UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT OF
FLORIDA

Case No. 03-61107-CIV-ZLOCH/SELTZER

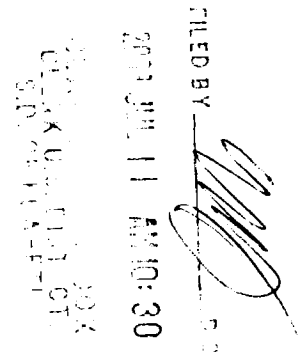
STEVEN I. WEISSMAN (as custodian under the Florida Uniform Transfers To Minors Act, as trustee and individually),

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),

Defendants.



PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT NASDAQ STOCK MARKET, INC.'S MOTION TO DISMISS THE COMPLAINT

Plaintiff responds to the Motion To Dismiss filed by Defendant, The Nasdaq Stock Market, Inc. ("**The For Profit**") and shows:

Introduction

Co-Defendant National Association Of Securities Dealers, Inc. ("NASD"), is a not for profit corporation which, since the 1930's, has been registered as a "national securities association," and functioning as a self regulatory organization ("SRO"). Complaint at pars. 15-20. "Nasdaq" is an acronym for National Association Of Securities Dealers Automated Quotation System. The NASD created, owned and operated the Nasdaq Stock Market from its inception in 1971 through July 9, 2000. Complaint at par. 22. The Nasdaq Stock Market is a telecommunications/computer network that provides real-time last sale trade information, computerized order routing and execution systems. There is no central trading floor like the New York Stock exchange. Complaint at par. 21.

Effective July 9, 2000, co-Defendant NASD effected a novel reorganization by

transferring responsibility for the operation of the Nasdaq Stock Market to a for-profit company it organized specifically for this purpose; to wit: **The For Profit.** The NASD's concept was to make **The For Profit** a publically traded company, thereby enriching co-Defendant NASD, its officers, directors and other insiders, who obtained stock and stock options in **The For Profit**. Complaint at pars. 29-34. In order to operate independently of the NASD, **The For Profit** is required to be registered as a national securities association. On March 15, 2001, **The For Profit** completed and filed its application with the SEC for registration as a national securities association. **The For Profit's** application is controversial within the securities industry and, for more than two years it has been under review by the SEC. Complaint at pars. 26-27. Until and unless such registration is completed, co-Defendant NASD is required by the SEC to retain total control of all statutory functions of **The For Profit** as a market regulator. Complaint at pars. 23-28.

As set forth in the Exchange Act, the purpose of a national securities association is "to protect investors and the public interest . . .". Complaint at par. 18. The function of the conservative not-for-profit NASD, like The New York Stock Exchange, is further explained in **The For Profit's** Motion to Dismiss (at pages 4-5):

> "The NASD is entrusted with numerous vital regulatory functions for the securities industry, including the promulgation of rules and regulations under the federal securites laws . . . Although the NASD is a non-governmental agency, it is subject to SEC oversight."

The purpose and function of **The For Profit,** to which co-Defendant NASD transferred the Nasdaq Stock Market, stands in sharp contrast with the quasi-governmental role of the NASD. In its 2002 report, the Management Committee of **The For Profit** declared (par. 40 of Complaint):

> " . . . the most important measure of Nasdaq performance is the increase in long-term stockholder value, attained through operating income, revenue growth and market share."

The NASD's CEO, Frank Zarb, succinctly put into perspective the reorganization and transfer of the Nasdaq market to **The For Profit** company (Complaint at page 10, note 3):

> "It went from a quasi-governmental entity a few years back, [to something that is] now dynamic and entrepreneurial."

On July 9, 2000 **The For Profit** began its operation of the Nasdaq Stock Market with a three year 100 Million dollar advertising and marketing campaign (2000-2002), to tout and sell the shares of its largest listed companies. Complaint at pars. 60-61. The purpose of the advertisements was to generate trading volume/revenue and to give the larger listed companies an incentive to remain listed on the Nasdaq, rather than moving to the more established New York Stock Exchange, which does not advertise, tout or promote individual companies. Complaint at par. 41.

The For Profit and co-Defendant NASD are immune from civil liability **only** for actions taken pursuant to responsibilities imposed upon them as market regulators under the Exchange Act. The sole and exclusive subject of the Complaint is the private, commercial, massive multimedia advertising campaign conducted in the name of **The For Profit,** which is **totally unconnected to any responsibilities imposed upon it under the Exchange Act as a market regulator**. The Complaint alleges that **The For Profit** wilfully conveyed false and fraudulent information in touting and selling the shares of WorldCom which, among other things, constituted a criminal violation under Florida law. In seeking dismissal, **The For Profit** disregards all of the substantive allegations contained in the Complaint and manufactures its primary assertion that the Complaint merely seeks relief for the carrying out of its official regulatory duties. In actuality, the Complaint seeks no relief on that ground.

I. Standard for Motion to Dismiss

To warrant dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, 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, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59

(1984)). Determining the propriety of granting a motion to dismiss requires courts to accept all the factual allegations in the complaint as true and to evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *See Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir.1994). The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. *See Ancata v. Prison Health Svcs., Inc.*, 769 F.2d 700, 703 (11th Cir.1985); *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir.1986). "[U]nless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint should not be dismissed on grounds that it fails to state a claim upon which relief can be granted. *M/V Sea Lion v. v. Reyes*, 23 F.3d 345, 347 (11th Cir.1994).

II. Procedural Background

The For Profit's explaination of the procedural background of this case (pages 1-3 of its Motion), creates the false impression there was previous consideration of the merits of Plaintiff's causes of action. Plaintiff previously filed a similar complaint which was dismissed by this Court, sua sponte, without prejudice. Case No 02-61500-Civ-Zloch. The sole basis for dismisssal was the technical defect in Plaintiff's allegation of diversity jurisdiction in that Plaintiff alleged he was a "resident" instead of a "citizen" of Florida.

III. The For Profit Is not Immune From Liability For Its Private Business Activity

The For Profit's Motion to Dismiss relies on the undisputed principle that it is absolutely immune from liability for actions taken pursuant to responsibilities delegated to it by co-Defendant NASD which are imposed by the Exchange Act. This undisputed principle is, however, not controlling because the Complaint expressly and emphatically states that Plaintiff does not seek to impose any liability upon **The For Profit** for any action relating to responsibilities delegated to it as a market regulator, or otherwise, under the Exchange Act (Complaint at Par. 6):

> 6. This action is based solely on the for-profit commercial business activity of the Defendants in touting, advertising, promoting and selling

> shares of stock in WorldCom, Inc. This activity includes Defendants' approximately $100 million dollar marketing and advertising campaign during the years 2000, 2001 and 2002 to promote and sell, among other companies, the shares of WorldCom, Inc. Plaintiff makes no claim based upon any failure of the Defendants to fulfill any duties as a self regulatory organization under the Exchange Act or otherwise. Likewise, Plaintiff's claims are not based upon any failure of the Defendants to properly regulate any aspects the securities markets, publicly traded companies, or any market participants whatsoever; or, in connection with enforcement of its rules and the performance of its regulatory or adjudicatory responsibilities or functions.

The For Profit's commercial business activity, including the running of a (*id.*) "$100 million dollar marketing and advertising campaign during the years 2000, 2001 and 2002 to promote and sell, among other companies, the shares of WorldCom, Inc.," has no relationship whatsoever to any regulatory functions under the Exchange Act delegated to it by the NASD. In fact, **The For Profit's** Motion describes the legitimate functions of a market regulator delegated to it by the NASD; and, those immunized functions quite clearly do not include any of the promotional activities at issue *sub judice* (**The For Profit's** Motion at page 6):

> ". . . 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 formulation of regulatory policies and listing criteria applicable to the markets it operates."

Under well established principles, **The For Profit** is not immune from liability for the private business activity, which is the sole basis of Plaintiff's allegations. See, *Sparta Surgical Corp. v. Nasd, Inc.*, 159 F.3d 1209, 1214 (9th Cir., 1998), stating:

> "To be sure, self-regulatory organizations do not enjoy complete immunity from suits; it is only when they are acting under the aegis of the Exchange Act's delegated authority that they so qualify. **When conducting private business, they remain subject to liability**."

Every case relied on by the **The For Profit** deals with the performance of quasi governmental functions, as a proxy for the SEC, when a self regulatory organization is acting under the aegis of the Exchange Act's delegated authority. None of these cases, nor any legal principal, cloaks commercial business activity with the immunity enjoyed by SRO's when

engaged in enforcement of their rules and the performance of their regulatory responsibilities. **The For Profit**'s advertising, stock promotion and sales activity, which is the sole basis for liability asserted by Plaintiff, is no more protected by immunity than if Defendant were operating a Burger King, a bar, a carnival, or a boiler-room sales operation. See, *Austin Mun. Sec. , Inc. v. NASD, Inc. 757 F. 2d 676,* 691-2 (5th Cir. 1985):

> The NASD performs myriads of activities in which it and its officers play no adjudicatory role. These include general administrative functions and the operation of the Nasdaq automated quotations system used in the over-the-counter securituies market. **Defendants lack immunity for these activities."** [Empasis added.]

Since no regulatory or adjudicatory functions of Defendant are at issue, no immunity exists.

The For Profit's assertion that the Complaint attempts to state an action for breach of regulatory functions delegated to it by the NASD, mirrors the same poorly conceived strategy adopted by the NASD in *Shapira v. NASD, Inc. et. al.*, 187 F.Supp.2d 188, 191-192 (S.D. New York, 2002):

> "The NASD's contention that there is no private cause of action against it for performance of its statutory role, which is correct, is beside the point. The cases upon which it relies all stand for the proposition that there is no implied private right of action *under federal law*. But plaintiff does not claim that there is. Rather, he sues the NASD on a common law tort theory. The absence of an implied federal cause of action therefore is immaterial."

Only by mischaracterizing and twisting Plaintiff's allegations, does **The For Profit** seek to apply the immunity defense to Plaintiff's tort claims as if they relate to the performance of <u>its regulatory or adjudicatory functions</u>. See **The For Profit's** Motion To Dismiss, at page 11:

> "Here, all of the alleged misconduct of which Nasdaq is accused falls plainly within Nasdaq's capacity as regulator."

However, as alleged, the advertising and promotional activities at issue have nothing whatsoever to do with "Nasdaq's capacity as regulator."

The For Profit acknowledges it is fundamental that for purposes of a motion to dismiss, Plaintiff's allegations must be accepted as true (**The For Profit's** Motion To Dismiss at page 8):

". . .a court is required to . . . accept the truthfulness of well-pleaded facts." Plaintiff clearly alleges that the "for-profit commercial business activity . . . in touting, advertising, promoting and selling shares of stock in WorldCom, Inc." is unrelated to any regulatory functions. Complaint at par. 6 (page 2, *supra*). However, notwithstanding its acknowledgment of the governing legal principle, **The For Profit's** entire argument is predicated on its improper presumption that this clear factual allegation is false.

The For Profit also inappropriately treats as false the allegation that it placed numerous advertisements touting and promoting WorldCom for the purpose of generating sales of those shares. Thus, **The For Profit** asks this Court to simply accept its naked assertion that the ads were merely "intended" to promote the exchange - - not any individual stocks **(The For Profit**'s Motion To Dismiss at page 6):

> "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."

The actual allegations of the Complaint, which are required to be accepted as true for purposes of a motion to dismiss, are directly contrary to **The For Profit's** assertion and include the allegations that (Complaint at paragraphs 12, 56, 61, 62 and 96): (i) it touted, marketed, advertised and promoted WorldCom by falsely representing it as a good company and worthwhile investment; (ii) knowing that WorldCom failed to meet the audit committee rules, **The For Profit** continued to advertise, promote and tout WorldCom as a great company, and to disseminate WorldCom's fraudulent financial statements, implicitly warranting and falsely representing that WorldCom satisfied all listing requirement; (iii) it repetitively advertised WorldCom as a "successful growth company;" and (iv) it advertised that WorldCom and its CEO were endorsed by **The For Profit** as, *inter alia*, having good character, accounting done in accordance with GAAP, and a viable audit committee in accordance with Nasdaq listing requirements.

Although the Complaint includes a discussion of WorldCom's failure to satisfy the NASDAQ listing requirement of an independent audit committee, Plaintiff seeks absolutely no relief based on the **The For Profit's** failure to de-list WorldCom. Whether to de-list is a regulatory decision for which **The For Profit** correctly asserts it is immune from civil liability. As expressly stated in the Complaint, this discussion of WorldCom's failure to satisfy the NASDAQ listing requirement is included merely to show that **The For Profit** negligently or intentionally touted, advertised and promoted WorldCom as a great company when it knew, or should have known, otherwise (Complaint at par. 46):

> "46. . . .The following allegations regarding WorldCom's failure to comply with the new requirements for audit committees of companies listed on the Nasdaq are included solely to demonstrate that the Defendants knew, or should have known, that their private, commercial advertisements and marketing efforts touting that company as a good investment were false ..."

The For Profit's Nasdaq website is utilized as a sales and marketing tool unrelated to any regulatory functions. The Complaint alleges that as part of its advertising and marketing campaign, **The For Profit** utilized the website to disseminate WorldCom's fraudulent financial statements, with its imprimatur, which Plaintiff relied on in purchasing Worldcom shares. Complaint at paragraphs 66-68. **In vivid conflict with The For Profit's present immunity argument, it has previously admited and acknowledged on its own website, that with respect to the information it disseminates, The For Profit and its affiliates are, in fact, subject to civil liability for willful, tortious misconduct or gross negligence.** As specifically alleged at paragraph 69 of the Complaint, the Nasdaq website contains the following disclaimer which acknowledges Defendants' civil liability:

> "Unless due to willful tortious misconduct or gross negligence, Nasdaq (and affiliates) and the Information Providers have no liability in tort, contract, or otherwise. . ."

In conclusion, the clearly alleged basis of the **The For Profit's** liability in the Complaint, is solely the false, fraudulent, massive, multimedia promotional campaign to sell WorldCom shares, which is not connected in any manner, to any immunized duties as a market regulator

under the Exchange Act. If **The For Profit** had not elected to engage in this non-regulatory, commercial business activity, it would have no liability to Plaintiff. [1]

IV. There Are No Applicable Administrative Remedies

The For Profit's argument that Plaintiff has failed to exhaust administrative remedies, again remarkably presumes Plaintiff seeks relief based on some act or omission in **The For Profit's** official capacity as a market regulator (Motion To Dismiss at page 13):

> "The dispute at issue here centers on Nasdaq's oversight of its market and its authority to list or de-list securities. . . . If Plaintiff challenges Nasdaq's handling of its duties, which his Amended Complaint purports to do, he must first do so at the SEC. . ."

In actuality, this dispute centers solely on **The For Profit's** activities in promoting and selling shares of stock to generate revenue and profit for itself - - exactly like any other ordinary commercial business corporation. These activities have absolutely nothing to do with regulatory duties. Plaintiff seeks no relief based on the Nadaq's oversight of the market and certainly none based on its failure to de-list WorldCom. (See paragraph 46 of the Complaint, quoted at page 8 above, stating that the allegation that WorldCom failed to meet Nasdaq listing requirements is merely to establish **The For Profit** knew, or should have known, its advertisements regarding WorldCom were false.)

All the cases cited by **The For Profit** clearly demonstate that administrative action before the SEC is only available when an aggrieved party is challenging an act or omission of a stock exchange when acting in its official capacity; such as challenges to the regulatory and disciplinary systems administered by SRO's and subject to oversight by the SEC. None of the TWELVE (12) cases relied on by **The For Profit** (pages 12-14 of its Motion), have any relevance to the present Complaint, which is based upon **The For Profit's** business conduct as

[1] While the reorganization/recapitalization of the NASDAQ market was approved by the SEC, the advertisements, promoting and touting WorldCom, were neither approved nor authorized by the SEC.

an ordinary for-profit corporation; and not any disciplinary or rule making or regulatory activities of an SRO. [2]

Plaintiff seeks monetary damages arising from **The For Profit's** tortious business conduct and the contention that Plaintiff could seek or obtain monetary relief against **The For Profit** for these torts by proceeding before the SEC is meritless. *Shapira v. Charles Schwab & Co. & NASD, Inc.*, 187 F. Supp. 2d 188, 192 (S.D. New York 2002) **is directly on point:**

> Finally, the NASD correctly points out that plaintiff has not exhausted his administrative remedies before the Securities and Exchange Commission, which is empowered to take action against self-regulatory organizations including the NASD to ensure that they comply with their

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[2] (i) *Cook v. NASD Regulation, Inc.*, 31 F. Supp. 2d 1245, 1248 (D. Colo. 1998): The court found that the plaintiff was challenging a function "performed as part of the NASDR's regulatory duties" and was therefore required to exhaust administrative remedies. (ii) *Swirsky v. NASD, Inc.* 124 F. 3d 59, 62 (ist Cir. 1997): NASD member broker disregarded NASD procedures requiring appeal of disciplinary decisions to the SEC and appeal of adverse SEC decisions to Court of Appeals. (iii) *Touche Ross & Co. v. SEC*, 609 F. 2d 570, 574 (2d Cir. 1979): *Touche Ross & Co* sued to enjoin SEC disciplinary proceeding against it. Held that *Touche Ross* failed to exhaust its administrative remedies before the SEC. (iv) *McKart v. U.S.*, 395 U.S. 185, 195, 89 S. Ct. 1657, 1663 (1969): Held that selective service registrant who failed to report for induction into the Armed Forces, was not precluded from raising an exemption defense by his failure to exhaust the administrative remedies provided by the Selective Service System. (v) *American Benefits Group v. NASD and SEC*, 1999 WL 605246: Held that plaintiff failed to exhaust administrative remedies provided for challenging NASD rules ". . .where Congress has provided a specific mechanism. . ." (vi) *Merrill Lynch v. NASD, Inc.*, 616 F. 2d 1363 (5th Cir. 1980): Held that action challenging a non-final procedural ruling in an NASD disciplinary hearing, should be dismissed for failure to exhaust administrative remedies. (vii) *Guitard v. Unites States Secretary Of Navy*, 967 F. 2d 737, 740 (2nd Cir. 1992): Naval Reserve lieutenant sought preliminary injunction barring Secretary of Navy from discharging him for refusing to submit to drug test and for marijuana use. The injunction was reversed because the lieutenant had failed to exhaust his administrative remedies. (viii) *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459 (1938): Complaint filed against National Labor Relations Board to enjoin a hearing. Held that plaintiff was required to exhaust the administrative remedy before the board and then follow the congressionally mandated appellate route. (ix) *Kennedy v. Empire Blue Cross & Shield*, 989 F. 2d 588 (2nd Cir. 1993): Holders of insurance policies governed by Federal Health Benefits Act were required to exhaust administrative remedies by appealing disputed claims to Office of Personnel Management before seeking judicial review. (x) *Perez-Perez v. Hanberry*, 781 F. 2d 1477 (11th Cir. 1986): Cuban detainees, who were excludable aliens, sought habeas review of Attorney General's refusal to parole them from a federal penitentiary. Held that petitioners did not exhaust administrative remedies. (xi) *First Jersey Sec., Inc. v. Bergen*, 605 F. 2d 690 (3rd cir. 1979): Held plaintiff failed to exhaust available administrative remedies with respect to disciplinary proceedings brought against it by the NASD. District court lacked jurisdiction to entertain suit to enjoin NASD from carrying out its duty of enforcing regulation of over-the-counter security dealers. (xii) *Coleman v. NASD, Inc.*, 1999 WL 305100 (S.D.N.Y., 1999): Broker failed to exhaust administrative remedies before seeking judicial intervention in an NASD disciplinary proceeding. Held that Congress intended the doctrine of exhaustion of administrative remedies apply to challenges to the disciplinary proceedings of the NASD.

> own rules and the Exchange Act. But plaintiff does not here claim that the NASD violated its own rules or the Exchange Act. Moreover, **he seeks damages, a remedy not available to him under the provisions upon which the NASD relies**. In consequence, there is no merit to the NASD's exhaustion argument. [Footnote omitted.]

There simply are no administrative remedies available to address Plaintiff's commercial tort claims.

V. Plaintiff is Not Seeking To Initiate A Private Right of Action For A Purported Violation Of The Nasdaq's Own Rules and Regulations

The For Profit asserts that Plaintiff is improperly attempting to sue under the "Exchange Act or the rules thereunder" to enforce its offical duties under that Act; but has disguised the action as State law claims (Motion at pages 15-18). However, the Complaint is not based on **The For Profit's** duties under the Exchange Act or as a market regulator. Accordingly, **The For Profit's** argument is meritless and warrants no further discussion.

VI. The Complaint Does Plead Fraud With Sufficient Specificity

The For Profit accurately recites the essential elements of common law fraud:

> "(i) a false representation of fact, known by the party making it to be false at the time it was made; (ii) that the representation was made for the purpose of inducing another to act in reliance on it; (iii) actual reliance on the representation; and (iv) resulting damage to the plaintiff."

However, in arguing that Plaintiff has failed to allege these elements, **The For Profit** simply ignores the allegations contained in the Complaint.

The four essential elements of common law fraud are set forth below, followed by the primary paragraphs of Count III (Common Law Fraud), satisfying each element:

(i) ***A false representation of fact, known by the party making it to be false at the time it was made*****; and**

(ii) ***That the representation was made for the purpose of inducing another to act in reliance on it*****:**

> 96. . . . **The For Profit** published numerous print and television advertisements in Florida which knowingly, with intent to deceive, endorsed WorldCom and conveyed 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. **The For Profit** also provided publicity to WorldCom on its web-site and assisted in the dissemination of WorldCom's fraudulent financial statements. The aforesaid advertising and marketing campaign conducted during the year prior to Plaintiff's purchases of WorldCom shares included, but was not limited to:

(i) As set forth in its April 30, 2001 registration statement filed with the SEC:

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

(ii) Appearing in major prime time programming such as West Wing and MSNBC News with Brian Williams, **The For Profit** ran TV spots for its 100 Index Trust, better known as the QQQ. These TV ads began running the week of September 24, 2001. The ads feature a group of companies included in the trust, including WorldCom. The key message is that the world's most sought after companies can be found on the world's most sought after security.

(iii) Seeking to calm the markets in the wake of the Enron fraud, on April 11, 2002, **The For Profit** took out a two full page spread advertisement in the Wall Street Journal discussing its belief in the need for Nasdaq listed companies to provide accurate financial reporting in accordance with Generally Accepted Accounting Principals, "supported by a Knowledgeable Audit Committee". On one page is a picture of the Nasdaq ticker with the slogan "**The Responsibilities We All Share**". On the opposite page under the headline "**Keeping Our Markets True - It Is All About Character**" is a list of the chief executives of the "good" Nasdaq listed companies under the sub-heading "**Our Beliefs Stand In Good Company**". Listed thereunder as an endorser of these Nasdaq goals is "Bernard J. Ebbers, President and Chief Executive Officer WorldCom, Inc." The message conveyed by the ad is that WorldCom and its CEO are endorsed by **The For Profit** as, *inter alia*, having good character, accounting done in accordance with GAAP, and a viable audit committee in accordance with Nasdaq listing requirements.

(iv) Linking the Nasdaq website to WorldCom's fraudulent financial statements with the specific intent to create the impression that they were reviewed and/or endorsed by **The For Profit.**

(v) Generally conveying the false impression that WorldCom was in compliance with Nasdaq listing requirements.

In addition to the foregoing, during the months prior to his purchases of WorldCom shares, Plaintiff saw, heard and relied upon other public media advertisements/communications by the Defendants conveying the same false representations and impression to the effect that WorldCom was a great company with accounting in accordance with GAAP; a good investment; and, that it met the listing requirements of the Nasdaq stock market. Plaintiff requires discovery to recall and provide further specification as to the dates and places and method of publication of said additional advertisements/communications during the time periods leading to Plaintiff's purchases of WorldCom shares.

97. **The For Profit** and **NASD's** advertising and marketing campaign was designed and intended by Defendants to induce investors, including Plaintiff, to purchase shares of WorldCom and, as part of that campaign, Defendants knowingly and intentionally made false laudatory representations regarding WorldCom while concealing their direct profit motive and interest in generating purchases of WorldCom shares. The intention of **The For Profit** and **NASD** in making these false representations and concealing their direct profit motive and interest in selling the stock of that company, was to convince and induce investors, including Plaintiff, to purchase shares of WorldCom.

98. In their advertising and marketing campaign, **The For Profit** and **NASD,** acting jointly and in concert with each other, purposely concealed and withheld disclosure of their profit motive and financial stake in generating sales of WorldCom shares, and of their joint venture with WorldCom to market said shares, with the intention of misleading potential investors, including Plaintiff, into believing the endorsements were being made by a disinterested self regulatory organization whose goal was investor protection and market integrity. In order to effectuate their plan to mislead potential investors, including Plaintiff, the Defendants willfully published numerous advertisements and distributed WorldCom's financial statements in violation of Florida Statute § 517.301(1)(b), which requires disclosure in advertisements and marketing material that Defendants were in a joint venture with WorldCom to promote the sale of its shares and were compensated and/or reimbursed, *inter alia*, from the trading volume the marketing and advertising generated, listing and other fees. The intention of **The For Profit** and **NASD** in so misleading potential investors, including Plaintiff, was to convince and induce investors, including Plaintiff, to purchase shares of WorldCom.

(iii) ***Actual reliance on the representation*; and**

(iv) ***Resulting damage to the plaintiff*:**

99. In purchasing all of his shares of WorldCom (listed at par. 10, *supra*), Plaintiff relied upon the aforesaid false and misleading

> representations in the Defendants' advertising and marketing campaign; and, as a result, was induced to and did purchase said shares of stock and has suffered substantial damages as a result thereof.

Plaintiff Has Satisfied The Rule 9(b) Pleading Standard For Alleging Fraud

The For Profit contends that Plaintiff fails to plead fraud with the particularity required by Rule 9(b), which states: "In all averments of fraud . . . the circumstances shall be stated with particularity." The oft repeated standard for pleading fraud under Rule 9(b) was stated in *Amerifirst Bank v. Boman, et al.*, 757 F. Supp. 1365, 1381 (S.D. Fla., 1991):

> "Rule 9(b), as applied in this jurisdiction, requires a plaintiff to allege fraud with sufficient particularity to permit 'the person charged with fraud . . .[to] have a reasonable opportunity to answer the complaint and adequate information to frame a response.' *In re U.S. Oil and Gas Litigation,* 1988 WL 28544, 1988 U.S. Lexis 2217, at 4 (S.D. Fla., 1988). The allegations must be accompanied by 'some delineation of the underlying acts and transactions which are asserted to constitute fraud.' *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Del Valle*, 528 F. Supp. 147, 149 (S.D. Fla. 1981)."

Also see the formulation as stated in stated in *Arral Industries, Inc. v. Touch Entertainment, Inc.*, 2000 WL 141269 (S.D. Fla. 2000) Case No. 99-0916-CIV- Highsmith:

> "Rule 9(b) of the Federal Rules of Civil Procedure imposes a heightened standard of pleading upon claims alleging fraud or mistake . . . This standard, however, 'does not require detailed fact pleading of claims of fraud.'. . . Rather, Rule 9(b) must be read in conjunction with Rule 8's notice pleading regime. . .The purpose behind Rule 9(b)'s specificity requirement 'is to eliminate fraud actions in which all of the facts are learned through discovery after the complaint is filed.' . . . Thus, Rule 9(b) is satisfied when the complaint 'alleges fraud with sufficient particularity to permit the person charged with fraud . . .[to] have a reasonable opportunity to answer the complaint and adequate information to frame a response.'" [Numerous citations of authority omitted.]

Finally, as noted in *SEC v. Ginsberg, et al.*, 2000 WL 1299020, Case No. 99-8694C-IV-Ryskamp (S.D. Fla., January 10, 2000):

> ". . .the Eleventh Circuit has cautioned that 'Rule 9(b) must not be read to abrogate Rule 8 . . ., and a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the

> directive of Rule 9(b) with the broader policy of notice pleading.' *Friedlander v. Nims,* 755 F. 2d 810, 813 n. 3 (11th Cir. 1985)."

With the pertinent 9(b) standard as a guide, the following paragraphs of the Complaint flesh out the who, what, where and when of **The For Profit's** fraudulent representations, with particularity, and directly refute its assertion that (Motion at page 20) ". . . Plaintiff failed to identify even a single false representation of fact propounded by[it] . . .":

(i) Par. 56. "Knowing that WorldCom failed to meet the audit committee rules, **The For Profit** continued to advertise, promote and tout WorldCom as a great company, and to disseminate its fraudulent financial statements, implicitly warranting and falsely representing that WorldCom satisfied all listing requirements."

(ii) Par. 61. Beginning the week of September 24, 2001, **The For Profit** ran numerous television spots in major prime time programming such as West Wing and MSNBC News with Brian Williams. These spots falsely advertised WorldCom as a "successful growth company" when they **The For Profit** knew it was not.

(iii) Par. 62. On April 11, 2002, **The For Profit** took out a two page spread advertisement in the Wall Street Journal intentionally conveying the false message that WorldCom and its CEO were endorsed by **The For Profit** "as, inter alia, having good character, accounting done in accordance with GAAP, and a viable audit committee in accordance with NASDAQ listing requirements."

(iv). Pars. 66-67, 70, 71. During the period July 9, 2000 through May 2002, **The For Profit** conspired with WorldCom and entered into a partnership with that company to promote WorldCom by lending WorldCom the Defendants' imprimatur. As part of this partnership, the **The For Profit** linked WorldCom's fraudulent financial statements to **The For Profit's** website and concealed its partnership arrangement in order to tout WorldCom shares with the intention to mislead investors.

> "70. **The For Profit** willfully failed to reveal the fact that it did not independently review the fraudulent WorldCom financial information and statements linked to and posted on its Nasdaq web-site; and, to the contrary,

> **The For Profit** represented that it believed the information to be accurate and reliable:
>
> > 'All information contained herein is obtained by NASDAQ from sources believed by NASDAQ to be accurate and reliable.'
> >
> > 71. . . .**The For Profit** and **NASD** had a financial stake in promoting shares of WorldCom and intentionally conveyed the false impression to Plaintiff that the financial information provided on the official Nasdaq site was reviewed by them in their official capacities."

As alleged throughout the Complaint, in purchasing WorldCom shares, Plaintiff saw and relied on the TV spots, the Wall Street Journal advertisement and the fraudulent financial statements disseminated by **The For Profit**. Plaintiff also relied on the **The For Profit's** false representation on its website that it believed the WorldCom financial information was from a reliable source. Plaintiff was also intentionally misled by the **The For Profit's** willfull concealment in its advertisements of the direct profit interest it had in promoting and selling WorldCom shares, which concealment is a crime under Florida law. Paragraphs 96-99, within Count III (Common Law Fraud), summarize these particularized allegations of fraud.

It is also noted that the Complaint alleges **The For Profit** profited from its fraud:

Par. 12 (iii). "Defendants directly and indirectly profited from the sale of WorldCom shares to Plaintiff . . ."

Par. 43. "Since the bulk of **The For Profit's** income is derived from the listing and volume of Nasdaq traded securities, its officers and directors have a strong personal incentive to promote and sell Nasdaq traded securities."

Par. 95. ". . . The purpose of this marketing and advertising campaign was to . . . benefit the **NASD** and **The For Profit** (as well as the officers and directors of the Defendants who held stock and stock options in **The For Profit)** by:

(i) generating increased trading volume and the attendant revenue;

(ii) generating and retaining listing income from Nasdaq listed companies, including WorldCom; and,

(iii) increasing the value of **The For Profit's** stock."

Par. 98. ". . . Defendants were in a joint venture with WorldCom to promote the sale of its shares and were compensated and/or reimbursed, *inter alia*, from the trading volume the marketing and advertising generated, listing and other fees."

In conclusion, the allegations which delineate the underlying acts of fraud are of sufficient particularity to satisfy the pleading requirement of Rule 9(b). **The allegations clearly spell out the who, what, where and when** of the fraudulent representations with particularity; and, afford **The For Profit** adequate information to frame a response and a reasonable opportunity to answer the Complaint. Accordingly, Plaintiff respectfully submits that the pleading requirements of Rule 9(b) are satisfied.

Plaintiff's Reliance

The For Profit essentially asks this Court to rule that, as a matter of law, Plaintiff could not have reasonably relied on the representations of fact by the Defendants. In support of its "reliance" theory for dismissal, **The For Profit** cites *Wasser v. Sasoni*, 652 So. 2d 411 (Fla. 3rd DCA 1995); *Welbourn v. Cohen*, 104 So. 2d 380 (Fla. 2d DCA 1958); and *David v. Davenport*, 656 So. 2d 952, 953 (Fla. 3rd DCA 1995). *Wasser* involved an appeal from a summary judgment; and, the *Welbourn* and *David* decisions both were appeals from bench trials. **The For Profit** cites no authority for its meritless assertion that the reasonableness of a plaintiff's reliance may be determined from the face of the pleadings on a motion to dismiss.

Whether Plaintiff's reliance was reasonable is a question of fact that is inapproriate for determination on a motion to dismiss. **The For Profit's** argument unrealistically presumes "the exercise of ordinary diligence" requires a retail investor to personally scrutinize tens of thousands of pages of SEC filings to assure compliance with thousands of highly technical requirements for generally accepted accounting practices and scores of Exchange listing requirements, before purchasing any shares of stock. **The For Profit** concludes that the largest corporate fraud in United States history, should have been uncovered by Plaintiff (Motion at page 20): ". . . the truth would have been discovered with even a minimal degree of diligence."

VII. Negligent Misrepresentation

Count IV, negligent misrepresentation, is based on essentially the same allegations as the Fraud Count; except Plaintiff alleges the false statements and misleading information were made negligently, rather than intentionally. Also, the heightened pleading reqirement of Rule 9(b), applicable to Count III, Fraud, is inapplicable to Count IV, Negligent Misrepresentation. [3]

The allegations of Count IV satisfy each element of an action for negligent misrepresentation; to wit: (i) **The For Profit** made misrepresentrations of material facts; (ii) **The For Profit** either knew of the misrepresentations or made them under circumstatnces in which it ought to have known of their fasity; (iii) **The For Profit** intended that the misrepresentations induce Plaintiff to act on them; and (iv) Plaintiff justifiably relied on the misrepresentations and was thus injured.

VIII. Count I - Fla. Stat. § 517.301(1)(b)

In moving to dismiss this Count, **The For Profit** essentially ignores, mischaracterizes and denies the allegations of the Complaint; but fails to cite any legal authority or to make any substantive legal argument. For example, in direct conflict with Plaintiff's allegations, **The For Profit** states, (Motion at page 23): ". . . In the . . .Complaint, Plaintiff argues that the listing fees charged by Nasdaq constituted 'consideration' . . . . Here WorldCom did not pay Nasdaq for mentioning WorldCom in Nasdaq ads, nor does Plaintiff even allege so." In actuality, **The For Profit** misrepresents the allegations of the Complaint, which state the precise opposite

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[3] At page 17 of its Motion, **The For Profit** erroneously relies on *Rhodes v. Omega Research, Inc.* 38 F. 2d 1353, 1357 (S.D. Fla. 1999) for the proposition that "an action for negligent misrepresentation sounds in fraud rather than negligence" and therefore the heightened fraud pleading requirements of Rule 9(b) apply. However *Rhodes* was based on the specific adjudication that a securities class action claim, brough under section 11 of the Securities Act, was grounded in fraud (38 F. Supp. 2d at 1361): " Although Plaintiffs . . . argue the claims here 'do not sound in fraud,' the Court must disagree." *Rhodes* was specifically relied on in *Sherleigh Associates v. Windmere-Durable Holdings, Inc.*, 178 F. Supp. 2d 1255, 1269 (S.D. Fla. 2000), as standing for the limited proposition that: "Where a section 11 claim 'sounds in fraud,' the particularity requirements of Federal Rule Of Civil Procedure 9(b) may apply." In arguing that Rule 9(b) applies to Plaintiff's negligent misreresentation claim, **The For Profit** quotes *Rhodes* (as well as a *dissenting* opinion in *Souran v. Travelers Ins. Co*, 982 F. 2d 1497, 1511 (11th Cir. 1993)) out of context.

(Complaint at pars. 76-77):

> "76. . . .**The For Profit** undertook said advertising and promotion for a consideration received or to be received directly or indirectly from WorldCom, market makers and/or stock dealers without disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration. [4]
>
> 77. The consideration WorldCom received for advertising WorldCom included, but is not limited to, continuation of listing fees from WorldCom, fees generated by increased trading volume on the Nasdaq stock market, and fees generated from gaining new listings."

After mischaraterizing Plaintiff's allegations and misreading the statute, **The For Profit** requests dismissal based on nothing more than unsupported, tortured logic (Motion at page 23):

> "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 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) . . . 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."

First, as shown above, Plaintiff alleges **The For Profit** was compensated with more than listing fees. Second, Plaintiff agrees that Florida's blue sky laws were not intended to regulate Nasdaq or any other securities exchange - - **when performing the regulatory functions of an exchange**. However, the Complaint alleges (par. 6, *supra* at page 4): "This action is based solely on the for-profit commercial business activity of the Defendants in touting, advertising, promoting and selling shares of stock in WorldCom, Inc." Paragraph 7 of the Complaint further alleges:

> ". . . The said private, for-profit commercial business activity of the Defendants in touting, advertising, promoting and selling shares of WorldCom, Inc. is completely unrelated, separate and apart from any duties or functions of either Defendant as a self regulatory organization under the Exchange Act or otherwise and is likewise unrelated to any responsibilities either Defendant may have to

[4] Fla. Stat. § 517.301(1)(b) specifically prohibits undisclosed consideration for advertisements from an "issuer, underwriter, or dealer, or from an agent or employee of an issuer, underwriter, or dealer, without fully disclosing the receipt" thereof.

> enforce its rules and perform regulatory or adjudicatory responsibilities as a self regulatory organization.

By **The For Profit's** logic, it could open a bar without a liquor license, or set up a fleet of taxis without complying with the applicable licensing statutes because, liquor laws and taxi regulations were never (*supra*) "intended to regulate Nasdaq or any other securities exchange." Of course, since it is alleged **The For Profit's** actions to promote and tout WorldCom were unrelated to any legitimate Exchange functions, **The For Profit's** argument is illogical.

The For Profit's assertion that (*supra*): "Indeed, there are no published cases of disgruntled investors suing a stock market under § 517.301(1)(b)" may well be correct. However, until now, no other Exchange has engaged in the purely commercial business activities conducted by **The For Profit** in touting, promoting and selling the securities traded thereon, for unlawfully concealed consideration, which is far removed from any regulatory function.

IX. Count II - Nasdaq Is A Dealer Under Chapter 517

Once again, in seeking dismissal, **The For Profit** disregards the black letter law that for purposes of a motion to dismiss, allegation are treated as true. **The For Profit** seeks dismissal solely on the ground that it denies the allegations of the Complaint (Motion at page 24):

> "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."

It is elementary that a defendant's denial of allegations is not a proper basis for dismissal of a complaint and **The For Profit's** Motion should therefore be denied.

Wherefore, Plaintiff prays that the **The For Profit's** Motion To Dismiss be denied as to all Counts.

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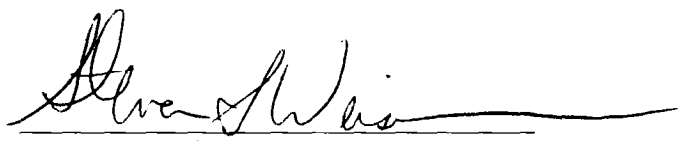
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered to Federal Express for next business day delivery to: David S. Mandel, Esq., MANDEL & MCALILEY LLP, Suite 1200, 169 East Flagler Street, Miami, Florida 33131; and to Betty G. Brooks, Esq., NASD, 1735 K Street, NW, Washington, DC 2006-1500, this 10th day of July, 2003.



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