UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

STEVEN I. WEISSMAN (as Custodian Under The Florida Uniform Transfers To Minors Act, as Trustee and Individually),

Plaintiff,

v.

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), and X, Y, and Z,

Defendants.

_____/

DEFENDANT NASD'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS THE COMPLAINT

The defendant, National Association of Securities Dealers, Inc. ("NASD"), hereby submits this memorandum in support of its motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Although not disclosed by plaintiff in this complaint or on the civil cover sheet, the complaint in this matter is an amendment to an earlier complaint involving the same parties and the same allegations that was dismissed by Chief Judge Zloch of this Court on May 30, 2003. That action was styled "Steven I. Weissman v. National Association of Securities Dealers, Inc., NASDAQ Stock Market, Inc., X, Y and Z," Case No. 02-61500-ZLOCH. Plaintiff filed this

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action on June 9, 2003, just 10 days after the dismissal of his earlier complaint, and it should be considered by this Court to be an amended, not an initial, complaint.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

NASD is a "self-regulatory organization" ("SRO") registered with the Securities and Exchange Commission ("SEC") and entrusted with a host of vital regulatory functions under the federal securities laws. In performing its functions, NASD has promulgated – with the approval of the SEC – rules and regulations to guide NASD and those it regulates. In the performance of its self-regulatory function, NASD is responsible for, among other things, regulating the activities of market participants on The NASDAQ Stock Market, Inc. ("NASDAQ"). NASDAQ makes decisions to list or de-list securities that trade on it, also pursuant to SEC-approved rules.

Plaintiff Steven I. Weissman ("Weissman") is a public investor who, individually or in a fiduciary capacity, purchased shares of WorldCom, Inc. ("WorldCom"), which traded on NASDAQ and is currently in bankruptcy proceedings. The value of Mr. Weissman's shares fell drastically and he now seeks to recover his losses and punitive damages from the stock market where they were traded, NASDAQ, and that market's regulator, NASD. Mr. Weissman's complaint, with respect to NASD, does nothing more than allege negligent regulation of NASDAQ, thereby preventing WorldCom's fraud from being detected and the company's securities delisted before plaintiff could purchase them.

NASD is a securities regulator. The complaint is replete with references to the Exchange Act. Plaintiff seeks to impose substantial monetary liability on NASD for actions taken or omitted strictly within its role as a securities regulator. Plaintiff's complaint does not allege that

he communicated with NASD prior to purchasing his WorldCom securities or at any time until immediately prior to filing suit against NASD.[1]

Plaintiff's complaint must be dismissed as to NASD for three reasons. First, the Exchange Act does not provide an express private right of action against an SRO and no federal court has ever implied a private right of action to recover damages from NASD. See Gustafson v. Strangis, 572 F. Supp. 1154 (D. Minn. 1983) and F.D.I.C. v. NASD, Inc., 582 F. Supp. 72 (S.D. Iowa), aff'd, 747 F.2d 498 (8th Cir. 1984) (both cases dismissing damage claims against NASD for alleged failure to detect and stop fraud in time to prevent plaintiff from purchasing securities). Plaintiff cannot avoid this well-established rule by cloaking his claim under common law.

Second, even if plaintiff states that the complaint alleges only common law claims (notwithstanding numerous references to provisions of the Exchange Act), plaintiff's claim is nonetheless barred because NASD is absolutely immune from state law liability for actions pursuant to responsibilities imposed by the Exchange Act. See Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998).

Third, Weissman's claims for common law fraud and negligent misrepresentation, considered on their own terms, fail to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

NASD is a self-regulatory organization registered with the SEC as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. §§ 78o-3 et seq., amending the

[1] Plaintiff sent NASD a draft copy of the complaint immediately before filing the initial suit in 2002.

Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78a, et seq.[2] The Exchange Act provides a comprehensive system of federal regulation of the securities industry. Congress contemplated that private self-regulatory organizations ("SROs") such as NASD and the New York Stock Exchange ("NYSE") would perform vital functions as necessary parts of that comprehensive system.

Pursuant to the established congressional plan, NASD is required to promulgate rules governing its members and its own policies and practices. See 15 U.S.C. § 78o-3(b). NASD must file proposed rules and rule changes with the SEC, and no rule may take effect unless and until the SEC approves it. See 15 U.S.C. § 78s(b). Further, the SEC "may abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . . as the [SEC] deems necessary to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization . . . ." 15 U.S.C. § 78s(c). NASD is responsible for the regulation of securities activities by market participants on NASDAQ, which is a for-profit stock market. At all times, NASD provided regulatory services to NASDAQ while NASD was either a 100% owner or, currently, as a majority shareholder in NASDAQ.

In 2000, NASD's membership approved a plan whereby NASDAQ became a stock corporation, and sold shares to a selected group of investors, including NASD firms, institutions, and NASDAQ listed companies. The SEC approved the NASDAQ recapitalization on June 26, 2000, noting in its Approval Order that "the proposed rule change also fills the division of responsibilities set forth in the Delegation Plan approved by the Commission." SEC Rel No. 34-

[2] The Exchange Act defines "self-regulatory organization" as "any national securities exchange, registered securities association, or registered clearing agency." 15 U.S.C. § 78c(26).

42983, 65 F.R. 41119 (July 3, 2000). The Delegation Plan referred to in the Approval Order is the same delegation plan referenced in ¶ 23 of the complaint.

The complaint's factual allegations concerning the NASDAQ recapitalization include the unremarkable disclosures by NASDAQ that certain officers and directors of NASDAQ would receive stock options (¶ 37), and that the value of NASDAQ's stock depended on the company's financial success (¶¶ 40-41). All of these statements, which were made in 2000 and 2001, according to the complaint, were publicly available through press releases, and NASDAQ's public filings with the SEC. See ¶¶ 41-45. Significantly, these statements were publicly available well before plaintiff made the bulk of his purchases of WorldCom stock in 2002 (¶ 10).

Similarly, in 2000 and 2001, well before plaintiff made most of his purchases, WorldCom itself filed information with the SEC that disclosed WorldCom's failure to meet the independent audit committee requirement and therefore NASDAQ listing standards. At ¶ 55, plaintiff refers to an April 26, 2001 SEC filing by WorldCom, which plaintiff contends reveals WorldCom's failure to comply with NASDAQ listing standards. At ¶ 47, the complaint refers to another SEC filing by WorldCom, which reveals that directors of WorldCom received WorldCom stock options. All of this information was publicly available to plaintiff.

Plaintiff allegedly purchased 82,800 shares of WorldCom at a total cost of approximately $610,000 from December 2000 through June 2002 for several accounts.[3] ¶ 10. Plaintiff's WorldCom stock presently has no value.[4] ¶ 11. Weissman claims that if NASDAQ had disclosed in its advertisements that WorldCom was not in compliance with NASDAQ listing

[3] Plaintiff purchased 12,000 of his 82,800 shares in December 2000. The remaining 70,800 shares were purchased between February and June of 2002.

requirements or was in violation of the NASDAQ independent audit committee requirement, he would not have purchased the shares. ¶ 12(iv), ¶ 59. Among other things, Weissman cites to WorldCom's fraudulent financial statements filed with the SEC, and NASD and NASDAQ's failure to disclose on the NASDAQ website and in advertisements that they had not independently reviewed WorldCom's financial statements (¶12(ii)), as well as WorldCom's alleged failure to put in place an independent audit committee as required by NASDAQ rules (¶ 55), as examples of conduct that NASD ignored in favor of its own alleged self interest in keeping WorldCom listed on NASDAQ. Plaintiff contends at ¶ 59 that if he had known of these problems with WorldCom, he would not have purchased the stock in 2002, although his own complaint concedes that WorldCom itself disclosed this information in SEC filings available on the EDGAR system in 2000 and 2001.

The complaint does not allege that NASD made any statements whatsoever to plaintiff concerning WorldCom's financial statements or compliance with NASDAQ's listing requirements. The complaint does not allege that NASD's own website linked to WorldCom or that the plaintiff reviewed NASD's website or contacted NASD prior to making his investment decision to purchase WorldCom securities. The complaint does not allege that the plaintiff had any communication with NASD at any time before filing suit. The complaint does not list the content or date of the NASDAQ advertisements upon which plaintiff allegedly relied, but refers to a general NASDAQ advertising campaign that mentioned WorldCom in some of its advertisements.

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[4] If this matter proceeded beyond the pleadings stage, the evidence would show that NASD too was a victim of WorldCom's fraud. NASD's employee pension plan lost several million dollars due to the decline in WorldCom stock.

Weissman alleges generally and without factual basis that NASDAQ and NASD acted in concert and misused their positions, both in refusing to enforce NASDAQ's listing requirements and the independent audit committee rules to allow WorldCom to remain listed on NASDAQ, and by restructuring the ownership interests of NASDAQ, in order to somehow enrich themselves. ¶¶ 12(iv), 59, 98. Weissman has now filed this action to recover compensatory and punitive damages because his WorldCom shares (along with those of every other WorldCom shareholder) lost most of their value when WorldCom restated its financial statements and declared bankruptcy.

NASD, through NASDAQ, oversees the trading of thousands of stocks on the NASDAQ system. Decisions regarding the listing and de-listing of stocks are made each day by NASDAQ. In over 30 years since NASDAQ began operation, no public customer, such as Mr. Weissman, has ever obtained a judgment against either NASD or NASDAQ for money damages resulting from its listing or de-listing decisions. Plaintiff's complaint does not differentiate him in any way from the millions of investors who buy and sell securities on U.S. stock markets every day, since he does not allege any relationship with NASD or NASDAQ other than as a viewer of advertising promoting NASDAQ as a stock market, or NASD as a securities regulator.

III. ARGUMENT

A. The Complaint Fails To State A Claim Because There Is No Private Right Of Action Against NASD For Violations Of Its Duties Under The Exchange Act.

Plaintiff basically alleges that if NASD had done a better regulatory job overseeing NASDAQ, then NASDAQ would have uncovered WorldCom's fraud (which went undetected by a host of other regulators, financial institutions, and investors), WorldCom would have been de-listed from NASDAQ, and plaintiff would not have been able to purchase WorldCom shares. In

essence, plaintiff alleges that NASD failed to prevent a fraudulent act committed by WorldCom. Although thinly veiled as state law claims, in Counts III and IV (the only counts naming NASD), Weissman seeks to impose liability upon NASD for negligent regulation.

1. Numerous Courts Have Recognized The Absence Of A Private Right Of Action.

Congress did not provide any private right of action against NASD or its officials or against any other SRO for violations of Sections 6(d) or 15A of the Exchange Act or NASD rules. Niss v. NASD, Inc., 989 F. Supp. 1302, 1303 (S.D. Cal. 1998). Moreover, federal courts consistently have declined to find an express or implied private right of action against SROS under Sections 6 and 15A of the Exchange Act. Gustafson v. NASD, Inc., supra; Feins v. American Stock Exchange, Inc., 81 F.3d 1215, 1218 (2d Cir. 1996) and Mihalakis v. Pacific Brokerage Services, Inc., No. 91 Civ. 994, 1991 U.S. Dist. LEXIS 18423 (S.D.N.Y. 1991) (holding that Section 6 applies only to stock exchanges, and not NASD, and that neither § 6 nor § 15A of the Exchange Act provide for a private right of action).

The Supreme Court identified several factors to be used by courts in determining whether a private right of action may be implied in a statute. The leading cases in this area are Cort v. Ash, 422 U.S. 66 (1975), Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979), and all look to Congressional intent to create a private right of action.

Every court that has considered the issue, including the Eleventh Circuit, has held that §§ 6 and 15A do not create a private right of action against SROs for violation of federal law or SRO rules. See, Thompson v. Smith Barney, Harris Upham & Co., 709 F.2d 1413, 1419 (11th Cir. 1983) (holding that plaintiff's claims of a private right of action under §§ 6 and 15A of

Exchange Act are "without merit"). See also, Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980) (holding that customers cannot bring private right of action based on violation of § 15A and NASD rules, because statute does not expressly provide for a private right of action and no private right of action could be implied. Id. at 681).

The Jablon analysis and denial of an implied private right of action were extended to NASD in Gustafson v. Strangis, 572 F. Supp. 1154 (D. Minn. 1983). In Gustafson, plaintiffs alleged that NASD had knowledge of illegal activities by a NASD member firm but failed to make a thorough investigation of the firm, failed to report the illegal activities to the SEC and failed to terminate the member firm and its principals. Id. at 1155. The district court dismissed claims brought against NASD, holding that no implied private cause of action exists against NASD under Sections 15A and 27 of the Act. Id. See also, F.D.I.C. v. NASD, Inc., 582 F. Supp. 72, 75 (S.D. Iowa), aff'd, 747 F.2d 498 (8th Cir. 1984) (holding that the Exchange Act does not create "a common law cause of action against the association for negligent admission or supervision of the member" where plaintiff alleged NASD was negligent in dealing with its member's application, analyzing reports and documents filed with NASD by the member, and conducting financial and operational examinations of the member); Niss v. NASD, Inc., supra, (dismissing federal and state law claims for negligent regulation where plaintiff lost money on stock purchases and claimed NASD failed to adequately supervise its member and therefore failed to prevent plaintiff's losses); Mihalakis v. Pacific Brokerage Services, Inc., No. 91 Civ. 994, 1991 U.S. Dist. LEXIS 18423 (S.D.N.Y. 1991) (dismissing claims for NASD's alleged refusal to accept claim for arbitration where claim was pending before another arbitration forum); Meyers v. NASD, Inc, No. 95-CV-75077, 1996 U.S. Dist. LEXIS 6044 (E.D. Mich. March 29, 1996) (dismissing claims arising from NASD's alleged failure to investigate and verify truth of

customer complaints reported to it by securities firms on Forms U-4 and U-5); Desiderio v. NASD, Inc., 191 F.3d 198 (2d Cir. 1999), cert. denied 531 U.S. 1069 (2001) (dismissing damage claims based on NASD's refusal to register securities broker).

The lack of a private damages remedy against NASD for conduct arising out of its self-regulatory responsibilities is perfectly consistent with the Congressional regulatory scheme. For example, the Supreme Court has held that the Sherman Antitrust Act ("Sherman Act") is impliedly repealed as to the activities of NASD, concluding that "the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from [NASD] activities approved by the SEC." United States v. NASD, Inc., 422 U.S. 694, 733 (1975). See also, Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) (citing self-regulatory scheme overseen by SEC in dismissing private antitrust action against NYSE); In re Stock Exchanges Options Trading Antitrust Litigation, 317 F.3d 134 (2d Cir. 2003) (holding that Sherman Act had no application to listing and trading of options on securities exchanges because Sherman Act had been impliedly repealed in this area by Exchange Act.).

Weissman's claims against NASD arise directly from NASD's enforcement of its rules and performance of its regulatory responsibilities. Weissman seeks to impose monetary damages on NASD for failing to detect and disclose the fraudulent financial statements WorldCom filed with the SEC and NASD, among other things. The claims for "common law fraud" and "negligent misrepresentation" squarely implicate NASD in its role as securities regulator under the Exchange Act. Mr. Weissman may not collect damages from NASD for its enforcement of its rules and performance of its regulatory responsibilities, or for its alleged failure to do so.

2. There Is No Bad Faith Exception To The Absence Of A Private Right Of Action Against NASD.

Weissman has alleged that through various acts, NASD and NASDAQ acted in "bad faith" for the purpose of enriching their managers and directors. ¶¶ 95, 97. In Feins v. American Stock Exchange, Inc., id., the Second Circuit concluded that Congress did not intend for there to be a private right of action under the Exchange Act for an SRO's alleged violation of its own rules, regardless of allegations of "bad faith."[5] See also, Desiderio v. NASD, Inc., supra at 208 (no monetary liability despite allegation that NASD acted in bad faith when it denied broker permission to register). In Niss v. NASD, Inc., supra, the court rejected the validity of the bad faith exception and citing Feins, held that no private right of action exists under Section 15A of the Exchange Act. "The Court holds that a private right of action under Section 15A does not exist against the NASD for failing to supervise its members, in violation of either its own rules or its statutory duties." Niss, 989 F. Supp. at 1307. See also, Sparta Surgical Corp., 159 F. 3d at 1211. Thus, Weissman cannot allege that NASD's conduct, even if it were in "bad faith," qualifies his claim as an exception to the undisputed rule that a party has no private right of action against an exchange for violating its own rules or for actions taken to perform its self-regulatory duties under the Exchange Act.

B. NASD Is Absolutely Immune From State Common Law Claims.

Even though plaintiff states that the complaint alleges only state law claims, and not a violation of the Exchange Act, plaintiff's claims are nonetheless barred because NASD is

[5] Other courts have also rejected the argument that an allegation of "bad faith" would permit an action to be maintained against an SRO because such a holding would eviscerate the doctrine of absolute immunity. See, e.g., Austin Mun. Sec., Inc. v. Nat'l Ass'n of Secs. Dealers, Inc., 757 F.2d 676, 686-693 (5th Cir. 1985) ("the intent with which those defendants operate is irrelevant to the absolute immunity argument.")

absolutely immune from state law liability for actions taken in a regulatory context pursuant to responsibilities imposed by the Exchange Act. NASD oversees the activities of NASDAQ pursuant to an SEC-approved plan of delegation, as the complaint concedes. Every aspect of NASD's activities, including the decision to convert NASDAQ into a stock corporation, was reviewed and approved by the SEC, and is a regulatory activity for which NASD is immune from money damages. SEC Rel. No. 34-42983, 65 F.R. 41116 (July 3, 2000). To the extent that NASD (in its own capacity or its oversight role for NASDAQ) failed to detect and deter WorldCom's fraud in time to prevent plaintiff from purchasing WorldCom stock, NASD was acting in its SEC-approved regulatory role.[6]

The SEC is required to review and approve NASD's activities pursuant to § 19 of the Exchange Act. Whether or not plaintiff admits it, all of NASD's actions with respect to the recapitalization and oversight of NASDAQ, and NASDAQ's oversight of WorldCom, were taken in NASD's regulatory role, and the law is clear that NASD is absolutely immune in this situation. See Partnership Exchange Sec. Co. v. NASD, Inc., 169 F.3d 606 (9th Cir. 1999) (state law money damage claims against NASD for allegedly improper actions arising from disciplinary proceeding are barred by absolute immunity); Sparta Surgical Corp., supra (state law claims against NASD and NASDAQ arising from delisting of company's stock on first day of trading barred by absolute immunity. "Extending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress."); Austin Municipal Sec., Inc., supra (NASD immune from antitrust liability when conducting disciplinary proceedings); D'Alessio v. New York Stock Exchange,

[6] NASDAQ's listing decisions are subject to absolute immunity, and any claim against NASD that is premised upon a faulty NASDAQ decision is similarly barred.

Inc., 258 F.3d 93 (2d Cir.), cert. denied, 534 U.S. 1066 (2001) (dismissing claims of injurious falsehood and concealment, fraudulent deceit and concealment, negligent misrepresentation and concealment and breach of contract); Barbara v. New York Stock Exchange, Inc., 99 F.3d 49, 58 (2d Cir. 1996) (dismissing claims of tortious interference, negligent supervision by NYSE of its Enforcement Division, and breach of covenant of good faith and fair dealing).

In this case, all of NASD's complained-of actions were taken pursuant to its role as a securities regulator under the Exchange Act. The Ninth Circuit, observed,

> [T]he results of any immunity rule may be harsh. If we take Sparta's complaint at face value, which we must, defendants acted in a capricious, even tartuffian manner which caused Sparta enormous damage. Nonetheless, when Congress elected "cooperative regulation" as the primary means of regulating the over-the-counter market, the consequence was that self-regulatory organizations had to enjoy freedom from civil liability when they acted in their regulatory capacity.

Sparta, 159 F.3d at 1215 (emphasis added).

The doctrine of absolute immunity differs from the absence of a private right of action in that it protects NASD from non-federal claims as long as those claims arise from NASD's discharge of its duties under the Exchange Act. See id. at 1213. In Sparta, the plaintiff alleged that NASD and NASDAQ not only violated their own rules, but also committed the common law torts of breach of express and implied contract, breach of the covenant of good faith and fair dealing, gross negligence, intentional misrepresentation, negligent misrepresentation (which plaintiff alleges in the complaint in this case), and interference with economic relations. See id. at 1211. The court dismissed these state law claims, and stated:

> Thus, the structure of the over-the-counter market vests self-regulatory organizations with regulatory authority on certain issues, subject to SEC oversight. The rules issued by the NASD governing listing and delisting stock offerings were not issued

> independent of the Exchange Act, but rather in conformance with it
> . . .

Id. at 1214. In Sparta, the plaintiff attacked NASDAQ's supervision of its market, and by extension NASD's supervision of NASDAQ. The Ninth Circuit rejected those attacks and held explicitly that NASD (and NASDAQ) and the other SRO's must "enjoy freedom from civil liability when they act in their regulatory capacity." See id. at 1215.

NASD's oversight of NASDAQ's listing standards and rules in the context of Mr. Weissman's complaint is not "independent" of the Exchange Act, which requires NASD to establish such requirements, but is performed in "conformance" with the Exchange Act. Permitting plaintiff to assert state law claims for conduct that is subject to a separate federal standard and SEC review would subject NASD to inconsistent and conflicting standards, not only under Florida common law, but also in the remaining 49 states and District of Columbia. The Exchange Act and cases are clear: NASD is not subject to state law claims for actions taken in its regulatory capacity.

Therefore, plaintiff's state law claims for common law fraud and negligent misrepresentation are barred by absolute immunity and must be dismissed.

C. The Complaint Fails To State Claims Under Florida Law

Even if the Court did not find that Counts III (common law fraud) and IV (negligent misrepresentation) barred by the absence of a private right of action or by NASD's absolute regulatory immunity, it must dismiss the complaint as to NASD because the complaint fails to state a claim under Florida law and fails to meet the pleading requirements of Fed. R. Civ. P. 9(b).

Fraud claims are subject to additional requirements in federal court under Rule 9(b). "[I]n in all averments of fraud there is a heightened pleading standard and the circumstances constituting fraud must be stated with particularity." Sands Point Partners, L. P. v. Pediatrix Medical Group, Inc., Case No. 99-6181-CIV-ZLOCH 2000 U.S. Dist. LEXIS 22349 (S.D. Fla. January 19, 2000) (dismissing securities fraud action for insufficient pleading of fact, despite extensive recitation of factual basis in complaint. Id. at * 5.) Common law fraud is a cause of action that must be pleaded with specificity.

Common Law Fraud

The essential elements of common law fraud are: (a) a false representation of fact, known by the party making it to be false at the time it was made; (b) that the representation was made for the purpose of inducing another to act in reliance on it; (c) actual reliance on the representation; and (d) resulting damage to the plaintiff. Ball v. Ball, 160 Fla. 601, 36 So. 2d 172 (Fla. 1948); S.H. Inv. & Dev. Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987); Poliakoff v. National Emblem Insurance Co., 249 So. 2d 477 (Fla. 3d DCA), cert denied, 254 So. 2d 790 (Fla. 1971).

Weissman fails to assert the essential elements of fraud as to NASD: there is no false representation of fact by NASD, known by NASD to be false at the time it was made – the first and second prongs, respectively, of a fraud claim. While the complaint is replete with allegations that WorldCom misrepresented its financial condition to everyone, the complaint does not allege that NASD made a single misrepresentation to plaintiff or anyone else concerning WorldCom's financial condition.

> ¶ 93. At the time of Plaintiff's purchases of the common stock of WorldCom, Inc. (See par. 10 supra), that company had: (i) for over two years issued phony financial statements grossly

> overstating its income and assets; (ii) represented itself as profitable and having positive cash flow when, in fact, it had losses and negative cash flow; (iii) failed to meet the independent audit committee requirement for listing on the Nasdaq stock market; and (iv) was engaged in the largest known corporate fraud in United States history. (emphasis added).

Weissman next alleges that he also relied upon NASDAQ's national advertising campaign (for NASDAQ), and the fact that WorldCom's shares were listed on the NASDAQ market, to make his investment decisions. (¶ 95-99).[7] The complaint does not allege that plaintiff had any contact with NASD (or with NASDAQ) prior to filing this lawsuit, or that NASD made any misrepresentations whatsoever about WorldCom. NASD cannot be left to imagine what these representations are.

The complaint also fails to assert the third prong of a fraud claim – actual reliance by plaintiff upon specific statements of NASD, and indeed, the complaint contains allegations that WorldCom itself disclosed publicly the information allegedly concealed by NASDAQ in its advertisements and NASD in its own advertisements. For instance, the complaint alleges at ¶ 19 that plaintiff relied upon NASD's advertising slogan "Investor Protection. Market Integrity." in making his decision to purchases WorldCom securities. First, a generalized advertising slogan, that contains no reference whatsoever toWorldCom or its financial condition, cannot as a matter of law constitute a representation or misrepresentation about WorldCom. Even short of that, the NASD slogan that plaintiff claims he relied upon in his decision to purchase WorldCom stock was not announced publicly until Friday, June 7, 2002, after all but one of plaintiff's WorldCom

[7] Weissman asserts generally and without factual basis that NASD had sufficient "control" over NASDAQ's affairs to pierce the corporate veil between NASD and NASDAQ, and that NASD had day to day control over NASDAQ's advertising campaigns and listing decisions.

purchases, the last of which occurred on Monday, June 10, according to ¶ 10 of the complaint. See Exhibit 1, press release dated June 7, 2002.[8]

The complaint also alleges that plaintiff relied upon NASDAQ's continued listing of WorldCom, and NASDAQ's failure to disclose in its advertisements that WorldCom was not in compliance with NASDAQ listing standards. ¶¶ 46-59. However, the complaint at ¶ 55 states that WorldCom's own Form S-4, filed with the SEC on April 26, 2001 and which was publicly available to plaintiff, states the very facts that NASD and NASDAQ are accused of failing to disclose, namely, that WorldCom's audit committee lacked expertise in financial accounting, and that the committee could not assure investors that WorldCom's auditors were independent. Similar disclosures were made by WorldCom about compensating its directors with WorldCom shares in 2000, according to public filings referred to in the complaint. All of plaintiff's purchases of WorldCom stock were made in 2002, well after WorldCom publicly disclosed this information that plaintiff claims was so crucial to his investment decision. And again, the complaint does not allege that plaintiff had any contact with NASD or NASDAQ or even viewed their websites at any time before purchasing WorldCom stock.

In sum, Count III contains neither a particularized factual description of any misrepresentations made by NASD to plaintiff nor any allegation that plaintiff relied upon anything NASD said in making his decision to invest in WorldCom. Plaintiff's "fraud" theory is based upon NASD's alleged failure to oversee NASDAQ's activities, such that NASDAQ failed to detect the fraud in WorldCom's financial statements and delist the company. Plaintiff

[8] Although the date that NASD's advertising slogan was publicly announced does not appear in the complaint, the complaint refers to and discusses the slogan, and NASD may attach information concerning the date of its public announcement without converting this matter into a motion for summary judgment under Rule 56.

acknowledges that information he alleges was not disclosed by NASD and NASDAQ was publicly available from WorldCom itself before he ever purchased the stock. This is not fraud under Florida law, and Count III must be dismissed for failing to state a claim.

Negligent Misrepresentation

> In order to be actionable, a suit for negligent misrepresentation must contain the following elements: (1) misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend that the representation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation. Alexander/Davis Properties, Inc. v. Graham, 397 So.2d 699 (Fla. 4th DCA) pet. for rev. denied, 408 So.2d 1093 (Fla. 1981); Joiner v. McCullers, 158 Fla. 562, 28 So.2d 823 (1947); Kutner v. Kalish, 173 So.2d 763 (Fla. 3d DCA), cert. denied, 183 So.2d 210 (Fla. 1965).

Atlantic National Bank of Florida v. Vest, 480 So.2d 1328, 1331-1332 (Fla. 2nd DCA 1985), rev. denied, 481 So.2d 281 (Fla. 1986) and 508 So.2d 16 (Fla. 1987).

The first of these elements is misrepresentation of a material fact. Again, Weissman's own complaint recognizes that WorldCom, and not NASD, is the entity that made the misrepresentations:

> 102. At the time of Plaintiff's purchases of the common stock of WorldCom, Inc. (See par. 10 supra), that company had: (i) for over two years issued phony financial statements grossly overstating its income and assets; (ii) represented itself as profitable and having positive cash flow when, in fact, it had losses and negative cash flow; (iii) failed to meet the independent audit committee requirement for listing on the Nasdaq stock market; and (iv) was engaged in the largest known corporate fraud in United States history. (emphasis added).

The second element of negligent misrepresentation—knowledge of its falsity-- is also missing. NASD never distributed or made any representations about WorldCom 's financial statements.

NASD does not audit financial statements or hold itself out as an auditor. The third element – the representor must intend that the representation induce another to act on it – likewise is missing. NASD has never "sold" WorldCom securities. WorldCom, along with other companies listed on NASDAQ, was simply included in some advertisements for NASDAQ. Finally, the fourth element – injury must result to the party acting in justifiable reliance on the misrepresentation – is also missing. NASD and NASDAQ in no way targeted Weissman with sales literature or brochures designed to address his investment needs. Weissman, an independent investor in WorldCom, could not justifiably rely upon a national advertising campaign for the NASDAQ stock market in making his individual investment decisions.[9]

NASDAQ's listing of WorldCom and inclusion of WorldCom in advertising for NASDAQ cannot give rise to a fraud or negligent misrepresentation claim about WorldCom's financial condition. If the defendants could be held liable here, then they would be exposed to such liability every time a listing company committed and concealed a fraud from its investors and regulators. Such a holding would undermine NASD's ability to carry out the regulatory responsibilities delegated to it pursuant to the Congressionally-mandated self-regulatory scheme.

[9] Courts that have considered whether securities exchanges owe a duty to customers who trade through their facilities have found no such duty. See Spicer v. CBOE, Inc.,No. 88 C 2139, 1992 U.S. Dist. LEXIS 18796 (N. D. Ill. 1992) (dismissing federal securities law claims that options exchange acted as "controlling person" under securities laws for securities sold by another entity); Sabino Piemonte v. CBOE, Inc., 405 F. Supp. 711 (S.D.N.Y. 1975) (dismissing plaintiff's breach of fiduciary duty claim holding the CBOE and Clearing Corporation are not in a fiduciary relationship with individuals who buy and sell shares through their facilities) and Steinberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 74 Civ. 63, 1974 U.S. Dist. LEXIS 8077 (S.D.N.Y. 1974) (notion that the exchange owed a fiduciary duty to investors who transacted business with its members was rejected and offered no basis for recovery).

IV. CONCLUSION

For the foregoing reasons, NASD requests that all claims against it be dismissed with prejudice.

Respectfully submitted,

NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

June 27, 2003

By: Betty G. Brooks /RK

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Defendant NASD's Motion to Dismiss the Complaint and Memorandum of Law in Support of the Motion to Dismiss on behalf of the National Association of Securities Dealers, Inc. was made this 27th day of June, 2003, by overnight Airborne Express mail, addressed as follows:

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News Release

FOR RELEASE Friday, June 7, 2002
CONTACTS: Nancy A. Condon 202-728-8379
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NASD BOARD APPROVES NEW DIVISIONAL STRUCTURE; EXTENDS TERM OF CHAIRMAN AND CEO ROBERT GLAUBER

Mary Schapiro, Douglas Shulman, Linda Fienberg Will Head New Operating Divisions; Schapiro Also Named NASD Vice Chairman

Washington, D.C. — NASD, the leading self-regulatory organization for the securities industry, announced today that its Board of Governors has approved a new divisional structure, which reflects NASD's singular regulatory focus on investor protection and market integrity as a result of its planned separation from both The Nasdaq Stock Market and the American Stock Exchange. The Board also extended the term of NASD Chairman and CEO Robert R. Glauber to five years.

"With our ownership of markets becoming a thing of the past, NASD has evolved into a fully independent organization with its focus entirely on financial regulation," Glauber said. "This new structure serves and makes plain our overriding mission to bring integrity to the markets and confidence to investors. The streamlined new organization will help all NASD professionals work together effectively towards this single unifying purpose. These strategic changes are evolutionary -- yet they are also essential."

Glauber also said the NASD Board approved additional resources to expand enforcement efforts in light of both the new analyst conflict rules approved by the SEC and the USA PATRIOT Act passed by Congress last fall.

In the new organization, NASD will have three operating divisions: Regulatory Policy and Oversight, with primary responsibility for rule making, member regulation, market surveillance and enforcement; Regulatory Services and Operations, with responsibility for NASD's market operations and information systems, technology, the Central Registration Depository (CRD^{SM}), international activities and member services, including education and training products; and Dispute Resolution, with responsibility for arbitration and mediation of investor and industry disputes. Schapiro's division will be responsible for offering NASD's regulatory services to U.S. markets, and Shulman's to markets internationally.

Mary L. Schapiro, who has served for the last six years as President of NASD Regulation, will head Regulatory Policy and Oversight. Schapiro, who previously served as a Commissioner of the Securities and Exchange Commission and as Chairman of the Commodity Futures Trading Commission, has also been named NASD Vice Chairman. Douglas Shulman, who has been responsible for a variety of NASD services, technology and corporate development initiatives for the last 18 months, has been named President of Regulatory Services and Operations. Shulman also will continue to lead NASD's corporate development efforts. Linda D. Fienberg, the current head of NASD Dispute Resolution, will continue to oversee the leading securities dispute resolution forum for investors and member firms.

Glauber said he had asked Schapiro, Shulman and Michael D. Jones to join him in forming a Management Committee to provide overall strategic direction and operational guidance for NASD. Jones, who was promoted to Senior Executive Vice President and will continue to serve as Chief Administrative Officer, will also take on some added responsibilities for overseeing strategy and research.

Glauber said that NASD's divisional structure would go into effect immediately. NASD will seek approval from its membership this summer for the bylaw changes needed to officially consolidate the existing subsidiaries. "With this new structure, we will be able to fulfill our regulatory mandate in an even more agile and efficient manner that will advance our mission and make NASD an even better organization," he said.

Commenting on the appointment of Schapiro as NASD Vice Chairman, Glauber said, "Mary is uniquely qualified to head Regulatory Policy and Oversight and play a key role in shaping NASD's strategic direction. Her appointment as Vice Chairman recognizes her work at the CFTC, the SEC and NASD, through which she has developed unparalleled expertise in the field of securities regulation and earned a well-deserved reputation for professional integrity. Her new positions underline NASD's continuing commitment to tough, even-handed regulation."

"With the changes we are making, NASD will be more fully integrated in its overall approach, from rule making, compliance and enforcement, to professional development, qualification and dispute resolution," Schapiro said. "Given our unified mission and focus, it's important that we unify our expertise, personnel and resources, as well."

In support of the changes announced today, NASD also unveiled a new logo and word mark, underscoring its visual as well as operational independence from Nasdaq. The new logo consists of a unique font spelling out "NASD" juxtaposed with an upward sweeping "data stream," representing both the increasingly technological nature of NASD's work and the positive effect of sound regulation on the markets. Emphasizing its core mission, NASD has also adopted the tagline, "Investor protection. Market integrity."

About NASD

NASD is the leading private-sector provider of financial regulatory services, dedicated to bringing integrity to the markets and confidence to investors through effective and efficient regulation and complementary compliance and technology-based services. NASD touches virtually every aspect of the securities business -- from registering and educating all industry participants, to examining securities firms, enforcing both NASD rules and the federal securities laws, and administering the largest dispute resolution forum for investors and member firms. For more information, please visit our Web Site at www.nasd.com.

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