

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-61107-CIV-MARRA

STEVEN I. WEISSMAN,

Plaintiff,

vs.

THE NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., et al.

Defendants.

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CLARENCE MADDOX
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DEFENDANT THE NASDAQ STOCK MARKET, INC.'S MOTION TO DISMISS

Defendant The Nasdaq Stock Market, Inc. ("Nasdaq"), by and through its undersigned attorneys and pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), respectfully moves the Court to dismiss Plaintiff's complaint. In support of its motion, Nasdaq hereby states as follows:

I. Procedural Background

Plaintiff Steven I. Weissman is a public investor who allegedly purchased shares of WorldCom, Inc., a company that was listed on The Nasdaq Stock Market® - until it was de-listed on July 23, 2002. The value of Mr. Weissman's shares fell drastically and he now seeks to recover his losses and punitive damages from the stock market that listed the shares, and that market's regulator, the National Association of Securities Dealers, Inc. ("NASD").

Plaintiff previously initiated an action with this Court against the same parties seeking essentially the same relief, case no. 02-61500-CIV-ZLOCH/SNOW (the "Original Action").¹ The complaint in that case (the "Original Complaint") had two counts for alleged violations of Florida's

¹ The previous action was originally before Judge Wilkie D. Ferguson, Jr., and subsequently transferred to Chief Judge William J. Zloch pursuant to Administrative Order 2003-47 [DE #33].

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11

blue sky statute, Fla. Stat. Chap. 517, and two state common law claims: (1) breach of fiduciary duty and (2) gross negligence.

Nasdaq filed a Motion to Dismiss the Original Complaint [Original Action DE #15], and the issues raised therein were fully briefed before this Court. Chief Judge Zloch dismissed that complaint on unrelated jurisdictional grounds [Original Action, DE #35]. Plaintiff's new Complaint (the "Amended Complaint") is not materially different from the Original Complaint in that Plaintiff makes no new allegations of fact. However, the Amended Complaint no longer alleges "breach of fiduciary duty" or "gross negligence." Instead, Plaintiff replaced those counts with two equally untenable theories, fraud and negligent misrepresentation, both of which are subject to precisely the same defenses as those that Nasdaq argued in full with respect to the Original Action.

With the Amended Complaint, Plaintiff is apparently attempting to avoid certain errors in the Original Complaint wherein he explicitly stated that he is suing the Defendants because they allegedly failed to ensure that WorldCom was a financially sound company through their regulation of the securities market. Instead, he now states that he is suing the Defendants because they allegedly persuaded him to purchase shares of WorldCom via Nasdaq's own advertising campaign, which occasionally mentioned WorldCom.

But Plaintiff's legal sleight of hand reveals the underlying weaknesses in his case. In essence, Plaintiff is seeking precisely the same relief as in the Original Action because of Nasdaq's alleged behavior in its role as a regulator of the securities market. As a regulator of that market, Nasdaq is a quasi-governmental authority that is protected from the lawsuits of disgruntled investors. The fact that Nasdaq identified WorldCom as a Nasdaq-listed company in a Nasdaq ad—which is really all Plaintiff alleges—doesn't change that. In short, the Amended Complaint is really the

Original Complaint that Plaintiff has dressed up in different clothes; as such, the Amended Complaint is subject to the very same defenses that undermined the Original Complaint.

II. Summary of Argument

Plaintiff fails to state a claim upon which relief may be granted. Plaintiff essentially claims that because he could directly link to WorldCom's website from Nasdaq's website and because Nasdaq included WorldCom in some of its advertising, that Nasdaq materially misled him and must stand as guarantor of his investment choices. Plaintiff is wrong.

Pursuant to a delegation from the NASD, Nasdaq is a securities regulator. Plaintiff impermissibly seeks to impose substantial monetary liability on Nasdaq for actions taken or omitted strictly within its role as a securities regulator. Plaintiff's claims fail, therefore, and must be dismissed on any one of three independent and well settled defenses.

First, Nasdaq is entitled to absolute immunity for conduct performed as part of its self-regulatory and oversight functions. It is indisputable that Nasdaq's conduct, as alleged in the Amended Complaint, arose in the course of congressionally sanctioned regulation of the Nasdaq market. As such, Nasdaq is absolutely immune for its alleged actions. See D'Alessio v. New York Stock Exch., Inc., 258 F.3d 93, 105-06 (2nd Cir.), cert. denied, 122 S. Ct. 666 (2001).

Second, Plaintiff has failed to exhaust his administrative remedies pursuant to the comprehensive federal scheme provided by Congress. In enacting the federal securities laws and establishing a system of cooperative self-regulation, Congress set forth a detailed administrative process that includes review by the Securities and Exchange Commission ("SEC") of NASD decisions and judicial review of SEC actions by the federal courts of appeals. Plaintiff has failed to exhaust those remedies and, accordingly, his attempt to initiate this action against Nasdaq is barred

for lack of jurisdiction. See, e.g., Touche Ross & Co. v. SEC, 609 F.2d 570, 574 (2nd Cir. 1979); Swirsky v. Nat'l Ass'n of Sec. Dealers, 124 F.3d 59, 62 (1st Cir. 1997).

Third, there is no private cause of action for violations of the Act or for violations of marketplace or NASD rules. See Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479 (1979); Desiderio, 191 F.3d at 208. Plaintiff's attempt to avoid this well-established rule by pleading his claims as Florida statutory and common law causes of action is unavailing. See, e.g., Feins v. American Stock Exch., Inc., 81 F.3d 1215, 1217 (2d Cir. 1996).

In addition, the Amended Complaint must fail because Plaintiff failed to allege sufficient facts to bring even a single cause of action. There are no facts in the Amended Complaint to support a claim for common law fraud or negligent misrepresentation, centrally because there is not a single specific allegation that Nasdaq made a false statement of a material fact. See Rhodes v. Omega Research, Inc., 38 F. Supp. 2d 1353, 1357 (Fla. S.D. 1999). Further, the statutory claims are a brazen misapplication of Florida's blue sky laws.

III. Analysis

A. The comprehensive federal regulatory scheme applies here.

Nasdaq is a subsidiary of the NASD, a private self-regulatory organization ("SRO") registered with the SEC as a national securities association pursuant to the 1938 Maloney Act Amendments, 15 U.S.C. §§ 78o-3, et seq., to the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78a, et seq.² The NASD is entrusted with numerous vital regulatory functions for the securities industry, including the promulgation of rules and regulations under the federal securities

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(a)(26)§§.

laws. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 201 (2nd Cir. 1999). Among other things, the NASD is responsible for overseeing Nasdaq.

Although the NASD is a non-governmental agency, it is subject to SEC oversight. Whitehall Wellington Investments, Inc. v. National Association of Sec. Dealers, Inc., 2000 WL 1846129, *1 (S.D. Fla.). The NASD must file all proposed rules with the SEC prior to implementation. Once proposed, the rules must be approved by the SEC. Id. To do so the SEC must determine that the proposed rule is consistent with the purposes of the Exchange Act. Id. The SEC may abrogate or amend NASD rules at any time. Id.; See 15 U.S.C. § 78s(c). Interested persons may submit comments concerning proposed NASD rules to the SEC. See 15 U.S.C. § 78s(b). Judicial review of SEC-approved NASD rules are limited exclusively to the United States Courts of Appeal. See 15 U.S.C. § 78y.

Nasdaq's legal authority to operate a stock market is delegated to it by the NASD under a plan approved by the SEC. Although Nasdaq exercises primary responsibility for market-related functions, including market-related rule-making, all actions taken by Nasdaq pursuant to its delegated authority are subject to review, ratification, or rejection by the NASD.³

The SEC also has the power to "abrogate, add to, and delete from" rules of the NASD, suspend or revoke the NASD's registration, censure or limit the NASD's activities, functions, and operations, or remove from office or censure any NASD officer or director. 15 U.S.C. §§ 78s(c), (h)(1), (h)(4); D'Alessio, 258 F.3d at 96; Gustafson v. Strangis, 572 F. Supp. 1154, 1155 (D. Minn. 1983). In addition, the SEC has the authority to bring an action to enjoin any activity that would

³ As stated in the Amended Complaint, Nasdaq has applied to the SEC to establish itself as an independent national securities exchange. That application is still pending with the SEC, and has no bearing on Nasdaq's status during all times relevant under the Amended Complaint.

violate the Exchange Act or the NASD's own rules, and can seek a civil penalty against violators. See 15 U.S.C. §§ 78u(d)(1), (d)(3)(a).

In accordance with its responsibilities as an SRO, the NASD performs several of its regulatory functions through Nasdaq, its subsidiary. For example, the NASD has delegated to Nasdaq the obligation to develop, operate, and maintain systems and services for a number of securities markets that it operates. The NASD also has delegated to Nasdaq the responsibility for the formulation of regulatory policies and listing criteria applicable to the markets it operates.

Subject to its delegated authority, Nasdaq oversees the trading of thousands of stocks on Nasdaq systems. Nasdaq is the largest electronic, screen-based market in the world, lists nearly 4,000 companies, and has a larger dollar volume and trades more shares per day, than any other market in the world. Using advanced computer and telecommunications technologies, Nasdaq enables securities firms to execute transactions for investors and for themselves from anywhere they are located in an environment of real-time trade reporting and automated market surveillance.

B. Plaintiff improperly blames Nasdaq for his investment losses.

Plaintiff, Steven I. Weissman, allegedly purchased 82,800 shares of WorldCom at a total cost of approximately \$610,000 over an eighteen month period, from December 2000 through June 2002. Complaint at ¶ 10. Plaintiff's WorldCom stock presently has essentially no value. Complaint at ¶ 11. Mr. Weissman claims that he purchased shares of WorldCom because he relied on Nasdaq to regulate WorldCom's disclosures (Complaint at ¶ 98) and to verify WorldCom's financial viability before mentioning the company in Nasdaq's own advertisements (Complaint at ¶ 109). These advertisements were all intended to feature Nasdaq, as a stock market. At most, the advertisements merely mention certain companies as examples of stocks that can be found on the Nasdaq stock market. Among other things, Mr. Weissman claims that the NASD and Nasdaq failed

to disclose that they had a financial interest in promoting WorldCom stock (Complaint at ¶ 95) and knowingly deceived him by "convey[ing] the false representation and impression that WorldCom was a great company with accounting in accordance with GAAP; a good investment; and, that WorldCom met the listing requirements of the Nasdaq stock market." Amended Complaint at ¶ 96. Mr. Weissman impermissibly seeks to recover alleged losses that resulted when the price of his shares in WorldCom fell.

Again, the fact that all United States stock markets have absolute immunity for actions taken in their regulatory capacity means that none of them can be sued for the disappointing performance of listed stocks—even if it turns out that those stocks did not meet the listing rules of the market. Like other United States securities markets, Nasdaq and the NASD oversee the trading of thousands of stocks on the Nasdaq Stock Market and mention dozens, if not hundreds, of stocks in its advertisements and other public relations materials. Decisions regarding the listing of stocks are made by Nasdaq on a daily basis. In the Plaintiff's memorandum of law in response to Nasdaq's motion to dismiss the Original Complaint [Original Action DE #17], Plaintiff failed to cite even a single case involving a public customer, such as Plaintiff, ever obtaining a judgment against a United States stock market for money damages allegedly resulting from its listing decisions. There is a very good reason that Plaintiff failed to cite such a case: one doesn't exist. Nasdaq is unaware of any decision holding a United States stock market liable to a public customer for money damages allegedly resulting from its listing decisions since the Exchange Act's inception in 1934.

As discussed below, it is well-settled that Nasdaq and other SROs may not be held liable in damages for violations of their rules. Therefore, the Amended Complaint fails to state a claim upon which relief can be granted and accordingly must be dismissed. Also, even if Plaintiff argues that he does not specifically allege that Nasdaq violated NASD rules or the Exchange Act, Plaintiff's

claim is nonetheless barred because Nasdaq is absolutely immune from state law liability for actions taken in a regulatory context pursuant to responsibilities imposed by the Exchange Act, and Plaintiff failed to exhaust his administrative remedies. Further, Counts III and IV fail to meet the pleading requirements under the Fed. R. Civ. P. 9(b).

IV. The Standard of Review

A motion to dismiss for failure to state a claim tests the sufficiency of a complaint to determine whether it sets forth sufficient allegations to establish a claim for relief. Conley v. Gibson, 355 U.S. 41, 45 (1957). Additionally, a court is required to view the complaint in the light most favorable to the plaintiff and accept the truthfulness of well-pleaded facts. See Warth v. Seldin, 422 U.S. 490, 501 (1975); See also Beck v. Deloitte et al., 144 F.3d 732, 735-36 (11th Cir.1998) (quoting St. Joseph's Hosp. Inc. v. Hospital Corp. of America, 795 F.2d 948 (11th Cir.1986)). To warrant dismissal it must be “clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

To survive a motion to dismiss, a plaintiff must do more than merely “label” his claims. Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice. Blumel v. Mylander, 919 F.Supp. 423, 425 (M.D. Fla.1996); Fernandez-Montes v. Allied Pilots Ass'n., 987 F.2d 278 (5th Cir. 1993). Moreover, dismissal of the complaint is appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir.1993).

V. Argument

A. Nasdaq is absolutely immune from suit for its regulatory actions.

It is well settled that SROs such as the NASD, and their senior officials, are absolutely immune “from suit for conduct falling within the scope of the SRO’s regulatory and general oversight functions.” D’Alessio v. New York Stock Exch., Inc., 258 F.3d 93, 105 (2nd Cir.), cert. denied, 122 S. Ct. 666 (2001); see also Partnership Exch. Sec. Co. v. Nat’l Ass’n of Sec. Dealers, Inc., 169 F.3d 606, 608 (9th Cir. 1999) (holding that the NASD was protected by absolute immunity for its conduct “under the aegis of the Exchange Act’s delegated authority” (citation omitted)); Sparta Surgical Corp. v. Nat’l Ass’n. of Sec. Dealers, Inc., 159 F.3d 1209, 1215 (9th Cir. 1998) (holding that the NASD is cloaked with immunity when performing its regulatory functions); Barbara v. New York Stock Exch., Inc., 99 F.3d 49, 58-59 (2nd Cir. 1996) (holding that the New York Stock Exchange, another SRO, 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); American Benefits Group, Inc. v. Nat’l Ass’n of Sec. Dealers, No. 99 CIV 4733 JGK, 1999 WL 605246, at *8 (S.D.N.Y. Aug. 10, 1999) (holding that “the NASD is entitled to absolute immunity when exercising its authority within the scope of its official duties”).

In D’Alessio, the Second Circuit held that the New York Stock Exchange, “when acting in its capacity as a SRO, is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder.” D’Alessio, 258 F.3d at 106. The court explained that providing SROs with immunity protection was an essential part of the overall structure of the securities market and the delegation of authority to SROs from Congress and the SEC. *Id.* at 105-06.

When Congress enacted 1933 Securities Act and the 1934 Securities Exchange Act (the “Exchange Act”), it chose to vest primary authority for regulating the national securities markets in SROs, subject to SEC oversight. See 15 U.S.C. § 78s; Sparta, 159 F.3d at 1213. Under the federal scheme, SROs such as the NASD exercise control over most aspects of the securities industry, through the promulgation of rules, the listing of particular securities for public trading, disciplinary actions, and various other functions. See 15 U.S.C. §§ 78f, 78l, 78s. Based on the extensive regulatory functions and responsibilities of SROs under this federal self-regulatory system, courts have consistently held that SROs are protected by absolute immunity for their SRO functions, just as judges and government regulatory entities enjoy such immunity for their actions. As the Second Circuit explained in Barbara:

We think that absolute immunity is particularly appropriate in the unique context of the self-regulation of the national securities exchanges. Under the Exchange Act, the [New York Stock Exchange] performs a variety of regulatory functions that would, in other circumstances, be performed by a government agency. Yet government agencies, including the SEC, would be entitled to sovereign immunity from all suits for money damages.

Barbara, 99 F.3d at 59 (internal citations omitted). Application of those controlling principles here requires that Nasdaq receive absolute immunity protection.

The essence of the Amended Complaint is that Nasdaq unlawfully “touted” WorldCom by stating—truthfully—that WorldCom was a listed company in some of its advertisements notwithstanding Defendants’ purported knowledge that WorldCom allegedly failed to meet Nasdaq listing requirements and thus should have been delisted. Amended Complaint at ¶¶ 52-59.⁴ Even assuming *arguendo* that those alleged actions occurred, they fall squarely within the sphere of

⁴ In the Original Complaint, Plaintiff did not use the term “touting” to consistently describe Nasdaq’s references to WorldCom in its advertisements. In the instant Complaint, however, Plaintiff inserted the term repeatedly in a transparent attempt to accomplish with tortured semantics what he could not accomplish with allegations of actual fact. Compare Amended Complaint at ¶¶ 52, 56 and 59 with Original Complaint at ¶¶ 54, 58 and 61.

Nasdaq's regulatory functions and is protected by absolute immunity. See D'Alessio v. New York Stock Exch., Inc., 125 F. Supp. 2d 656, 658 (S.D.N.Y. 2000) (explaining that where the allegations "relate to the defendants' development and promulgation of interpretations of statutory and regulatory requirements, the dissemination and implementation of these interpretations, and the provision of information to government agencies, all of which are categories of action well within the perimeter of the defendants' quasi-governmental duties," absolute immunity attaches), aff'd, 258 F.3d 93 (2nd Cir.), cert. denied, 122 S. Ct. 666 (2001); Sparta, 159 F.3d at 1214 (observing that "[t]he 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"). Nasdaq is charged with overseeing the market it operates and under the applicable NASD rules, it is Nasdaq that is assigned the regulatory authority to list or de-list securities. See NASD Manual (CCH), Rule 4300. Even if one assumes, arguendo, that Nasdaq failed to enforce its listing rules properly, it is immune from suit on that basis.

As the Ninth Circuit noted in Sparta,

defendants acted in a capricious, even tartuffian manner which caused [plaintiff] 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.⁵

Here, all of the alleged misconduct of which Nasdaq is accused falls plainly within Nasdaq's capacity as regulator. See D'Alessio, 125 F. Supp. 2d at 658. As a stock market, Nasdaq must

⁵ As the Ninth Circuit also pointed out in Sparta, if Plaintiffs were able to recover against Nasdaq based on a common law damage theory like the one they purport to invoke here, states would be placed in the position of "defin[ing] by common law the regulatory duties of a self-regulatory organization, a result which cannot co-exist with the Congressional scheme of delegated regulatory authority under the Exchange Act." Sparta, 159 F.3d at 1215.

enforce its rules through the listing process; therefore, Nasdaq is plainly entitled to absolute immunity in this case and Plaintiff's Complaint must be dismissed.

B. Plaintiff's failure to exhaust his administrative remedies also requires dismissal.

Persons aggrieved by acts or omissions by a SRO are required to exhaust their administrative remedies at the SEC. As stated above, Congress has created a comprehensive and interrelated system of law, regulation, and administrative remedy to control the functioning of the national securities markets and their participants. Pursuant to this system, the NASD and other SROs are responsible for regulating the day-to-day operation of the markets and ensuring compliance with the Exchange Act, federal securities regulations, and their rules. See 15 U.S.C. §§ 78s(b), 78s(d), 78o-3(b). The SEC exercises plenary supervisory authority and primary jurisdiction to remedy any improper acts or omissions of the SROs, and provides an administrative forum for aggrieved persons. See 15 U.S.C. § 78s(h); Cook v. NASD Regulation, Inc., 31 F. Supp. 2d 1245, 1248 (D. Colo. 1998). Persons aggrieved by any such acts or omissions by a SRO are required to exhaust their administrative remedies at the SEC. *Id.* As a final step in the administrative system, Congress provided that judicial review of actions by the SEC may only be had in the federal courts of appeals. See 15 U.S.C. § 78y. "Congress believed that this three-tiered process founded upon self-regulation would garner several benefits, including 'the expertise and intimate familiarity with complex securities operations which members of the industry can bring to bear on regulatory problems, and the informality and flexibility of self-regulatory procedures.'" Swirsky v. Nat'l Ass'n of Sec. Dealers, 124 F.3d 59, 62 (1st Cir. 1997) (quoting S. Doc. No. 93-13, 93rd Cong., 1st Sess. 149 (1973)).

It is settled law that "a litigant is required to pursue all of his administrative remedies before he will be permitted to seek judicial relief." Touche Ross & Co. v. SEC, 609 F.2d 570, 574 (2d Cir.

1979); see also McKart v. U.S., 395 U.S. 185, 195, 89 S.Ct. 1657, 1663; American Benefits Group, 1999 WL 605246, at *5. This exhaustion requirement “allows the administrative agency to utilize its discretion, apply its expertise, correct its own errors, and handle its business expeditiously.” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass'n of Securities Dealers, Inc., 616 F.2d 1363, 1370 (5th Cir. 1980).

The doctrine of exhaustion of administrative remedies in general provides that a party may not seek judicial relief in the federal courts until he has first sought all possible relief within the agency itself. Guitard v. United States Secretary of Navy, 967 F.2d 737, 740 (2nd Cir. 1992) (citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459 (1938)). The requirement of exhaustion may arise either from explicit statutory language or an administrative scheme that provides for agency relief. Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 592 (2nd Cir. 1993). If a party fails to exhaust administrative remedies before seeking redress in the federal courts, the Court should dismiss the action because it lacks jurisdiction over the subject matter. Perez-Perez v. Hanberry, 781 F.2d 1477, 1478 (11th Cir.1986).

The dispute at issue here centers on Nasdaq’s oversight of its market and its authority to list or de-list securities. The NASD rules governing decisions to list, not list, or de-list a company were issued pursuant to the Exchange Act’s directive that self-regulatory organizations adopt rules and by-laws in conformance with the Exchange Act. See 15 U.S.C. § 78o-3(b). As these functions plainly call for “agency expertise or the exercise of agency discretion,” the exhaustion requirement is especially appropriate in this case. Touche Ross & Co., 609 F.2d at 577. If Plaintiff challenges Nasdaq’s handling of its duties, which his Amended Complaint purports to do, he must first do so at the SEC: “It is the SEC that is required, in the first instance, to determine whether a self-

regulatory organization such as NASD, is discharging properly its duties and responsibilities in compliance with all applicable rules, regulations and federal law.” Cook, 31 F. Supp. 2d at 1249.

In Touche Ross & Co., the Second Circuit concluded that if the defendant has acted “plainly beyond its jurisdiction as a matter of law,” plaintiff may successfully escape the exhaustion requirement. 609 F.2d at 576. However, Plaintiff has not alleged facts that could support a finding that Nasdaq acted beyond its jurisdiction in failing to disassociate itself from WorldCom and/or in mentioning the company in Nasdaq’s public announcements and advertisements. To the contrary, Plaintiff alleges that Nasdaq purportedly misused its congressionally mandated authority to generate “profit” for itself by “generating purchases of WorldCom shares.” Amended Complaint at ¶ 97. There is no excuse for Plaintiff’s failure to exhaust his administrative remedies. Indeed, any error on the part of the NASD in this case “could have and should have been raised with the NASD and the SEC,” with judicial relief ultimately available in the federal courts of appeals. See American Benefits Group, 1999 WL 605246, at *8.⁶ Therefore, Plaintiff’s failure to exhaust his administrative remedies requires dismissal of his Complaint for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 700 (3d Cir. 1979); Coleman v. Nat’l Ass’n of Sec. Dealers, Inc., No. 99 Civ. 248(BSJ), 1999 WL 305100, at *3 (S.D.N.Y. May 14, 1999).

⁶ Courts occasionally have noted that exceptions to the exhaustion requirement, though “disfavored,” can in some circumstances excuse a plaintiff’s failure to exhaust his remedies. See, e.g., American Benefits Group, 1999 WL 605246, at *7. Because Congress “already provided a clear answer to the question of how the SROs and the SEC should be integrated into the legal system,” however, “the discretionary balancing called for by the exhaustion doctrine is . . . both unnecessary and inappropriate.” Hayden v. New York Stock Exch., Inc., 4 F. Supp. 2d 335, 339 n.3 (S.D.N.Y. 1998). Under the Exchange Act, the administrative remedies available to persons aggrieved by SRO actions are the result of congressional direction. Accordingly, Plaintiff must avail himself fully of the administrative review system set forth by Congress, and it would be inappropriate to excuse Plaintiff from fulfilling the exhaustion requirement in this context.

C. Plaintiff's state law claims are an improper attempt to initiate a private right of action for a purported violation of the Nasdaq's own rules and regulations.

A separate ground requiring dismissal of Plaintiff's Complaint — and a corollary to both of the well-established doctrines of absolute immunity and exhaustion of administrative remedies discussed above — is that there exists no implied private right of action to sue the SEC or SROs under the Exchange Act or the rules thereunder.

Although Section 19(g) of the Exchange Act requires “[e]very self-regulatory organization” to “comply with the provisions of [the Exchange Act], the rules and regulations thereunder, and its own rules,” 15 U.S.C. § 78s(g)(1), federal courts have repeatedly held that there is no private right of action to challenge a SRO's failure to follow its own rules and regulations. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 208 (2nd Cir. 1999); Feins v. American Stock Exch., Inc., 81 F.3d 1215, 1216 (2^d Cir. 1996). Courts have recognized that finding a private cause of action to enforce the federal securities laws against SROs would be contrary to the self-regulatory nature of the securities industry. See, e.g., Sparta, 159 F.3d at 1213 (holding that “to the extent that [plaintiff] seeks private relief for NASD or Nasdaq's breach of their own rules, its claims are barred”); Jablon v. Dean Witter & Co., 614 F.2d 677, 681 (9th Cir. 1980) (“We believe the entire statutory scheme makes it highly improbable that Congress absentmindedly forgot to mention an intended private action” in 15 U.S.C. § 78f(b) or § 78o-3(b)(6) (citations omitted)); Gustafson v. Strangis, 572 F. Supp. 1154, 1155 (D. Minn. 1983) (dismissing a complaint against the NASD and noting that “implied causes of action undermine the concept of self-regulation, a central component of the [Exchange] Act”); Colman v. D.H. Blair & Co., 521 F. Supp. 646, 654 (S.D.N.Y. 1981) (noting that “the statutory scheme,” which “provides for self-regulation and enforcement” by the NASD and the SEC, “suggest[s] that Congress has selected” those measures “as the exclusive means of enforcement”). Indeed, as discussed above, Congress expressly provided a system of administrative

relief through which to enforce a SRO's compliance with its own rules, the Exchange Act, and other rules and regulations thereunder.

In an apparent attempt to escape the unavoidable consequence that he has no private right of action against Defendants, in the Original Complaint Plaintiff purported to plead Florida common law and statutory claims against Nasdaq. Now, with his Amended Complaint, Plaintiff is again attempting to artfully plead around the well settled doctrine that no private right of action exists. However, "artful pleading cannot be used to disguise federal issues in state law terms." Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., No. C-95-3926-MHP, 1997 WL 50223, at *3 (N.D. Cal. Jan. 30, 1997), *aff'd*, 159 F.3d 1209 (9th Cir. 1998).

As the district court recognized in Sparta, "all seven of the plaintiff's common law claims are founded on the conduct of defendants in their role as a self-regulating organization. That these claims have been pled in common law terms does not negate this fact." *Id.* Courts have consistently rejected similar attempts by plaintiffs to dress up their allegations as state or common law claims. See, e.g., Desiderio, 191 F.3d at 207-08 (treating plaintiff's purported state law tort claims against the NASD as an attempt to bring a private right of action under the Exchange Act for the NASD's alleged failure to follow its own rules); Feins, 81 F.3d at 1217 (affirming district court's treatment of plaintiff's claims brought against SRO for acting "negligently, carelessly, recklessly and wantonly" as asserting private rights of action under 15 U.S.C. §§ 78s(d), 78s(f) and 78s(g)); Niss v. Nat'l Ass'n of Sec. Dealers, Inc., 989 F. Supp. 1302, 1308-09 (S.D. Cal. 1997) (recognizing that plaintiffs' state law claims were mere attempts to assert a private right of action for the NASD's alleged failure to follow its own rules). The same rule applies here.

Plaintiff's attempt to cloud the true nature of his claims must be rejected. Although Plaintiff asserts Florida statutory and common law claims in his Amended Complaint, a fair reading of both

the Original Complaint and the Amended Complaint in their totality reveals that at the root of all the allegations lies a simple disagreement over the way in which Nasdaq treated WorldCom in Nasdaq's capacity as an SRO under the Exchange Act and NASD rules. Plaintiff's Complaint, therefore, must be dismissed.

D. The Complaint fails to plead fraud with sufficient specificity.

Even if Defendants lacked the well-established defenses that the comprehensive federal scheme creates, Plaintiff's fraud claim would fail on its face. Fed. R. Civ. P. 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rhodes v. Omega Research, Inc., 38 F. Supp. 2d 1353, 1357 (Fla. S.D. 1999) "[I]n Florida an action for negligent misrepresentation sounds in fraud rather than negligence." Id. at 1362 (citing Souran v. Travelers Ins. Co., 982 F.2d 1497, 1511 (11th Cir. 1993)). See also Meterlogic, Inc. v. Copier Solutions, Inc., 126 F. Supp. 2d 1346, 1360, fn. 10 (Fla. S.D. 2000). As a result, the averment's in Plaintiff's common law fraud claim (Count III) and negligent misrepresentation claim (Count IV) must be stated with particularity. Rule 9(b) may be satisfied if the complaint sets forth:

- (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
 - (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
 - (3) the content of such statements and the manner in which they misled the plaintiff,
- ...

126 F. Supp. at 1360 (citing Medalie v. FSC Sec. Corp., 87 F. Supp. 2d 1295, 1306 (S.D. Fla. 2000); Leonard v. Stuart-James Co., 742 F. Supp. 653, 659 (N.D. Ga. 1990) (granting motion to dismiss where complaint failed to allege "specifically when, where, by whom, or specifically what the representation was"))).

In the Amended Complaint, Plaintiff failed to allege any misstatements by Nasdaq, whatsoever, much less the time, place and manner in which Plaintiff was misled. The only indication that Plaintiff even attempted to comply with the pleading requirements in this regard is in ¶ 96 of the Amended Complaint wherein he lists five examples of an alleged advertising campaign by Nasdaq. None of the five examples are misstatements, or even characterized as such by Plaintiff. Importantly, none of the examples actually state what Plaintiff claims they "conveyed."⁷ Given that the statements amounted to all of the specificity Plaintiff could muster, the entire Complaint falls far short of the exacting pleading requirements of Rule 9(b).

The Amended Complaint states that Plaintiff "requires discovery to recall and provide further specification as to the dates and places and method of publication" as to the specifics of additional alleged misstatements. Amended Complaint ¶ 96. But Plaintiff's obligation to follow Rule 9(b) cannot be postponed until Plaintiff accomplishes further discovery. See, e.g., A.I. Credit Corp. v. Hartford Computer Group, Inc., 847 F.Supp. 588 (N.D.Ill.1994) (recognizing that one purpose of Rule 9(b) is "to eliminate filing of conclusory complaint as pretext for using discovery to uncover wrongs"). Because Plaintiff cannot identify specific misstatements by Nasdaq upon which he relied, Rule 9(b) requires that the common law fraud (Count III) and negligent misrepresentation claims (Count IV) be dismissed.

⁷ For example, Plaintiff quoted but did not attach the Form 10-12G, filed by Nasdaq with the SEC on April 30, 2001. Amended Complaint at ¶ 96(i). The Court may properly review the quoted passage in context. See Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1189 (11th Cir. 2002) (holding that "a court may consider the contents of public disclosure documents which are required to be filed with the SEC and are actually so filed"). The first several pages of Nasdaq's Form 10-12G is excerpted and attached to the accompanying affidavit of David. S. Mandel, Esq. as Exhibit A. The Form 10-12G, itself, is over five-hundred and fifty pages long and the passage cited by Plaintiff, when viewed in context, is obviously of no promotional value whatsoever to WorldCom. See cited text at p. 12 of Ex. A of attached affidavit.

E. Plaintiff failed to plead the elements of fraud.

Plaintiff failed to properly plead the elements of common law fraud; therefore Count III should be dismissed. The elements to an action in common law fraud are: (1) an intentional false representation of fact (i.e., known to be false at the time it was made); (2) the false representation was intended to induce another to act in reliance thereon; (3) actual reliance by the plaintiff; and (4) resulting damages. See 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 S.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). The Amended Complaint failed to establish all of the first three elements of fraud.

1. Plaintiff failed to allege that Nasdaq made a false statement of fact.

As demonstrated in the previous Section V.D. Plaintiff failed to allege the existence of any specific false representations of fact by Nasdaq. The only specific reference to a false statement of material fact is at ¶ 93 of the Amended Complaint:

At the time of Plaintiff's purchases of the common stock of WorldCom, Inc. . . . that company had: (i) for over two years issued phony financial statements grossly overstating its income and assets; (ii) represented itself as a 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.

However, none of the false representations of fact identified in ¶ 93 were propounded by Nasdaq; instead, according to the Amended Complaint itself, they were propounded only by WorldCom. Plaintiff does allege that Nasdaq knew the statements WorldCom made were untrue; however, that is rather beside the point: It was WorldCom that made the alleged misstatements of fact, not Nasdaq.

While Plaintiff alleged that Nasdaq implicitly endorsed WorldCom's alleged false statements of fact in Nasdaq's own advertising campaign; he failed to identify any such endorsement, even

among the five examples he enumerated. Amended Complaint at ¶ 96. In sum, Plaintiff failed to identify even a single false representation of fact propounded by Nasdaq; therefore he failed to establish both the first and second⁸ elements of his fraud claim. As a result, that claim (Count III) should be dismissed.

2. Plaintiff failed to show that his reliance was reasonable, as required under Florida law.

It is well settled under Florida law that “a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence.” Wasser v. Sasoni, 652 So. 2d 411 (Fla. 3rd DCA 1995) (citing Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So. 2d 1089 (Fla. 3^d DCA 1979) and Welbourn v. Cohen, 104 So. 2d 380 (Fla. 2^d DCA 1958)); David v. Davenport, 656 So. 2d 952, 953 (Fla. 3rd DCA 1995) (holding that “a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence”).

Here, even if the Court determines that Plaintiff did allege sufficient facts to show that there may have been both a false statement of fact and an intention to induce reliance thereon, Plaintiff could not possibly show that his reliance was reasonable because the truth would have been discovered with even a minimal degree of diligence.

Plaintiff’s only evidence that Nasdaq knowingly issued false statements of fact is the existence of a Form S-4 that Plaintiff filed with the SEC on April 26, 2001. Amended Complaint at ¶ 55. However, as Plaintiff’s own actions prove, he had access to precisely the same information that he claims Nasdaq tortiously ignored. WorldCom’s publicly filed documents are freely available for every investor, including Plaintiff. Plaintiff cannot now complain that Nasdaq did not make him aware of certain “disclaimers” that were easily available for his own perusal. If Plaintiff had engaged

⁸ Because Plaintiff failed to allege that Nasdaq propounded a false representation of fact, he also failed to allege that Nasdaq did so intentionally to induce reliance thereon.

only in ordinary diligence, he could have discovered the information that he now claims contradicts the alleged false statements by Nasdaq. Amended Complaint at ¶ 55.

Indeed, any reasonably diligent investor should be expected to review the publicly filed documents of the company whose stock he is purchasing. In effect, because Plaintiff failed to review the April 26, 2001 Form S-4 for himself, he is now suing Nasdaq for not reading it for him and alerting him to the disclaimers that, given the advantage of hindsight, he wishes he would have paid more attention to. Plaintiff's position is simply untenable. Under Florida law, in order to bring an action in fraud, Plaintiff must demonstrate that he engaged in at least a minimal degree of responsible diligence in order to justify his reliance on the allegedly false statement of fact. Plaintiff admits in the Amended Complaint that if he would have performed such diligence, he would have discovered disclaimers that he claims dispelled the misstatements allegedly made by Nasdaq; he cannot, therefore, claim that he justifiably relied on those misstatements.

In short, because Plaintiff could have easily discovered the truth of what he claims was a misstatement by Nasdaq through the exercise of ordinary diligence, he cannot maintain his claim in fraud. Count III should be dismissed.

F. Plaintiff failed to plead the elements of negligent misrepresentation.

To prove negligent misrepresentation, it must be shown that (1) there was a misrepresentation of material fact; (2) the representer either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the representer intended to induce another to act on the misrepresentation; and (4) injury resulted to a party acting in justifiable reliance upon the misrepresentation.

Baggett v. Electricians Local 915 Credit Union, 620 So. 2d 784, 786 (Fla. 4th DCA); Hoon v. Pate Constr. Co., 607 So. 2d 423, 427 (Fla. 4th DCA 1992). Essentially, the elements for fraud and negligent misrepresentation are identical except that in the latter type claim the defendant need not know of the falsity of the statement in question if he "should have known" of its falsity. It follows

that Plaintiff's claim for negligent misrepresentation (Count IV) is deficient for all of the reasons stated in the previous Section V.E. regarding fraud. Namely, (1) Plaintiff failed to allege a misstatement of fact, (2) Nasdaq did not intend to induce Plaintiff to purchase shares of WorldCom and (3) Plaintiff did not justifiably rely on any alleged misstatements by Nasdaq.

The argument that Plaintiff must have exercise due diligence himself in order to maintain a claim against Nasdaq is particularly strong in the case of negligent misrepresentation. The Florida Supreme Court has explained this distinction as follows:

When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences. The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions.

Gilchrist Timber Co. v. ITT Rayonier, 696 So. 2d 334 (Fla. 1997). Indeed, in light of Florida's well established comparative negligence regime, one "can [not] hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error." *Id.* at 339.

The Florida Supreme Court further explained that a plaintiff is responsible for "investigating information that a reasonable person in the position of the recipient would be expected to investigate." In the instant case, as explained in Section V.E.3, Plaintiff should at least be vested with the responsibility of checking the publicly filed documents of the companies he is investing in. If he had done so, even according to the allegations in the Amended Complaint, he would have been alerted to the falsity of the alleged misstatements. See Amended Complaint at ¶ 55.

In any event, Plaintiff failed to demonstrate the existence of even a single instance of a false statement uttered by Nasdaq. As previously argued, all of the false statements that Plaintiff identifies that may have injured him in any way, were made by WorldCom, not Nasdaq. As such, Count IV

of the Amended Complaint must fail because Plaintiff failed to allege the elements of fraudulent misrepresentation.

G. Fla. Stat. § 517.301(1)(b) does not apply to stock exchanges and, therefore, does not give rise to an action against Nasdaq.

Count I of the Amended Complaint is an attempt to stretch the application of Fla. Stat. § 517.301(1)(b) so far beyond its purposes, that application in the instant case would be absurd and preempted⁹ by the federal securities laws. § 517.301(1)(b) makes it illegal to:

publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication, or broadcast 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, or from an agent or employee of an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration.

(emphasis added). In the Amended Complaint, Plaintiff argues that the listing fees charged by Nasdaq constituted “consideration” under § 517.301(1)(b) (Amended Complaint at ¶ 77), and that the mentioning of WorldCom by Nasdaq in its public relations advertisements and elsewhere amounted to a publication that violated the statute. Amended Complaint at ¶ 79. But his misreads the plain language of the statute. The consideration required by § 517.301(1)(b) has to be paid for the publication. Here, WorldCom did not pay Nasdaq for mentioning WorldCom in Nasdaq ads, nor does Plaintiff even allege so. As Plaintiff alleges, WorldCom paid Nasdaq listing fees, for listing the company on the Nasdaq stock market. If Plaintiff is correct and merely being compensated with listing fees brings it under the ambit of Florida’s blue sky laws, then every single person who has

⁹If the Court found that the Plaintiff’s reading of § 517.301.(1)(b) such that it applies to stock exchanges, then such would surely require a preemption analysis. While the issue has not been briefed for this Court, Nasdaq is confident that such an interpretation would be preempted by the Exchange Act and, in particular, the 1938 Maloney Act Amendments thereto. 15 U.S.C. §§ 78o-3.

ever lost money with stock purchased on the Nasdaq market would have a cause of action against Nasdaq for all of its losses. Clearly, this was not the intent of § 517.301(1)(b).

Indeed, there are no published cases of disgruntled investors suing a stock market under § 517.301(1)(b) for failing to disclose its listing fees. There are no cases for a very important reason: The statute is inapposite on its face. If Florida's blue sky laws were intended to regulate Nasdaq or any other securities exchange, such as the New York Stock Exchange or the American Stock Exchange, then such intention would have appeared somewhere in the statute itself. It doesn't. If it did, this Court would have to address the issue of whether such a statute was preempted by the federal statutory scheme. Plaintiff's novel attempt to apply § 517.301(1)(b) here should be rejected and Count I should be dismissed.

H. Nasdaq is not a “dealer” under Chapter 517; therefore, it did not violate § 517.12.

Plaintiff baldly asserts that Nasdaq falls under Chapter 517's definition of “dealer.” Amended Complaint at ¶ 87. Plaintiff then goes on to reason that because Nasdaq is not registered as a “dealer” in the state of Florida, that it violated Fla. Stat. § 517.12 and Plaintiff is, thereby, entitled to recoup from Nasdaq all of the losses he suffered because of his purchases of WorldCom stock. Like his claim under § 517.301, this claim is nothing more than a tautology predicated on a tortured reading of the plain language of Chapter 517.

Plaintiff quotes the following portion of Chapter 517's definition of “dealer”:

Any person . . . who engages, either for all or part of her or his time, directly or indirectly, as broker . . . in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

Amended Complaint at ¶ 87 (quoting § 517.021(6)). Plaintiff is apparently claiming that Nasdaq is a “broker” and “in the business of offering buying, selling, or otherwise dealing or trading in securities.” However, Plaintiff is wrong on all counts. Nasdaq is not a “broker,” but a stock market.

It is a forum where brokers, buyers and sellers trade their shares. Nasdaq does not buy, sell or otherwise “deal in” securities. Instead, Nasdaq functions as a medium for such activity. Nasdaq is no more a “dealer in securities” than the telephone companies that brokers use to communicate, or the floor of a conventional stock exchange where they often congregate to effectuate trades.

Because Nasdaq is not a “broker” under Chapter 517¹⁰ and because it is not “in the business of offering, buying, selling, or otherwise dealing or trading in securities,” it does not meet the definition of a dealer under § 517.021(6). Count II of the Amended Complaint is predicated on the notion that Nasdaq is defined as a “dealer” under § 517.021(6); therefore, it should be dismissed.

VI. Conclusion

Nasdaq and the NASD enjoy a comprehensive immunity from lawsuits brought by disgruntled investors. Indeed, this absolute privilege is both well settled and imperative to the operation of a fair and efficient securities marketplace. The Amended Complaint, therefore, fails to state a claim for which relief may be granted because of the same doctrine that would have defeated the Original Complaint. Plaintiff’s statutory and common law claims are unequivocally barred because Nasdaq is absolutely immune from liability for conduct performed within the ambit of its self-regulatory and oversight functions and there is no private right of action against Nasdaq.

Even if this Court declines to apply the various well settled defenses that Nasdaq has to Plaintiff’s claims, those claims must still be dismissed because Plaintiff failed to properly allege the elements of even a single cause of action against Nasdaq. His common law claims are rooted in the pretense that Nasdaq was “touting” WorldCom stock merely by functioning as a stock market.

¹⁰Again, if the Court were to agree with Plaintiff that the Chapter 517 definition of “dealer” includes stock exchanges, then a preemption analysis would be appropriate and Nasdaq believes that, once fully briefed, it would be clear that the Exchange Act preempts such a reading of Florida’s blue sky laws.

Likewise, the statutory claims are rooted in the pretense that Florida's blue sky laws were intended to create a state based private cause of action against all stock markets for the losses of investors who use them. To put it charitably, Plaintiff has been engaging in a bit of creative lawyering; however, he simply failed to state a legitimate claim for relief.

Finally, the common law fraud and negligent misrepresentation claims must fail on procedural grounds because they do not meet the specificity requirements of the Federal Rules. Accordingly, Nasdaq Stock Market, Inc. respectfully requests that the Court enter an order dismissing Plaintiff's Complaint, granting Defendant entitlement to an award of reasonable attorneys' fees pursuant to Fla. Stat. §517.211(6), and granting such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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By:



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Counsel for The Nasdaq Stock Market, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by first-class mail this 30th day of June, 2003 to: Steven I. Weissman, Esq., Steven I. Weissman, P.A. (counsel for Plaintiff), 10762 Denver Drive, Cooper City, Florida 33026; and Betty G. Brooks, Esq. (counsel for Defendant National Association of Securities Dealers, Inc.), Office of General Counsel, National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, DC 20006.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a long horizontal line extending to the right.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-61107-CIV-MARRA

STEVEN I. WEISSMAN (as custodian under
the Florida Uniform Transfers 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),
and X, Y and Z,

Defendants.

DECLARATION OF DAVID S. MANDEL

I, David S. Mandel, declare under penalty of perjury as follows:

1. I am a partner with the law firm of Mandel & McAliley LLP, attorneys for defendant The Nasdaq Stock Market, Inc. ("Nasdaq") in the above-captioned action. I make this declaration in support of Defendant The Nasdaq Stock Market's Motion to Dismiss.

2. Attached hereto as Exhibit A is a true and correct excerpt of the Form 10-12G, that Nasdaq filed with the Securities and Exchange Commission on April 30, 2001. The document in its entirety is approximately five-hundred and fifty (550) pages long.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2003.

Respectfully submitted,

MANDEL & McALILEY LLP

1200 Alfred I. duPont Building

169 East Flagler Street

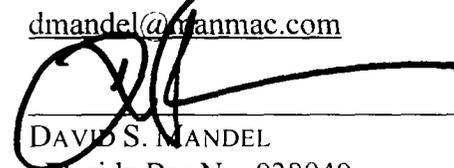
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By:



DAVID S. MANDEL

Florida Bar No. 038040

Counsel for The Nasdaq Stock Market, Inc.

-----BEGIN PRIVACY-ENHANCED MESSAGE-----

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CONFORMED SUBMISSION TYPE: 10-12G

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COMPANY CONFORMED NAME:	NASDAQ
STOCK MARKET INC	
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STANDARD INDUSTRIAL CLASSIFICATION:	[]
IRS NUMBER:	521165937
STATE OF INCORPORATION:	DE
FISCAL YEAR END:	1231

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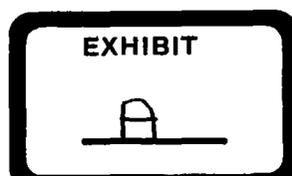
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STREET 1:	ONE LIBERTY PLAZA
CITY:	NEW YORK
STATE:	NY
ZIP:	10006
BUSINESS PHONE:	2128584750

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STATE: NY
ZIP: 10006

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As filed with the Securities and Exchange Commission on April 30, 2001
File No. -

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10
GENERAL FORM FOR REGISTRATION OF SECURITIES
PURSUANT TO SECTION 12(b) OR 12(g) OF THE
SECURITIES EXCHANGE ACT OF 1934

The Nasdaq Stock Market, Inc.

(Exact Name of Registrant as
Specified in Its Charter)

Delaware 52-1165937
(State or Other Jurisdiction of (I.R.S. Employer
Incorporation or Organization) Identification No.)

One Liberty Plaza 10006
New York, New York (Zip Code)
(Address of Principal Executive Offices)

Registrant's telephone number,

including area code:
212-858-4750

Copies to:

Edward S. Knight, Esq.	Matthew J. Mallow, Esq.
The Nasdaq Stock Market, Inc.	Eric J. Friedman, Esq.
One Liberty Plaza	Skadden, Arps, Slate, Meagher & Flom LLP
New York, New York 10006	Four Times Square
	New York, New York 10036

Securities to be registered pursuant to Section 12(b) of the Act:

Not Applicable

Title of each class to be so registered	Name of each exchange on which each class to be registered
--	---

Securities to be registered pursuant to Section 12(g) of the Act:

Common Stock, par value \$.01 per share
(Title of class)

TABLE OF CONTENTS

Item 1. Business.....	
Item 2. Financial Information.....	
Item 3. Properties.....	
Item 4. Security Ownership of Certain Beneficial Owners and Management.....	
Item 5. Directors and Executive Officers.....	
Item 6. Executive Compensation.....	

Item 7. Certain Relationships and Related Transactions.....

Item 8. Legal Proceedings.....

Item 9. Market Price of and Dividends on the Registrant's Common Equity
and Related Stockholder Matters.....

Item 10. Recent Sales of Unregistered Securities.....

Item 11. Description of Registrant's Securities to be Registered.....

Item 12. Indemnification of Directors and Officers.....

Item 13. Financial Statements and Supplementary Data.....

Item 14. Changes in and Disagreements With Accountants on Accounting
and Financial Disclosure.....

Item 15. Financial Statements and Exhibits.....

INDEX TO CONSOLIDATED FINANCIAL STATEMENTS.....

Certain statements in this registration statement (the "Registration Statement") contain or may contain information that is forward-looking within the meaning of Section 27A of the Securities Act of 1933, as amended (the "Securities Act"), and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Actual results may differ materially from those described in the forward-looking statements and will be affected by a variety of risks and factors including, without limitation, the risks described in "Item 1. Business--Risk Factors" of this Registration Statement. Readers should carefully review this Registration Statement in its entirety, including, but not limited to, The Nasdaq Stock Market, Inc.'s ("Nasdaq") financial statements and the notes thereto. Nasdaq undertakes no obligation to publicly release any revisions to such forward-looking statements to reflect events or circumstances after the date hereof.

Item 1. Business.

Nasdaq Overview

Nasdaq, is the world's largest electronic, screen-based equity securities market and the largest equity securities market in the world based on

dollar volume. Through its deployment of advanced technology, Nasdaq is positioning itself to become the world's first truly global securities market. Since its inception in 1971, Nasdaq has been at the forefront of innovation and a leader in utilizing technology to enhance the securities markets. Nasdaq's total share volume for the year ended December 31, 2000 increased approximately 63.5% compared to the year ended December 31, 1999 to 442.7 billion shares, which represented approximately 61.6% of the total shares traded in the United States. Dollar volume for the year ended December 31, 2000 increased 85.2% compared to the year ended December 31, 1999 to \$20.4 trillion, approximately 62.9% of the dollar volume of all equity shares traded in the United States. For the year ended December 31, 2000, Nasdaq share volume averaged approximately 1.76 billion shares daily and the dollar volume on Nasdaq averaged \$81 billion per day. In addition, the market value of Nasdaq-listed companies has increased over the last five years from \$1.5 trillion at December 31, 1996 to \$3.6 trillion at December 31, 2000, which represents approximately 22.3% of total U.S. equity market value compared to 17% five years ago.

There are approximately 4,700 companies listed on Nasdaq, making it the market of choice for more companies than any other U.S. equities market. As of December 31, 2000, Nasdaq was home to the highest percentage of publicly-traded technology and service companies in the U.S., including 77% of computer hardware and peripherals companies, 96% of computer networking companies, 87% of computer software and data processing companies, 87% of semiconductor companies, 72% of telecommunications and electronic companies, and 81% of biotechnology companies. In addition, as of December 31, 2000, there were over 480 foreign companies listed on Nasdaq, more than on any other U.S. equities market. Of all U.S. initial public offerings in the year ended December 31, 2000, 397 companies, or approximately 88% of initial public offerings on primary U.S. exchanges, were brought to market on Nasdaq and raised over \$52.5 billion in equity capital.

Nasdaq's top 100 U.S. and international non-financial listed stocks, reflecting Nasdaq's largest growth companies across major industry groups, comprise the Nasdaq-100 Index(R). As of March 31, 2001, the companies in the Nasdaq-100 Index had an average market capitalization of approximately \$16.1 billion and an average daily trading share volume of 11.8 million shares. From March 31, 1991 to March 31, 2001, the Nasdaq-100 Index rose by approximately 494%. In addition, the Nasdaq Composite Index(R) rose by approximately 282% over the same 10 year period, compared with an approximate 209% gain for the S&P 500 Index(R), an approximate 239% gain for the Dow Jones Industrial Average, and an approximate 190% gain for the NYSE Composite Index(R). The Nasdaq Composite Index measures all domestic and non-U.S. based common stocks listed on Nasdaq. This index is market-value weighted so that each company's security affects the index in proportion to its market value.

Nasdaq, initially an automated quotation system, has evolved into an electronic screen-based display and execution system to provide price discovery and high levels of liquidity for thousands of equity securities. Since its inception, Nasdaq has expanded its services through the innovative deployment of technology to provide better price discovery and trade executions, enhanced services for issuer listings, and broader information dissemination. Nasdaq has three main revenue sources:

- o transaction services, which accounted for approximately 45.5% of Nasdaq's revenues for the year ended December 31, 2000;
- o market information services, which accounted for approximately 29.8% of Nasdaq's revenues for the year ended December 31, 2000; and
- o issuer services, which accounted for approximately 21.3% of Nasdaq's revenues for the year ended December 31, 2000.

Nasdaq's total revenues increased from \$332.2 million for the year ended December 31, 1996 to \$868.0 million for the year ended December 31, 2000, representing a compounded annual growth rate of 27.2% that was primarily due to a strong increase in market information and transaction services revenues. Nasdaq's total revenues for the year ended December 31, 2000 of \$868.0 million increased \$233.8 million, or 36.9% from \$634.2 million for the year ended December 31, 1999. The growth in revenues for the year ending December 31, 2000 was due primarily to the growth in trading volumes and market information services. See "Item 15. Financial Statements and Exhibits."

Industry Overview

Historically, stock markets have served as gathering points for buyers and sellers of securities. In the U.S., traditional stock markets operate in an order-driven "physical" environment—a single trading floor where orders are routed through a designated dealer called a specialist. Structured to respond to incoming orders, floor-based stock markets employ an auction system that channels trades for a particular stock through a specialist. This gives one specialist an exclusive franchise to make a market in a particular security. The basic function of a specialist is to maintain an orderly market while allowing public agency orders to interact with one another.

Development of advanced communication and computer technology, as well as certain regulatory developments, changed the needs and expectations of the securities industry. In response, a new stock market model was pioneered by Nasdaq in 1971: a quotation-driven, floor-less, screen-based, electronic dealer market model. This market linked widely dispersed buyers and sellers without the limitation of a single location or the restriction of channeling all trades through a single specialist. The Nasdaq model accommodates a system of multiple geographically dispersed market makers and alternative trading systems ("ATs"). These ATs that are linked together via a screen-based, electronic trading and execution system include both crossing systems and electronic communications networks ("ECNs")(1). Nasdaq information technology receives and then simultaneously broadcasts quotes representing investor orders or market maker interest to more than 500,000 computer terminals worldwide.

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- (1) Crossing systems collect orders to buy and sell, and thereafter, at predetermined times match buyers and sellers in a batch processing mode. ECNs are formally defined in Rule 11 Ac1-1 of the Exchange Act. Their primary function is to act as a venue for the display of subscriber limit orders.

Market makers openly compete with one another for investors' orders and are responsible for providing continuous, two-sided quotes (the "bid" and "ask"). Excluding ECNs, which actively display orders in many stocks of Nasdaq-listed companies, there is an average of approximately 14 market makers for each stock traded on Nasdaq. Some of Nasdaq's more actively traded stocks far exceed this average and some stocks have over 80 market makers. Collectively, the market makers provide continuous depth (the numbers of buyers and sellers) and liquidity (the ease with which the market can absorb volume buying and selling without dramatic fluctuation in price) while maintaining an orderly market.

Nasdaq has evolved to incorporate features of both quotation-driven (dealer) and order-driven (auction) markets. The SEC Order Handling Rules of 1996 generally provide a means for investors to have their best-priced limit orders (orders to buy or sell stock at a specified price) displayed to all market participants. When an investor's limit order is priced better than the market maker quote to which the investor (or his broker) has given his limit order, the investor's order can determine the inside spread (the difference between a stock's best buy and sell price). Nasdaq's implementation of these rules further enhanced both the depth and liquidity of the market.

The securities industry is once again undergoing sweeping changes, spurred by factors such as: rapid advances in information technology (in particular the Internet); globalization of securities trading; the dramatic increase

in trading volume in the stock markets; regulatory changes (in particular the Order Handling Rules and the SEC's Regulation ATS); and the emergence of ATSS. These changes present the securities industry with the challenge of developing a stock market model that can provide a natural center of liquidity and depth and, therefore, of price discovery. To be successful, a stock market may be required to provide globally dispersed buyers and sellers round-the-clock stock price quotation and immediate execution of trades in a low-cost environment.

Nasdaq's Strategic Initiatives

Nasdaq's strategic initiatives include enhancing its market structure, pursuing global market expansion through the creation of Nasdaq Japan, Inc. ("Nasdaq Japan") and Nasdaq Europe S.A./N.V. and exploring alliances with foreign exchanges, competing for listings, competing for trading volume in exchange-listed securities, and creating a market for listing and trading single stock futures.

Enhancing Market Structure.

Nasdaq National Market ("NNM") Execution System. The NNM Execution System (also known as "SuperSOES(sm)") is an improved order execution system designed to provide automatic execution capability for market makers and order entry firms and streamline Nasdaq's transaction systems. The NNM Execution System will combine features of the existing SelectNet(R) and Small Order Execution System ("SOES(sm)"). SelectNet is an order delivery and negotiation system that facilitates order execution. It currently links all market participants that trade Nasdaq stocks and is the primary system that market makers use to trade with one another. SOES currently provides for the automatic execution of small orders of public customers. The central purpose of the NNM Execution System is to encourage and assist market participants to provide liquidity by increasing their ability to manage the receipt and execution of the dramatically increased volume of orders prevalent in today's Nasdaq market.

Among other things, NNM Execution System rules:

- o permit automatic execution of both customer and market maker proprietary orders against the best priced quote in the market;
- o establish a larger maximum automatic execution order entry size of up to 999,999 shares for NNM securities;
- o reduce time delays between NNM executions against the same market maker at the same price level; and

- o enable system interaction with a market maker's reserve size in NNM securities.

The new system was recently approved by the SEC and is tentatively scheduled to begin operating in the third quarter of 2001.

Nasdaq Order Display Facility. On January 10, 2001, the SEC approved a rule proposal to establish the Nasdaq Order Display Facility ("SuperMontage(sm)") to improve the Nasdaq market structure and make it a strong natural center of liquidity. SuperMontage, a fundamental market enhancement, is an improved user interface designed to refine how market participants can access, process, display, and integrate orders and quotes in Nasdaq. SuperMontage has several strategic implications. First, it is intended to attract more orders to the Nasdaq market by providing a comprehensive display of the interest at or near the inside market (i.e., the highest bid and the lowest offer for a security, which is also called the "inside quote"). Second, SuperMontage is intended to increase competition and market transparency. Third, SuperMontage will provide pre-trade anonymity to market participants using a Nasdaq system. As such, prior to execution, no one will know the identity of the firm displaying the order unless such firm reveals its identity.

In the January 10 approval order, the SEC imposed certain conditions on both Nasdaq and the National Association of Securities Dealers, Inc. (the "NASD") that must be met prior to the implementation of SuperMontage. These conditions include that:

- o the NASD will offer a quote and trade reporting alternative that satisfies the Order Handling Rules, Regulation ATS, and other regulatory requirements for ATSS and market makers;
- o NASD quotes disseminated through the exclusive securities information processor ("ESIP") will identify the ATS or market maker source of the quote; and
- o participation in SuperMontage will be entirely voluntary.

Assuming these conditions can be met and Nasdaq can successfully implement SuperMontage, Nasdaq will add SuperMontage to the Nasdaq Workstation II(R) ("NWII"), which will show the top three price levels: the best bid/best offer in Nasdaq, and the two subsequent price levels. In each case, this display will be accompanied by the aggregate order size at each price level. Nasdaq market makers and ECNs that are members of The Nasdaq Stock Market will be able to display their orders anonymously at these price

levels in SuperMontage, thus encouraging display of greater trading interest. As currently envisioned, SuperMontage displays the aggregate trading interest in a security at the top of the screen by aggregating multiple levels of trading interest of identified market participants and any non-identified interest that exists in such security, which is entered into the Nasdaq system. Market participants will be able to access the best prices in SuperMontage electronically using enhanced versions of Nasdaq's NNM Execution System and SelectNet services. Thus, Nasdaq will provide order delivery and automatic execution against the prices displayed in SuperMontage. Nasdaq will continue to offer the ability for market participants to negotiate transactions with specific market makers and ECNs electronically at sizes above the quote size in Nasdaq.

By allowing (but not requiring) market participants to give the Nasdaq system multiple orders at a single as well as at multiple price levels, SuperMontage will assist market participants with the management of their back book, i.e., orders that are not at the top price point in the market maker's book/system. This functionality will also assist market participants with compliance with the Order Handling Rules. Other system enhancements will make it easier for ECNs to participate in automatic execution.

Pursuing Global Market Expansion. The forces of technology and deregulation are accelerating the pace of globalization in the trading and processing of securities. Nasdaq believes that the foundation to create a global exchange should be built on a strong regional presence in the dominant capital centers of the world. At this time, those centers are the United States, Europe, and parts of Asia, particularly Japan. By establishing centers for price discovery and trading in these key regions, the foundation will be developed for electronically linking these markets to establish a global platform.

Nasdaq Japan. In June 1999, a joint venture agreement was entered into with SOFTBANK Corp. of Japan to capitalize a new company, Nasdaq Japan Planning Company, Inc. (subsequently renamed Nasdaq Japan, Inc.), which is undertaking to develop and implement a new electronic stock market in Japan as a section of the Osaka Securities Exchange (the "OSE"). On April 19, 2000, Nasdaq Japan signed a Business Collaboration Agreement with the OSE to establish Nasdaq Japan Market as a new market section of the OSE. The Nasdaq Japan Market began operations on June 19, 2000. In its first phase of operations, prior to its deployment of Nasdaq/Indigo Markets technology, Nasdaq Japan will recruit initial public offerings of companies for listing and will trade these securities on the existing OSE system. As of March 31, 2001, 41 companies are trading on the interim trading platform. The Nasdaq Japan Market operates under the umbrella of the OSE, which provides regulatory and listing review as well as clearance and settlement services.

In addition, Nasdaq Japan intends to be competitive in the trading of U.S. listed securities and exchange-traded funds ("ETFs") in Japan, with the trading of the Nasdaq-100 QQQ ETF planned to begin in 2001.

On October 24, 2000, Nasdaq Japan sold in a private placement transaction an approximately 15 percent stake for approximately \$48 million to a group of 13 major Japanese, U.S., and European brokerages, thereby reducing the ownership interest of Nasdaq Global Holdings ("Nasdaq Global") in Nasdaq Japan to approximately 39 percent. Nasdaq Global is a wholly-owned subsidiary of Nasdaq. Ten of the new investors sit on an advisory council that recently elected one director to represent them on Nasdaq Japan's seven member board. The proceeds of this private placement will be used primarily for working capital and the development of a more sophisticated and efficient share-trading platform.

Nasdaq Europe S.A./N.V. In March 2001, Nasdaq acquired an initial 68% stake in EASDAQ S.A./N.V. ("EASDAQ") with an immediate aim to dilute its interest to 51% through the introduction of other strategic partners as shareholders. EASDAQ is a pan-European stock market for emerging growth companies and is headquartered in Brussels. Under the agreement, Nasdaq has restructured EASDAQ into Nasdaq Europe S.A./N.V., which expects to become a globally linked pan-European market. By the end of the second quarter of 2001, it is expected that Nasdaq Europe S.A./N.V. will launch the newly developed European Trading System ("ETS"). ETS is expected to offer similar functionality as The Nasdaq Stock Market while being adaptable to the needs and requirements of the European market. In addition, Nasdaq Europe S.A./N.V. intends to introduce a hybrid market model (similar to SuperMontage) customized to European best practices later this year. This market model will integrate market maker quotes into an anonymous, voluntary limit order book and provide expanded negotiation facilities and trade reporting.

Canadian Alliance. In April 2000, Nasdaq entered into a cooperative agreement with the Provincial Government of Quebec for the development of a new securities market within Canada called Nasdaq Canada. Nasdaq Canada will be developed in stages, and may culminate in the creation of an autonomous pan-Canadian market. The first stage commenced on November 21, 2000 with the installation of Nasdaq terminals in 10 Canadian securities firms in Montreal, Canada. These terminals allow these firms to trade Nasdaq-listed securities directly through their local broker, including the over 40 Canadian firms previously listed solely on Nasdaq in the United States. The second stage is scheduled to commence following the implementation of SuperMontage.

Competing for Listings. Nasdaq will continue to pursue new listings aggressively. As of December 31, 2000, there were 4,734 issuers listed on

Nasdaq. From January 1 through December 31, 2000, 397 new issuers listed on Nasdaq following their initial public offerings, which raised over \$52.5 billion. Since 1990, over 88% of companies having initial public offerings on primary U.S. markets have chosen to list on Nasdaq. Nevertheless, Nasdaq's overall number of listings has declined in each of the last five fiscal years from a record high of 5,556 listings as of December 31, 1996 as a result of Nasdaq imposing more rigorous listing standards and consolidation of listings due to increased merger and acquisition activity. Nasdaq's strategies for maintaining its current listings and gaining new listings include marketing and building brand identity, contacting key decision makers, and providing value-added issuer services.

Marketing. Marketing efforts center on creating a valuable brand-an important factor in attracting and retaining large world class growth companies. Nasdaq's branding strategy is designed to convey to the public that the world's innovative, successful growth companies are listed on Nasdaq. New and existing companies value being listed on a market that is recognized around the world, and that helps position them as highly attractive to investors of all types. Nasdaq employs a variety of initiatives and tools in its marketing efforts, including media advertising, Internet publishing (Nasdaq.com), and international road shows.

Contacting Key Decision Makers. Nasdaq's issuer services directors are continually engaged with each key Nasdaq-listed company. A schedule of calls and visits along with contact with various industry and market forums are used to enhance customer satisfaction, keep companies informed of new developments at Nasdaq, and discuss the benefits of a listing on Nasdaq. Nasdaq also has created a program to educate investment bankers, capital market dealers, institutional investors, and other constituencies that influence listing decisions.

Issuer Services. Nasdaq provides value-added information services, products, and programs to Nasdaq-listed companies. This combination of online real time data and analytical information, along with a series of seminars and other programs, is designed to help management of listed companies make better equity management decisions. Nasdaq offers a variety of value-added products and services to Nasdaq-listed companies, and each company is assigned a Nasdaq issuer service director.

Competing for Trading Volume in Exchange-Listed Securities. Nasdaq InterMarket consists of exchange-listed stocks traded off the floor of an exchange. For the year ended December 31, 2000, Nasdaq InterMarket accounted for approximately 10.6% of trades in stocks listed on the New York Stock Exchange, Inc. (the "NYSE") and approximately 16.2% of trades in stocks listed on the American Stock Exchange LLC ("Amex"). The vast

majority of Nasdaq InterMarket trades are reported to the Consolidated Tape Association ("CTA") Plan by two major wholesale market makers. One ECN currently quotes in Nasdaq InterMarket; other ECNs report trades through Nasdaq systems to CTA and some are planning to begin quoting in Nasdaq InterMarket. Additionally, there is significant trading activity accounted for by NASD members that trade exchange-listed stocks away from a registered exchange. The Nasdaq-like open architecture of Nasdaq InterMarket allows market participants to provide fast, low-cost executions for the sector of the market accounted for by online traders.

The current business environment provides the opportunity for a vigorous Nasdaq InterMarket effort to increase market share by encouraging additional market makers and ECNs to participate. Nasdaq InterMarket operates a transaction credit program designed to lower costs for InterMarket participants executing trades through Nasdaq facilities. The program allows InterMarket participants to share in the tape revenue Nasdaq receives as the participant in the CTA Plan. In addition, in May 2000, Nasdaq redesigned certain systems to improve the InterMarket trading environment. As more quotes and orders are displayed within Nasdaq InterMarket, trading among its participants could expand, increasing the value of the Nasdaq facilities that support Nasdaq InterMarket.

Creating a Single Stock Futures Market. On March 20, 2001, Nasdaq entered into a non-binding letter of intent and is currently negotiating a definitive agreement with the London International Financial Futures and Options Exchange ("LIFFE") to create a new U.S. joint venture company that will list and trade single stock futures. The products of the new joint venture are expected to be traded through the LIFFE CONNECT(TM) electronic system.

Products and Services

Nasdaq's revenue sources can be classified into three principal categories: (1) transaction services, which accounted for approximately 45.5% of Nasdaq's revenues for the year ended December 31, 2000; (2) market information services, which accounted for approximately 29.8% of Nasdaq's revenues for the year ended December 31, 2000; and (3) issuer services, which accounted for approximately 21.3% of Nasdaq's revenues for the year ended December 31, 2000.

Transaction Services. Transaction services provide dealers and traders with price discovery, order routing and processing, and trade reporting and comparison tools supported by key technologies.

Dissemination of Quotes. Nasdaq provides quotation collection, processing, and dissemination to its market participants. Subscribers to the system pay

a monthly fee based generally on the number of display terminals used by the subscriber. Using the network, market makers and ECN operators enter quotes that are then processed and broadcast to all other subscribers. The highest bid and lowest offer combine to set the inside market.

Order Routing and Processing. Historically, orders for Nasdaq-listed stocks were communicated via the telephone. However, advances in technology made routing with electronic systems prevalent. Since the late 1980s, Nasdaq has provided order routing services that during the last few years have experienced increased usage. Approximately 27% of Nasdaq's share volume comes from orders routed using a Nasdaq system. The remaining 73% comes from third-party networks and proprietary systems.

Nasdaq has four systems that provide for order routing and/or execution: SelectNet, SOES, Advanced Computerized Execution System ("ACES"), and the Computer Assisted Execution System ("CAES"). SelectNet and SOES, as well as Nasdaq's plan to leverage them into the NNM Execution System, are described above. See "--Nasdaq's Strategic Initiatives-Enhancing Market Structure-Nasdaq National Market ("NNM") Execution System." SelectNet and SOES accounted for approximately 16.8% of revenues for the year ended December 31, 2000.

The third Nasdaq trading system, ACES, is an order routing service that is used by market makers to execute order flow from order entry firms with which the market maker has a relationship. The order entry firms can route orders directly to specified market makers through their NWIIs or their own proprietary systems. These orders are executed within the market makers' internal trading systems and execution reports are routed back to the order entry firms. ACES is often used by market makers to connect with firms whose order traffic is too sparse to justify the fixed costs of establishing a proprietary network linkage. ACES fees accounted for approximately 2.0% of Nasdaq's revenues for the year ended December 31, 2000.

The fourth system, CAES, is the Nasdaq InterMarket transaction service system. CAES is linked to the Intermarket Trading System ("ITS"), which links Nasdaq InterMarket with U.S. stock exchanges that are participants in the ITS Plan. CAES allows NASD member firms to direct orders in exchange-listed securities to other Nasdaq InterMarket market makers for automated execution (i.e., automatic response as well as automatic execution). Technology enhancements made during 2000 allow Nasdaq InterMarket participants to accept the delivery of CAES and ITS orders if the recipient provides an automated response. The ITS interface allows CAES/ITS market makers to direct and receive orders from the securities exchanges that trade ITS eligible securities. With the exception of the Cincinnati Stock Exchange, other securities exchanges currently do not

provide for automatic execution of orders sent to them via CAES/ITS. The current fee for CAES orders is \$0.50 for the originating party (i.e., the sender). The current fee for ITS orders is \$1.00 for the originating party (i.e., the sender). CAES and ITS fees accounted for less than 1% of Nasdaq's revenues for the year ended December 31, 2000.

Trade Reporting and Comparison--Automated Confirmation Transaction Services ("ACTsm"). U.S. securities laws require that all registered stock exchanges and securities associations establish a transaction reporting plan by which information (specifically price and volume) concerning trades executed in qualified securities in those markets is centrally collected and disseminated to vendors, which in turn sell it to the public. This procedure furthers the goal of transparency, a stated objective of U.S. securities policy designed to protect investors. Transactions in Nasdaq-listed securities, exchange listed securities traded over-the-counter ("OTC"), and other equity securities traded OTC are reported to ACT. A protocol establishes which of the two parties to the trade are assigned reporting responsibility. During market open hours, members are to report trades within 90 seconds. Alternative procedures are in place for reporting trades executed after hours. ACT has a schedule of fees that reflect the services it provides. Tape-only trade reports are assessed a nominal fee, while trades that require comparison matching generally are assessed a higher fee depending upon the size of the trade. ACT fees accounted for approximately 11.5% of Nasdaq's revenues for the year ended December 31, 2000.

Market Information Services. As a market operator, Nasdaq collects and disseminates quote and trade information. Using its network system, Nasdaq accepts orders and quotes from market makers and ECNs and disseminates these orders and quotes to a wide range of market participants. Of particular interest among these quotes are the inside quotes. Broker/dealers also use the Nasdaq system (specifically ACT) to report transactions promptly. As a result, participants in Nasdaq have real-time access to quote and trade data. Interested parties that are not direct market participants in Nasdaq also can receive real-time information through a number of data products.

Nasdaq has two primary data products designed to serve the varying levels of detail desired by different brokers and dealers and their customers. The first product is called Level 1. This product provides subscribers with the current inside quote and most recent transaction price. Professional subscribers to this product currently pay \$20 per terminal per month for the service, which is typically delivered to the subscriber through a third-party data vendor. A vendor or a broker/dealer can provide non-professional customers with Level 1 information at a reduced fee calculated on a per query basis of \$.005 with a cap of \$1 per month per

user. The growth in online investing has increased the usage of these fee structures by online brokerage firms and other Internet services. The second data product, the Nasdaq Quotation Dissemination Service ("NQDS"), currently priced at \$50 per terminal per month for professional subscribers and \$10 per terminal per month for non-professional customers, provides subscribers with the quotes of each individual market maker and ECN, in addition to the inside quotes and last transaction price. NQDS is not priced on a per query basis.

Issuer Services. At December 31, 2000, Nasdaq listed 4,734 domestic and international companies, the largest number of listings of any equity market in the world. Since the end of 1994, 3,294 initial public offerings, approximately 85.5% of all initial public offerings in U.S. primary markets, listed on Nasdaq. Nasdaq charges issuers an initial listing fee, a listing of additional shares fee, and an annual fee. The initial listing fee includes a one-time listing application fee of \$5,000 and a total shares outstanding ("TSO") fee. The total maximum fee for the initial listing application is \$95,000. The fee for listing of additional shares is based on the TSO, which Nasdaq reviews quarterly. The fee is \$2,000, or \$.01 per additional share, whichever is higher, up to a maximum of \$17,500 per quarter and an annual maximum of \$35,000. Annual fees are based on TSO and range from \$10,710 to \$50,000 for NNM securities.

Other Markets

The Nasdaq Stock Market is the flagship market of Nasdaq and has two tiers of listed companies: The Nasdaq National Market, which includes over 3,700 companies, and The Nasdaq SmallCap Market, with over 850 smaller, emerging growth companies. Nasdaq also operates the Nasdaq InterMarket, which is described under "--Nasdaq's Strategic Initiatives-Competing for Trading Volume in Exchange-Listed Securities," as well as the OTC Bulletin Board.

OTC Bulletin Board. The OTC Bulletin Board(R) is an electronic, screen-based market for securities that currently are not listed on Nasdaq or any primary exchange. At present, the OTC Bulletin Board is a quotation service, as companies do not list on the OTC Bulletin Board. NASD members may post quotes only for companies that file periodic reports with the SEC and/or with a banking or insurance regulatory authority. In addition, such companies are required to be current with their periodic filings.

Last year, in conjunction with Nasdaq's application to become registered as a national securities exchange ("Exchange Registration"), the Nasdaq Board of Directors (the "Nasdaq Board") and the NASD Board of Governors (the "NASD Board" and, together with the Nasdaq Board, the "Boards"), approved several rule changes that are designed to enhance the OTC Bulletin Board

and permit Nasdaq to continue to operate it after Exchange Registration. First, the Boards approved a program for Nasdaq to enter into a listing agreement with each OTC Bulletin Board issuer and impose new listing standards to ensure the quality of these issuers. Second, both Boards approved the creation of an automated order delivery system for the OTC Bulletin Board that would allow orders to be delivered and executed via NWII. Finally, to accompany the new listing standards and order delivery system, the Boards approved enhanced market rules that provide for limit order protection, short interest reporting, and intraday trading halt authority.

Nasdaq has submitted to the SEC drafts of these proposed rules and has discussed an exemption request that would allow Nasdaq to continue to operate the OTC Bulletin Board after Exchange Registration. The SEC has not yet approved the rules or the exemption request. Therefore, it is not certain whether Nasdaq will continue to operate the OTC Bulletin Board following Exchange Registration.

Technology

Nasdaq was the world's first electronic screen-based stock market and its use of new computer networking, telecommunications, and information technologies distinguishes it from other U.S. securities markets. Nasdaq embraces automation through the effective use of technology as the key to the future of financial markets. Using technology, Nasdaq eliminates the need for a physical trading floor and enables securities firms across the country to compete freely with one another in a screen-based environment. Nasdaq also employs technology to maximize its ability to communicate with investors, issuers, traders, the media, and others. Nasdaq technologies include:

Nasdaq Workstation II. Introduced in 1995, NWII is a proprietary front-end interface for Nasdaq's quotation network. This network of workstations gives securities traders access to a centralized quotation service, automated trade executions, real-time reporting, trade negotiations, and clearing. Nasdaq's trading terminals are now on the desks of approximately 9,000 users. With NWII, traders are immediately connected to Nasdaq's electronic trading network. NWII employs advanced Windows technology to create a fast, flexible, and convenient trading environment running on a variety of platforms that can be integrated with most in-house systems. Also available is an Application Programming Interface ("API") through which approximately 2,400 users currently customize NWII to meet their own presentation needs.

The Nasdaq Network. Nasdaq's primary telecommunications network, called the Enterprise Wide Network II ("EWNII"), was designed, built, and is managed

by WorldCom Inc. This network is one of the world's largest, most reliable, and sophisticated networks delivering time-sensitive information from Nasdaq's technology centers to traders nationwide. The EWNII is presently capable of handling trading four billion shares per day. The advanced design of the EWNII allows Nasdaq to scale the network to greater levels of capacity as market conditions dictate. Since the introduction of the EWNII in August 1999 the capacity of the network has been doubled to meet growing market demand.

The Processing Complex. Nasdaq's quote, trade execution, and trade reporting systems are based on mainframe technology and are located in a processing complex in Trumbull, Connecticut. The systems routinely handle trade volume of over two billion shares daily and over 4,000 transactions per second. In addition, these systems have substantial reserve capacity to handle far greater levels of activity. An alternate processing complex located in Rockville, Maryland backs up the Trumbull technology center.

Data Repository. Market data from Nasdaq's quote and trade execution systems are transferred via high-speed communications links to a market data repository in Rockville, Maryland. At this facility, eight terabytes of online data are available for real-time analysis, historical analysis, market surveillance and regulation, and data mining. The information is provided to applications and users through relational database and higher-level access facilities. The data is also available for delivery to Internet applications.

Nasdaq Tools. On March 7, 2000, Nasdaq purchased Financial Systemware, Inc. ("FSI"), a manufacturer of software products. FSI became a wholly-owned subsidiary of Nasdaq that has been named Nasdaq Tools, Inc. ("Nasdaq Tools"). Nasdaq Tools has an order routing and quote management product that allows for, among other things, automatic execution of a liability order, automatic updating of a security's market, and the ability to decline subsequent orders at the same price. Nasdaq Tools is in the process of introducing a new service bureau product. "Tools Plus" is a position management system with real-time valuation, including profit and loss calculations, automatic execution and display of orders, risk management features, direct ECN access (for SEC Ordering Handling Rule compliance), and storage of information in a database and/or report format. It also provides an Order Audit Trail System ("OATS(sm)") compliance feature that handles transaction reporting via e-mail to regulatory agencies.

Strategic Technology Alliances. Historically, Nasdaq has demonstrated an ability to adapt current technology to provide an efficient, robust, and fault tolerant price discovery network. To continue its successful evolution, Nasdaq has formed partnerships and alliances with innovative technology leaders, including the following:

WorldCom. In November 1997, Nasdaq committed to a six-year, \$600 million dollar contract for WorldCom Inc. to build and maintain the EWNII, a custom Extranet that would expand Nasdaq's daily trading capacity to four billion shares a day, with the capability of scaling up to eight billion shares a day. The EWNII is one of the world's largest and most sophisticated information systems, delivering time-sensitive information from Nasdaq's Trumbull, Connecticut technology center to traders nationwide and giving Nasdaq sophisticated routing and information collection capabilities.

Microsoft. Nasdaq uses Microsoft technology to drive Nasdaq.com and other Web sites. In addition, Microsoft products are in broad use throughout Nasdaq, including Microsoft Exchange for e-mail and sharing information; NT and Windows 2000 servers for application, file, and print support; and Windows workstations for applications and professional productivity. Future potential technology alliances with Microsoft include site and information linkages between Nasdaq.com and Microsoft's MoneyCentral Web site. The alliance may sponsor industry standard solutions for Internet-based financial information exchange and management.

TIBCO. Nasdaq has formed an alliance with TIBCO Software Inc. ("TIBCO") to develop a series of innovative applications utilizing TIBCO information bus technology, which simplifies and manages communications between diverse systems and platforms. These applications include the real-time dissemination of market data, population of data on the Nasdaq.com Web site, and planned use of the technology in next-generation workstation products. Future uses of TIBCO technology may include the development and deployment of next-generation market systems, and extension of publish-and-subscribe technology to additional data distribution channels inside and outside Nasdaq.

Primex. On December 9, 1999, Nasdaq signed a letter of intent with Primex Trading N.A., LLC to provide investors and market makers with a new electronic trading platform. The new system will allow users to seek price improvement opportunities for their customers' orders by electronically exposing them to participants who compete for the orders based on price within the context of the best quotes publicly displayed. The technology will be offered exclusively to Nasdaq and is scheduled to launch in 2001.

IndigoMarkets. IndigoMarkets(sm) Ltd., a joint venture company with SSI Ltd. of India, was established in May 2000. Nasdaq Global currently has a 55% interest in the venture. The company will create market systems for Nasdaq global markets, including Nasdaq Japan. IndigoMarkets is also expected to license its products to other customers worldwide. In October 2000, Indigo Markets created a wholly-owned Indian subsidiary, Indigo Markets India Private Ltd. The purpose of the new subsidiary is to license

products to Indian customers as well as to provide ongoing maintenance and consulting services.

BIOS Group. On June 25, 1999, Nasdaq and the BIOS Group, a research and development organization based in Santa Fe, New Mexico, formed the Nasdaq/BIOS R&D Joint Venture, LLC (the "Nasdaq BIOS JV"). This joint venture is owned 50% by Nasdaq and 50% by the BIOS Group. The purpose of the joint venture is to spawn inventions and applied research to advance the business objectives of Nasdaq. Nasdaq will retain a right of first refusal on any intellectual property generated as a result of the joint venture. Nasdaq has the exclusive right to any technologies related to its business objectives.