissal."); *see also* Defendants' Mem. of Law in Supp. of Joint Mot. for Recon. (hereinafter "Mot. for Recon.") at 2-3. That principle is even more important when an immunity defense is raised. The artful pleading doctrine requires the Court to look behind the

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[2] As demonstrated in Defendants' opening memorandum, Plaintiff is not the first litigant to seek to evade immunity by means of such artful—but irrelevant—denials. *See* Mot. for Recon. at 13-14.

literal allegations of the Complaint and to determine whether the claims implicate in any way the Defendants' SRO activities. *See* Mot. for Recon. at 3-4; 13-15. This doctrine is applied with special rigor in the context of suits against SROs because SRO activities are so comprehensively regulated by federal law, and because SRO immunity is an absolute protection from suit and is lost if it is not enforced at the motion to dismiss stage.

Defendants do not, as Plaintiff asserts, "simply deny the allegations actually pled." Opp. at 2. Instead, the motion for reconsideration explains how each of Plaintiff's claims relates to Defendants' SRO activities. Mot. for Recon. at 4-7, 8-10, 11-13, 13-15. Plaintiff never disputes that detailed analysis of his *factual* allegations. Nor does Plaintiff address Defendants' showing that his disavowals of any relationship between the Complaint and Defendants' SRO activities are irrelevant as a matter of law. *See, e.g.*, Mot. for Recon. at 13-14; *see also* Opp. at 3 n.1, 5. This Court should disregard those conclusory assertions, as other courts have done, in determining that an artfully pled suit implicates SRO activities and proceeding to dismiss on grounds of absolute immunity. *See, e.g., Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1214-15 (9th Cir. 1998).[3]

Plaintiff's only other argument is to repeat his claims that Defendants acted with bad motives. Opp. at 3-4, 10. Those allegations cannot strip Defendants of their absolute immunity.

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[3] Plaintiff also relies on facts, events, and non-legal material not alleged in the Complaint. *See, e.g.*, Opp. at 4, Exh. 2. A motion to dismiss, however, should be decided solely on the basis of the allegations set forth in the complaint. *See, e.g., Caravello v. Am. Airlines, Inc.*, 315 F. Supp. 2d 1346, 1348 (S.D. Fla. 2004) ("In deciding a motion to dismiss, a court may only examine the four corners of the complaint and not matters outside the complaint . . . .").
This Court should disregard this extraneous material.

Plaintiff never contests that such allegations of profiteering or any bad motive cannot circumvent Defendants' immunity. Mot. for Recon. at 11-13 (citing cases).

Indeed, even Plaintiff's merits-based arguments regarding his purported state statutory claims reveal that the Complaint concerns matters within Congress's comprehensive regulatory scheme for SROs and within Defendants' immunity. Plaintiff explains that Fla. Stat. § 517.301(b)—the basis for Count I of the Complaint—"is derived verbatim from Section 17(b) of the Securities Act of 1933." Opp. at 11 (emphasis in original). Courts have been clear, however, that there is no private cause of action under the Exchange Act against an SRO. *See* Mot. for Recon. at 14. Plaintiff cannot circumvent the prohibition on suits against SROs for matters covered by the Exchange Act through artfully pled state-law claims.[4]

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[4] Plaintiff never meaningfully responds to the other defects in his state law claims. Plaintiff expresses no disagreement with Defendants' argument that his fraud and negligent misrepresentation claims, as well as his claim under Fla. Stat. § 517.12(1), are invalid as a matter of law. *Compare* Mot. for Recon. at 17-19 *with* Opp. 12; *see also* Mot. for Recon. at 19-20.

Moreover, Plaintiff has failed to state a claim under Fla. Stat. § 517.301(b) because he has not alleged that Defendants received any consideration from WorldCom *for the specific act of advertising the company's stock.* The authority cited by Plaintiff is not to the contrary. In both *United States v. Wenger*, 292 F. Supp. 2d 1296 (D. Utah 2003), and the SEC and NASD disciplinary actions, those making public statements performed no other task for the issuer than promulgating those statements. *Id.* at 1298 (describing "a lucrative contract" with a company "to promote its stock"); *see also* Opp. at 14 (SEC administrative proceeding against a defendant who failed to "disclos[e] that his employer had promised him a bonus for promoting the stock"); *id.* (NASD disciplinary proceeding against a defendant who "received payments . . . for the issuance of research"). In contrast, the alleged compensation here is listing and transaction fees. Nasdaq, however, performs a distinct direct service for those fees—either listing the company or providing a self-regulated marketplace for the execution of transactions. In this context, those fees cannot be characterized as "for advertising." *See* Mot. for Recon. at 19 n.9.

## II. Well-Established Precedent Requires Dismissal Of The Complaint Due To Defendants' Immunity

Plaintiff's treatment of the long line of precedent establishing Defendants' broad immunity only reinforces that the Complaint should be dismissed.

Plaintiff claims that the Ninth Circuit's decision in *Sparta* has no bearing here because it involved decisions "to suspend trading and to delist a security" and those decisions "are clearly prototypical regulatory actions." Opp. at 7. While the regulatory nature of those actions may be clear to Plaintiff now, the *Sparta* court was confronted with the same arguments that Plaintiff presents here, made by another plaintiff with equal vigor. The plaintiff in *Sparta*, just as Plaintiff here, claimed that Defendants' actions in promoting the Nasdaq stock market were outside their SRO activities. *Sparta*, 159 F.3d at 1213 (describing plaintiff's arguments that Defendants were not acting as self-regulatory organizations, but as "market facilitators"). There too, the plaintiff asserted that Defendants' profit motive and bad faith had pushed them outside their self-regulatory role and the protection of their immunity. *Id.*; *see also Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, No. C-95-3926, 1997 WL 50223, at *4 (N.D. Cal. Jan. 30 1997) (attached to Mot. for Recon. as Exhibit C) (describing the Sparta complaint's allegations that Nasdaq was operating a "competitive business" and acted in bad faith to maximize the profit of that "business"). Although the plaintiff in *Sparta* asserted that its suit related to a private contract to list and to promote a stock offering, the Ninth Circuit looked behind those conclusory allegations and determined that the suit related to self-regulatory activities. The lessons of *Sparta* are many, but at a minimum, the decision demonstrates that the scope of Defendants' self-regulatory activities is broad, and that their immunity cannot be overcome by Plaintiff's summary characterizations in the Complaint. Immunity cannot be sacrificed to pleading games.

Similarly, Plaintiff's discussion of the decisions in *Barr v. Nasdaq Stock Market, Inc.*, No. 02 Civ. 2614 (S.D.N.Y. Jan. 23, 2004) (attached as Exhibit A to Mot. for Recon.), and *DL Capital Group LLC v. Nasdaq Stock Market, Inc.*, No. 03 Civ. 9730, 2004 WL 993109 (S.D.N.Y. May 5, 2004) (attached to Mot. for Recon. as Exhibit B), only begs the ultimate legal question before this Court. In both instances, Plaintiff asserts that those cases are inapposite because those suits were directed at activities "within the scope of [Defendants'] regulatory conduct," while Plaintiff's suit involves "quintessential non-regulatory, private, commercial activities." Opp. at 10. Other than offering his legal conclusion, Plaintiff never explains why the principles of immunity explained in those cases do not encompass his Complaint.

Importantly, Plaintiff never disputes the correctness of the legal principles governing Defendants' self-regulatory activities established in these cases and explained in the motion for reconsideration. As far as the Opposition reveals, Plaintiff agrees that Defendants are immune when they, for example, (1) seek to maintain investor confidence (Mot. for Recon. at 9); (2) support an active and liquid market (*id.*); (3) make listing decisions (*id.* at 8); (4) enforce or fail to enforce the securities laws or SEC or SRO rules against listed companies (*id.* at 10); or (5) make statements to the marketplace about any of these activities (Mot. for Recon. at 5, *DL Capital*, 2004 WL 993109, at *6). Under these legal principles, the Complaint is reduced to allegations about Defendants' supposed bad motivations in conducting these activities, which (as shown above) cannot serve to overcome their immunity.

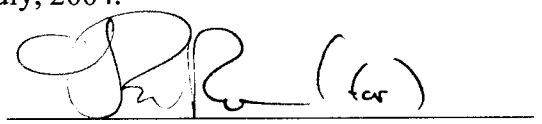
Finally, Plaintiff's heavy reliance on *Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033 (9th Cir. 2003), is a red herring. Crucially, the defendants in *Lippitt* were *brokerage firms*, which possess no immunity from suit, as Plaintiff himself concedes. Opp. at 8. There accordingly was no reason for the *Lippitt* court to look beyond the face of the complaint to

determine whether the plaintiff's state law claims were actually a surreptitious attempt to circumvent immunity. As the Ninth Circuit explained in a passage quoted by Plaintiff, it was unnecessary to invoke the artful pleading doctrine because, "[u]nlike the situations in *Sparta* or *D'Alessio*, a state court need not inquire into NYSE regulations, or even federal law [in this case] . . . . Lippitt's claim does not amount to a challenge of the NYSE's decision to allow the sale of callable CDs." *Lippitt*, 340 F.3d at 1045; *see also id.* at 1043 ("we read the complaint not to challenge the NYSE's decision to allow brokerage firms to sell callable CDs"). On the other hand, courts should be especially vigilant when the defendant is an SRO, in order to preserve the necessary immunity for the broad range of SRO activities under Congress's comprehensive scheme for regulation of the securities markets.

**CONCLUSION**

The Opposition's reliance on the conclusory allegations of the Complaint will not suffice to defeat Defendants' immunity. For the reasons set forth above and in Defendants' opening memorandum, this Court should reconsider its June 21, 2004, Order and dismiss the Complaint.

Respectfully submitted, this 21st day of July, 2004.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of July, 2004, a copy of the foregoing DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR RECONSIDERATION was served by U.S. mail upon the following:

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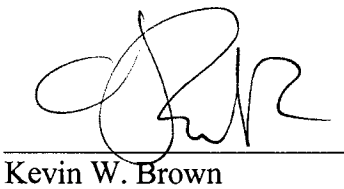

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