WEISSMAN v. NASD:
PIERCING THE VEIL OF ABSOLUTE IMMUNITY OF AN SRO UNDER THE SECURITIES EXCHANGE ACT OF 1934

ABSTRACT

Pursuant to the Securities Exchange Act of 1934 (Exchange Act), self-regulatory organizations (SROs) receive quasi-governmental immunity. The justification for this immunity is twofold: first, to enforce the minimum financial and sales practice requirements created by Congress and the Securities and Exchange Commission and second, to denounce and publicly reprimand any violators of these requirements. An issue arises, however, when SROs forfeit their responsibility for these duties by participating in actions that are solely for their own private interests.

The National Association of Securities Dealers Automated Quotation (NASDAQ) became a privatized, for-profit company in 2002, with annual profits exceeding $365 million in 2006. With profits as excessive as these, it should be inferred that Nasdaq, Inc. has transitioned their priorities from regulation to annual gross revenue. As a result, NASDAQ, like the many other publicly traded stock exchanges, has struggled to maintain its identity as an SRO.

This comment will further explore the issue of whether SROs should still receive the protections of immunity under the Exchange Act and considers the potential legal and economic impact of the Eleventh Circuit's decision in Weissman v. NASD, Inc. In Weissman the court decided Nasdaq should no longer receive the benefits of quasi-governmental immunity in actions where Nasdaq is acting privately. This comment takes the position that Weissman was correctly decided and analyzes the legal and economic impact this decision could have on both Nasdaq and other for-profit stock exchanges.

I. INTRODUCTION

Since the passage of the Securities Exchange Act of 1934 (Exchange Act),¹ self-regulatory organizations (SROs),² like Nasdaq, have enjoyed absolute immunity for acts carried out under the quasi-governmental powers of the Exchange Act.³ Courts have generally held that SROs will receive

---

²According to the Exchange Act, "self-regulatory organizations" are any "national securities exchange, registered securities association, or registered clearing agency." Id. § 78c(a)(26).
³See Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998) ("Extending
protection from the Exchange Act so long as their "alleged misconduct falls within the scope of [their] quasi-governmental powers." But recently, there has been a trend by SROs to become for-profit entities. Since 2000, seven of the ten largest U.S. stock exchanges have filed initial public offerings with the Securities and Exchange Commission (SEC) and relinquished their nonprofit status. As a consequence of such filings, SROs, like Nasdaq, have been struggling to maintain their identities as quasi-governmental entities. Thus, the issue becomes whether an SRO's actions in furthering profit-making activity fall within its quasi-governmental powers under the Exchange Act. It is the resolution to this issue that makes Weissman v. NASD, Inc. a landmark decision.

Immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress.); Austin Mun. Sec., Inc. v. NASD, Inc., 757 F.2d 676, 697 (5th Cir. 1985) (extending absolute immunity to another national securities exchange and its employees); D'Alessio v. NYSE, Inc., 125 F. Supp. 2d 656, 657 (S.D.N.Y. 2000), aff'd, 258 F.3d 93 (2d Cir. 2001) (holding that the New York Stock Exchange (NYSE) has absolute immunity when it performs regulatory functions that would otherwise be performed by the SEC).


The stock exchanges that have gone public are the New York Stock Exchange, the Chicago Stock Exchange, the Philadelphia Stock Exchange, the National Stock Exchange, the Pacific Stock Exchange (which is now NYSE Acra), and finally the NASDAQ Stock Exchange. See Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to the Demutualization of the National Stock Exchange, Exchange Act Release No. 53,963, 88 SEC Docket 477 (June 8, 2006); Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 8 Relating to the NYSE's Business Combination with Archipelago Holdings, Inc., Exchange Act Release No. 53,382, 71 Fed. Reg. 11251-01 (Feb. 27, 2006); Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 by the Chicago Stock Exchange, Inc. Relating to the Demutualization of the Chicago Stock Exchange, Inc., Exchange Act Release No. 51,149, 84 SEC Docket 2815 (Feb. 8, 2005); Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 Thereto Relating to the Demutualization of the Philadelphia Stock Exchange, Inc., Exchange Act Release No. 49,098, 81 SEC Docket 3460 (Jan. 16, 2004). See also Fleckner, supra note 5, at 2562 (listing stock exchanges and the years they became publicly traded markets).


Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293, 1299 (11th Cir. 2007).
In *Weissman*, the United States Court of Appeals for the Eleventh Circuit held that Nasdaq, for the first time since its establishment, was not entitled to absolute immunity. Thus, the Eleventh Circuit has made Weissman the first plaintiff ever to pierce the veil of immunity of a stock exchange. In disregarding the long-standing liberal application of the absolute immunity doctrine, the court established a new test to determine whether an SRO is entitled to such immunity. By establishing this new standard, the court properly created a fraud exception to the Exchange Act by making a distinction between Nasdaq's private actions and its regulatory functions. Because of this distinction, *Weissman* is a controversial decision that could have many repercussions. Yet, the most serious of these possible implications is the potential liability that stock exchanges could face varying from state to state. This comment supports the court's ruling and further investigates why Nasdaq should no longer receive the protection of immunity for its private actions as well as whether Nasdaq will be overburdened by facing multiple state fraud claims.

Part II discusses the development of SRO immunity in the context of the Exchange Act and how other circuits have interpreted SRO immunity. Part III examines the facts, procedural history, and rationale of the majority's opinion in *Weissman*. Part IV considers the potential implications stock exchanges may face and also discusses some opposing arguments to the court's decision. Finally, Part V concludes that, despite the arguments predicting Nasdaq's potential burden of fighting state fraud claims, it is unlikely these implications will become problematic.

II. HISTORICAL PERSPECTIVE

A. The Securities Exchange Act of 1934

The National Association of Securities Dealers (NASD) is a registered SRO. Under the Exchange Act, Congress not only delegates power to SROs to administer compliance, but also grants broad supervisory powers to

---

9 Id.

10 See *Sparta Surgical Corp. v. NASD, Inc.*, No. C-95-3926-MHP, 1997 U.S. Dist. LEXIS 4567, at *17 (N.D. Cal. Jan. 30, 1997) (stating that "no plaintiff has ever successfully sued defendants for money damages based on a listing decision.") aff'd, 159 F.3d 1209 (9th Cir. 1998).

11 *Weissman IV*, 500 F.3d at 1297 ("To determine whether an SRO's conduct is quasi-governmental, we look to the objective nature and function of the activity for which the SRO seeks to claim immunity.").

the SEC. As a result, SROs are under extensive control and oversight by the SEC on a continuous basis. All SROs are required to "comply with the provisions of the Exchange Act, [their] own rules, and the rules of both the SEC and Municipal Securities Rulemaking Board." In the event an SRO fails to meet these rules, the SEC has the power to restrict the organization's activities, suspend or revoke its status as an SRO, or impose further sanctions. Nasdaq, a wholly owned subsidiary of the NASD, has been delegated authority to maintain, oversee, and manage the NASDAQ Stock Exchange. More specifically, Nasdaq has been delegated the authority to create regulatory policies and listing requirements.

"Traditionally, stock exchanges [and SROs] were organized as not-for-profit organizations, founded and owned by brokers and dealers." But recently, many of the stock exchanges have transformed into for-profit corporations. In 2000, NASDAQ was converted into a full for-profit enterprise, and by 2007, seven of the ten U.S. stock exchanges became for-profit entities. According to Professor Andreas M. Fleckner, these transformations occur because "domestic and international competition [is] increasingly compelling stock exchanges to give up their exclusivity, undergo restructuring, and become publicly traded for-profit companies, a process referred to as demutualization." Because of demutualization, "self-regulatory organizations . . . are in the throes of an identity crisis . . . [and] are now accused of advocating no interest more keenly than their own survival."
B. Absolute Immunity: Pre-Weissman

Federal courts have long recognized the doctrine of absolute immunity when a national securities association or exchange is acting in its regulatory capacity but have been cautious in extending immunity claims beyond this in favor of defendants. They have acknowledged the "undeniable tension" between the granting of immunity to protect SROs and the denial of a party's right to seek a remedy in a court of law. This tension is the reason courts have placed the burden on SROs to justify the application of the immunity doctrine. The following cases represent the evolution of absolute immunity as applied to SROs.

In Austin Municipal Securities Inc. v. NASD, Inc., the Fifth Circuit became one of the first courts to hold that "the National Association of Securities Dealers . . . and its disciplinary officers have absolute immunity from . . . prosecution for personal liability on claims arising within the scope of their official duties." In Austin, eleven members of the District Business Conduct Committee were alleged to have violated NASD disciplinary proceedings by spreading confidential information about the plaintiff to third parties and to have defamed the plaintiffs by disclosing that the plaintiffs were going into bankruptcy. To determine the extent absolute immunity should be awarded to SROs, the court used a three-part test that was established in Butz v. Economou. According to the Butz test, an official's conduct is entitled to immunity from civil liability if: (a) the official's functions share the characteristics of the judicial process; b) the official's activities are likely to result in recriminatory lawsuits by disappointed parties; and c) sufficient safeguards exist in the regulatory framework to control unconstitutional conduct. In applying the test, the court in Austin found the actions of the officials satisfied all three criteria. The court reasoned that because "the NASD was acting in an adjudicatory and

---

25 Absolute immunity is defined as a "complete exemption from civil liability afforded ... while performing particularly important functions." BLACK'S LAW DICTIONARY 339 (8th ed. 2004).
28 See id. at 224.
29 757 F.2d 676 (5th Cir. 1985).
30 Id. at 679.
31 Id. at 681-82. See also DL Capital Group, LLC v. NASDAQ Stock Mkt., Inc., No. 03 Civ. 9730 (CSH), 2004 U.S. Dist. LEXIS 7955, at *11-12 (S.D.N.Y. May 5, 2004).
33 Austin, 757 F.2d at 688. See also Butz, 438 U.S. at 510-13.
34 Austin, 757 F.2d at 689, 692.
prosecutorial capacity," it was entitled to receive absolute immunity. 35 The court concluded that "surrogates for the SEC . . . should receive the same immunity their principles possess." 36

The Second Circuit, in Barbara v. NYSE, Inc., 37 found "the reasoning in Austin persuasive, and . . . [held] that the Exchange is absolutely immune from damages claims arising out of the performance of its federally-mandated conduct of disciplinary proceedings." 38 However, five years later, in D'Alessio v. NYSE, Inc., 39 the court expanded the immunity doctrine beyond disciplinary proceedings. 40 The court recognized, in quoting Barbara, that "courts have not hesitated to extend the doctrine of absolute immunity to private entities engaged in quasi-public adjudicatory and prosecutorial duties." 41 On this assumption, the court gave Barbara a broader interpretation: "Barbara stood for the broader proposition that a[n] SRO . . . may be entitled to immunity from suit for conduct falling within the scope of the SRO's regulatory and general oversight functions." 42 This conclusion has also found support in the Ninth Circuit. 43

III. THE WEISSMAN DECISION

A. Factual and Procedural History

From December 29, 2000, until June 10, 2002, Florida attorney Steven Weissman had every reason to believe his purchase of 82,800 shares 44 of WorldCom stock was a wise investment. 45 However, when news

35 Id.
36 Id. at 691.
37 99 F.3d 49, 58 (2d Cir. 1996).
38 Id.
39 258 F.3d 39 (2d Cir. 2001).
40 Id. at 106 (granting a stock exchange absolute immunity when plaintiff alleged "improper performance of its interpretive, enforcement and referral functions" which are regulatory roles delegated to SROs).
41 Id. at 105 (quoting Barbara, 99 F.3d at 58).
42 Id.
43 P'ship Exch. Sec. Co. v. NASD, Inc., 169 F.3d 606, 608 (9th Cir. 1999) (holding SROs and their disciplinary members absolutely immune from suits only "when they are acting under the aegis of the Exchange Act's delegated authority," and not when they are conducting private business-related matters) (citation omitted); Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998); Am. Benefits Group v. NASD, Inc., No. 99 CIV 4733 JGK, 1999 U.S. Dist. LEXIS 1231, at *24 (S.D.N.Y. Aug. 10, 1999).
broke about WorldCom's $11 billion accounting fraud, not only did its stock deprecate, but the company also descended into bankruptcy. As a result, Weissman’s investment was rendered virtually worthless. But, unlike the many other investors who suffered a loss, Weissman believed that he was fraudulently induced by Nasdaq to purchase WorldCom stock.

Given WorldCom's success from the 1990s through early 2001, Nasdaq added WorldCom to its NASDAQ 100 Index Fund and spent $74 million on marketing companies like WorldCom. Nasdaq continued its spending habits well into 2002 when it spent over $27 million on a marketing campaign to entice investment in NASDAQ-listed companies. In addition to its marketing campaign, Nasdaq filed a registration statement on April 30, 2001 with the SEC stating: "Nasdaq's branding strategy is designed to convey to the public that the world's innovative, successful growth companies are listed on [NASDAQ]."

Weissman's lawsuit refers to two advertisements which caused him to purchase WorldCom stock. The first appeared in nationally televised broadcasts of "The West Wing" and "MSNBC News with Brian Williams. This advertisement was continuously broadcasted and displayed some of NASDAQ's most profitable companies in an attempt to show that the most successful companies could be found on the NASDAQ Stock Exchange. The second of the advertisements consisted of a two page spread in the Wall Street Journal with the headlines "The Responsibilities We All Share," "Keeping Our Markets True—It Is All About Character," and "Our Beliefs

2007), on reh'g en banc reinstated in part, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007).


46Analyst Says Ebbers Grasped Accounting at WorldCom, HOUS. CHRON., Jan. 27, 2005, at 8.

47Complaint, supra note 44, at 4.

48The NASDAQ-100 Index is composed of 100 of the largest nonfinancial companies listed on the NASDAQ National Market tier of the NASDAQ Stock Market. The Index allows people to invest in 100 companies by buying 1 share instead of shares of each company. NASDAQ-100 Index Tracking Stock shares, just like shares of common stock, can normally be traded at any time during the trading day on the NASDAQ Stock Exchange. The ticker symbol for the index is "QQQ" which is commonly referred to throughout the Weissman opinions. NASDAQ-100 Index, NASDAQ.COM, http://dynamic.NASDAQ.com/dynamic/NASDAQ100_activity.stm.

49Complaint, supra note 44, at 18.


51Complaint, supra note 44, at 18.

52Id. at 18-19.

53Id.

54Id. at 19.
Stand In Good Company." Under these headlines, chief executive officers (CEOs) were listed from NASDAQ's 100 Index Trust accompanied by a message from Bernard Ebbers, then CEO of WorldCom. Shortly after the run of the Wall Street Journal advertisement, Ebbers resigned and the WorldCom accounting fraud became public.

As a result of WorldCom becoming destitute, Weissman brought suit against the NASD and Nasdaq in the United States District Court for the Southern District of Florida claiming he bought WorldCom stock as a result of Nasdaq's advertisements. In response to the complaint, Nasdaq filed a motion to dismiss Weissman's claim based on absolute immunity. The court denied Nasdaq's motion, concluding that absolute immunity was not available to the NASD or Nasdaq. In reaching its decision, the district court acknowledged that when private actors perform important governmental functions, they are absolutely immune "from state common law claims when acting in the regulatory and disciplinary role that would normally be reserved for government." But in the court's application of this standard and pursuant to the Exchange Act, the court failed to find immunity in situations where SROs conduct private business. The court reasoned that because the acts alleged by Weissman were outside traditional governmental functions, the NASD and Nasdaq were not entitled to immunity.

On appeal, the United States Court of Appeals for the Eleventh Circuit upheld the district court's ruling. From the concurring opinion of Judge

---

55Complaint, supra note 44, at 19.
56Id.
57Id.
58See id.
60Weissman v. NASD, Inc. (Weissman I), No. 03-61107, 2004 WL 3395190, at *5 (S.D. Fla. June 18, 2004), rev'd in part, aff'd in part, Weissman v. NASD, Inc. (Weissman II), 468 F.3d 1306 (11th Cir. 2006), vacated, reh'g en banc granted, Weissman v. NASD, Inc. (Weissman III), 481 F.3d 1295 (11th Cir. 2007), on reh'g en banc reinstated in part, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007).
61Id. The court was very cognizant of the role of the NASD which is to adopt and enforce rules of the entire securities market pursuant to section 78o-3(b)(6) of the Exchange Act. Id. at *1. Section 78o-3(b)(6) states a national securities association's rules must be "designed to prevent fraudulent and manipulative acts and practices . . . and, in general, to protect investors and the public interest . . . ." 15 U.S.C. § 78o-3(b)(6) (1997).
62Weissman I, 2004 WL 3395190, at *5. The court stated, in pertinent part, that "self regulatory organizations 'do not enjoy complete immunity from suits; . . . [w]hen conducting private business, they remain subject to liability.'" Id. (quoting Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1214 (9th Cir. 1998)).
63Id.
64Weissman II, 468 F.3d at 1313.
Tjoflat, it is clear that the court's main struggle was whether Nasdaq's advertising was a for-profit activity or related to one of Nasdaq's quasi-governmental duties. Judge Tjoflat points out that Nasdaq's advertising could be interpreted in two ways. He states that while Nasdaq's advertising campaign may have been fueled by monetary purposes, the ads still "pertain[ed] directly to the regulatory function of NASD and Nasdaq to make listing decisions . . . [and] to announce listing decisions to the public." The majority, however, disagreed and reasoned that Nasdaq's advertising was for the purposes of enticing investors to buy stock and increase trading volume, therefore the advertisements represented only Nasdaq's interests (not the government's). For these reasons, the circuit court held Nasdaq Inc.'s "advertisements were in the service of [Nasdaq's] own business, not the government's, and such [distinct] non-governmental conduct [was] unprotected by absolute immunity.

Several months after this controversial opinion was issued, the court decided to vacate its opinion and grant a rehearing en banc. The next two sections of this comment discuss the party's contentions and reasoning of the court's decision.

B. Parties' Contentions

In his primary argument, Weissman argued that Nasdaq violated a Florida statute by: (1) "tout[ing], market[ing], advertis[ing] and promot[ing] WorldCom [by] falsely representing it as a good company and worthwhile investment" without acknowledging that they profited from WorldCom's increased trading through its promotions; (2) attempting to sell WorldCom shares without registering as a broker; and (3) making fraudulent and/or negligent misrepresentations in its advertising. For these reasons, Weissman concluded that Nasdaq's advertising was outside of its delegated authority under the Exchange Act, and because of its actions, Weissman

---

65 See id. at 1313-21.
66 Id. at 1318.
67 Id.
68 Weissman II, 468 F.3d at 1312. "NASDAQ represents no one but itself when it entices investors to trade on its exchange and, specifically, when it suggests that particular companies are sound investments." Id.
69 Id.
70 Weissman v. NASD, Inc. (Weissman III), 481 F.3d 1295 (11th Cir. 2007), on reh'g en banc reinstated in part, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007).
71 Complaint, supra note 44, at 4.
72 Id. at 28.
73 Id. at 33.
suffered a financial loss and thus, Nasdaq should not be protected by absolute immunity.74

In response, NASD argued that because its organization serves regulatory functions, a liberal rule should be adopted to make an SRO absolutely immune to all claims consistent with the powers granted them by the Exchange Act.75 They also contended that the advertisements, assuming that they served no regulatory function, are consistent with Nasdaq's role as an SRO and within the boundaries of the Exchange Act.76 The defendants concluded that the standard articulated in D'Alessio should be the appropriate standard of review for deciding whether an SRO is entitled to absolute immunity and they, therefore, should be entitled to immunity.77

C. The En Banc Decision

In their en banc decision, the court first established that Nasdaq must adhere to the "quasi-governmental authority" granted to it as an SRO through the Exchange Act: "NASDAQ serves as an SRO within the meaning of the Securities Exchange Act . . . which vests it with a variety of adjudicatory, regulatory, and prosecutorial functions, including implementing and effectuating compliance with securities laws; promulgating and enforcing rules governing the conduct of its members; and listing and de-listing stock offerings."78

Although the court found no fault with nongovernmental activity, it made clear that when an SRO is "'performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit,'" the SRO, like a for-profit corporation, will not be entitled to immunity.79

74See id. at 36-37.

75Defendants-Appellants En Banc Brief at 17, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007).

76Id. at 30.

77Id. at 20-21. The court in D'Alessio held that an SRO is absolutely immune whenever 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.'" Id. (quoting D'Alessio v. NYSE, Inc., 258 F.3d 93, 106 (2d Cir. 2001)).

78Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293, 1296 (11th Cir. 2007) (citing 15 U.S.C. §§ 78c(a)(26), 78f(b), 78f(d), 78s(g) (2006)). The court implicitly called this part of the Exchange Act, the "quasi-governmental" standard that an SRO must follow to receive absolute immunity. See id. While the court here limited the actions of an SRO to what is stated in the Exchange Act, the court understood that NASDAQ "engage[s] in a variety of non-governmental activities that serve its private business interests." Id.

79Id. (quoting Owen v. City of Independence, 445 U.S. 622, 645 n.27 (1980)).
The court reiterated some of the principles of absolute immunity as applied to SROs that were established in prior cases: first, it stated, "To be sure, self-regulatory organizations do not enjoy complete immunity from suits"; second, the court limited the immunity doctrine to "[o]nly when an SRO is 'acting under the aegis of the Exchange Act's delegated authority.' While the majority of federal courts have not favored finding SROs liable for conduct outside of the Exchange Act, the court did cite various cases in which other courts have held that an SRO will only be entitled to immunity when its actions are quasi-governmental.

Next, the court examined the issue of how to determine whether an SRO's activity is quasi-governmental enough to warrant absolute immunity. Because courts favor providing remedies to parties, the court said that "grants of immunity must be narrowly construed" and that courts should be "careful not to extend the scope of the protection further than its purposes require." As established earlier in the Weissman district court opinion, whether an SRO is entitled to absolute immunity depends on the type of activity the SRO is performing. Based on these claims, the court created an objective test to determine when an SRO's conduct is beyond its quasi-governmental functions. The court stated that "[t]o determine whether an SRO's conduct is quasi-governmental, we look to the objective nature and function of the activity for which the SRO seeks to claim immunity." In establishing this test, the court repudiated the standard set forth in Bogan v.

---

80Id. at 1297 (quoting Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1214 (9th Cir. 1998)).
81Id. (quoting Sparta, 159 F.3d at 1214).
82Weissman IV, 500 F.3d at 1296-98. See generally D'Alessio, 258 F.3d at 104-06 (disciplinary decision banning trader from the NYSE floor); Sparta, 159 F.3d at 1213-15 (decision to suspend trading and delist shares of company); Barbara v. NYSE, Inc., 99 F.3d 49, 58-59 (2d Cir. 1996) (conduct in carrying out disciplinary decisions). The most influential of the cases cited was Owen, in which the court stated:
When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, . . . then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances.

Weissman IV, 500 F.3d at 1296-97 (quoting Owen, 445 U.S. at 645 n.27).
83Id. at 1297 (emphasis added).
84Id. (quoting Forrester v. White, 484 U.S. 219, 224 (1988)).
85Weissman v. NASD, Inc. (Weissman I), No. 03-61107, 2004 WL 3395190, at *5 (S.D. Fla. June 18, 2004), rev'd in part, aff'd in part, Weissman v. NASD, Inc. (Weissman II), 468 F.3d 1306 (11th Cir. 2006), vacated, reh'g en banc granted, Weissman v. NASD, Inc. (Weissman III), 481 F.3d 1295 (11th Cir. 2007), on reh'g en banc reinstated in part, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007).
86Weissman IV, 500 F.3d at 1296.
87Id. at 1297.
Scott-Harris, which provided a test based on the SRO's subjective intent and motivation.

Applying the objectiveness test, the court held Nasdaq was not entitled to absolute immunity. The court agreed with Weissman that both the television and newspaper advertisement served absolutely no quasi-governmental function. In its opinion, the court once again used the specific language of the Exchange Act to conclude that, based on the "tone" and "content" of the advertisements, Nasdaq advertised to increase company profits (i.e., failed to perform a quasi-governmental function). For these reasons, the court upheld the district court's decision refusing to grant immunity to Nasdaq.

The court rejected Nasdaq's interpretation of D'Alessio based on two premises. First, in comparison to the case in question, the court distinguished D'Alessio, because the alleged misconduct was within the SRO's quasi-governmental power. Second, the court articulated that Nasdaq incorrectly interpreted D'Alessio to mean that Nasdaq is entitled to immunity "whenever SROs engage in conduct that is simply 'consistent with' their powers." The court noted that "only when an SRO is 'acting in its capacity as a[n] SRO'" can "[i]t [be] 'entitled to immunity ... when it engages in conduct consistent with the quasi-governmental powers delegated to it ... '. In addition to Nasdaq's misinterpretation, the court also noted that every court that has granted absolute immunity to an SRO has done so because the SRO was acting within their quasi-governmental authority through the power delegated to it by the Exchange Act.

89 Weissman IV, 500 F.3d at 1296 (citing Bogan, 523 U.S. at 54).
90 Id. at 1299.
91 Id.
92 Nasdaq's advertising did not "prevent fraudulent and manipulative... practices, promote just and equitable principles of trade, remove impediments to and perfect... [or] protect investors and the public interest." Id. (quoting 15 U.S.C.A. § 78o-3(b)(6)).
93 Weissman IV, 500 F.3d at 1299. The court also briefly discussed the power and financial benefits that arise from advertising: "[NASDAQ's] advertisements[,] by their very nature[,] serve the function of promoting certain stocks that appear on its exchange in order to increase trading volume and, as a result, [a] company profits." Id.
94 Id. at 1297-98. "The court in D'Alessio granted absolute immunity to an SRO where the complaint... dealt with allegations of 'improper performance of its interpretative, enforcement and referral functions' in connection with the suspension of a broker—a core regulatory responsibility delegated to SROs by the SEC." Id. (quoting D'Alessio v. NYSE, Inc., 258 F.3d 93, 105-106 (2d Cir. 2001)).
95 Id. at 1298 (quoting En Banc Reply Brief of Defendant-Appellant at 16, Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293 (11th Cir. 2007)).
96 Id. (quoting D'Alessio, 258 F.3d at 106).
97 Weissman IV, 500 F.3d at 1298 (citing DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc., 409 F.3d 93, 97-100 (2d Cir. 2005); D'Alessio, 258 F.3d at 104-06; Barbara v. NYSE, Inc., 99
In a strongly worded concurrence in part and dissent in part, Judge Pryor criticized the majority's decision arguing that the Wall Street Journal advertisement was shielded by absolute immunity.\footnote{Id. at 1300 (Black, Marcus, Pryor, & Wilson, JJ., dissenting in part).} While the minority opinion adopted the majority's objective test, Judge Pryor interpreted the Wall Street Journal advertisement as endorsing the Nasdaq's rigorous financial standards rather than enticing investors to purchase stock and concluded, that "[b]ecause the establishment of those standards was a duty delegated to Nasdaq by the SEC, Nasdaq is entitled to absolute immunity for its communication of those standards to investors."\footnote{Id. at 1300.} Judge Pryor reasoned that a "reasonable reader would understand the alleged reference to WorldCom . . . as a communication to the investing public that WorldCom was listed on the exchange and met the described requirements."\footnote{Id. at 1301.} Because Judge Pryor concluded that the advertisements in the newspaper were no different from an announcement made on Nasdaq's website or in a press release, Nasdaq was acting within its duties as an SRO by "objectively advanc[ing] delegated governmental functions."\footnote{Weissman IV, 500 F.3d at 1361.}

IV. EVALUATION

A. Nasdaq as a Corporation

NASDAQ, with approximately 3,100 companies listed, trades more shares per day than any other U.S. market and is the largest electronic screen-based equity securities market in the United States.\footnote{NASDAQ Performance Report, http://www.nasdaq.com/newsroom/stats/Performance_Report.stm (last visited May. 15, 2008).} In serving millions of investors around the globe, NASDAQ is also the most rapidly growing stock market in the United States.\footnote{Alvin Han, The Need For NASDAQ, http://www.alvinhan.com/need-for-NASDAQ.htm.} NASDAQ has proven to be the unchallenged leader for foreign listings.\footnote{Id.} In the fourth quarter of 2006, the stock exchange added $63 million to its net earnings\footnote{NASDAQ Announces Fourth Quarter 2006 Results; Operating Income Up 105.1 Percent From Prior Year, PRIMENEWswire, Feb. 13, 2007, http://ir.nasdaq.com/releasedetail.cfm?ReleaseID=229727.} bringing Nasdaq's

\footnote{F.3d 49, 58-59 (2d Cir. 1996); Sparta Surgical Corp v. NASD, Inc., 159 F.3d 1209, 1213-15 (9th Cir. 1998); Dexter v. Depository Trust & Clearing Corp., 406 F. Supp. 2d 260, 263-64 (S.D.N.Y 2005)).}
profits to $365 million for the year.\textsuperscript{106} For 2007, Nasdaq's earnings totaled $518.4 million.\textsuperscript{107} In addition to its earnings, Nasdaq has established its own stock exchange called "Portal Market."\textsuperscript{108} This private stock exchange gives wealthy investors a stock exchange that is free from SEC regulations.\textsuperscript{109} Although this exchange was just launched on August 15, 2007, Nasdaq will receive enormous profits from this market because it requires investors to have a portfolio value of at least $100 million.\textsuperscript{110} With these future profits, in addition to the estimated $500 million from this year, it is clear that Nasdaq is a successful company, but what is also important to understand is NASDAQ's role as a stock exchange in the U.S. economy.

B. \textit{NASDAQ as a Stock Exchange}

NASDAQ, and other domestic stock exchanges, are at the "heart of our economy."\textsuperscript{111} Shares of stock not only provide capital for corporations, but also reflect a shareholder's confidence in future earnings.\textsuperscript{112} These earnings are dependent on the health of the U.S. economy and also act as an important indicator of how the U.S. economy is performing.\textsuperscript{113} For instance, when shareholder confidence is low, stock values decline and, in the event that these values do not improve, there will be less consumer wealth.\textsuperscript{114} But because consumer wealth drives seventy percent of the U.S. economy, a stock market like NASDAQ can easily lead the United States into recession.\textsuperscript{115} Thus, the relationship between the U.S. economy and its stock markets are very causal in nature. In fact, many scholars even believe that the prices established in the stock market affect the efficiency of the real


\textsuperscript{109}\textit{Id.}

\textsuperscript{110}\textit{Id.}

\textsuperscript{111}Fleckner, \textit{supra} note 5, at 2541.


\textsuperscript{113}\textit{Id.}

\textsuperscript{114}\textit{Id.}

\textsuperscript{115}\textit{Id.} "A declining stock market could... eventually lead to a slowdown in the global economy. That is because the U.S. economy provides 20% of the world's output." \textit{Id.}
economy. Therefore, stock exchanges like NASDAQ have a vital role to the U.S. economy.

C. Should We Exculpate Nasdaq from All Liability?

The Weissman court appropriately determined that the objective nature and function of the exchange's activity should be the primary determination of whether an SRO's conduct is quasi-governmental. This conclusion is eminently sensible and consistent with the Exchange Act. But among the many reasons why the court did not grant immunity to Nasdaq was the distinction between a true SRO and a for-profit corporation. In making this distinction, the court properly identified that the motive fueling these advertisements was for-profit and not listing purposes. This distinction was both proper and necessary for the court to make. Nasdaq not only made an initial public offering on its own exchange, but also changed its focus from performing regulatory functions for the government to performing as a private corporation for its own financial benefit. After considering Nasdaq's $651 million in earnings for the third quarter of 2007, one can easily infer Nasdaq's focus has shifted from performing regulatory functions to profit-making activities, such as promoting certain stocks.

As a society, both legally and morally, we have never treated for-profit and nonprofit organizations identically. The Internal Revenue Service, for example, makes this distinction clear in Section 501(c)(3), by exempting organizations formed for charitable, educational, religious, literary, or scientific purposes from paying both state and federal income taxes. As a result there are very few organizations that cannot have claims of fraud brought against them. The bottom line is society does not tolerate fraud. In


117Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293, 1297 (11th Cir. 2007).

118Id. at 1299.

119Id. ("This conduct was private business activity . . . . NASDAQ represents no one but itself when it entices investors to trade on its exchange.").


fact, the law, in many cases, provides relief to plaintiffs to reach an organization or corporation for claims of fraud. For instance, in corporate law, if a plaintiff overcomes the presumption of the business judgment rule, they can successfully hold directors personally liable for their actions.122

The business judgment rule creates a presumption shielding directors and their decisions from personal liability in the absence of "fraud, bad faith, or self-dealing."123 As stated by the Delaware Court of Chancery, "[I]n the absence of this evidence [(fraud)], the board's decision will be upheld."124 For instance, in Malone v. Brincat,125 the Delaware Supreme Court held directors who knowingly disseminated false or misleading information to public trading markets breached their duty of disclosure, and thus were not protected by the business judgment rule.126 Directors of a corporation have a duty to shareholders to observe disclosure requirements,127 similar to the duties of NASDAQ to provide an accurate list of securities on its exchange for its investors. It is because of this similarity that the business judgment rule should apply when determining whether an SRO receives immunity.

In suits against shareholders, the law allows plaintiffs in contract claims (and sometimes in tort claims) to pierce the corporate veil and hold shareholders personally liable.128 In these cases, limited liability creates a default rule that those who deal with the corporation will look only to its business assets.129 However, when corporate participants falsely create the appearance of sufficient business assets or otherwise mislead creditors, courts understandably refuse to enforce this general rule.130 In fact, in a study conducted by Professor Robert Thompson, courts almost always pierced where there was a finding of misrepresentation.131 However, while these standards are difficult to meet,132 the law still provides plaintiffs an

---

122 See Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984) ("[I]n rare cases a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.").
124 Id.
125 722 A.2d 5 (Del. 1998).
126 Id. at 9.
127 Stroud v. Grace, 606 A.2d 75, 85 (Del. 1992) ("Delaware law imposes upon a board of directors the fiduciary duty to disclose fully and fairly all material facts within its control that would have a significant effect upon a stockholder vote.") (citations omitted).
130 Id. at 1041.
131 Id. at 1059, 1063.
132 Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984); see Cathy S. Kendl & James R.
opportunity to get their case to court. Until Weissman, no such law permitted plaintiffs to reach SROs for claims of fraud. Despite the reasons supporting the court's ruling, however, there are some valid arguments to criticize these claims.

The first of these arguments is the theory that Nasdaq will be subjected to a variety of state fraud claims according to different statutes. As a result, the degree to which Nasdaq has immunity could vary from state to state and could, therefore, place an easier burden on plaintiffs to pierce in states that have a lower burden. For example, a plaintiff in State "A" might have an easier burden of proof in proving his claim than if he was in State "B" which has a more difficult burden. Therefore, the plaintiffs in State "A" will have an easier time in bringing suit against an SRO like Nasdaq. This discrepancy could force Nasdaq into litigation in some states and offering settlements in others. Presumably, this is a burden that the Exchange Act was meant to protect.

The second argument opposing subjecting SROs to liability is the overflow of lawsuits that will prevent SROs from performing its regulatory duties. Because plaintiffs like Weissman can sue based on state statutes, courts are implicitly encouraging plaintiffs to sue NASDAQ and other stock exchanges for claims based on poor investment choices. The damages a plaintiff could collect would be astronomical when multiplied by the number of plaintiffs bringing suit. In theory, plaintiffs could sue an SRO and ultimately force a major stock exchange out of the market, forcing the country into a recession.

However, the decision of the Weissman court, by establishing the objectiveness test and ruling in favor of Weissman, will have little practical effect on SROs. In response to the first argument, while some states may have more liberal fraud statutes than others, Nasdaq will now be more aware of its advertising activity. Fortunately for Nasdaq, corporate scandals like Enron and WorldCom are few and far between. In the future, if NASDAQ wants to advertise, all it has to do is create an advertisement strictly focusing on the accuracy of its listings, by creating an advertisement that is more representative of its regulatory function through the method of advertising and the context of the advertisement rather than trying to persuade investors to invest in NASDAQ stock. If, for example, Nasdaq advertised on its

Krendl, Piercing the Corporate Veil: Focusing the Inquiry, 55 DENV. L.J. 1, 31 (1978) ("Fraud cases are difficult to prove, and the quantum of evidence available in most corporate veil cases is considerably smaller than would be required to carry the burden on a fraud claim.").


134 Id.

135 Krause, supra note 21.

136 The court rejected NASDAQ's advertisements because they were "in no sense
website about the accuracy of its listings, instead of in the Wall Street Journal or on television (where the ad would be mixed in with other for-profit ads causing a reasonable reader to buy Nasdaq stock), then a court would probably have a harder time finding for a plaintiff. A court would also be more inclined to rule in favor of Nasdaq if the context of the ad was more neutral. For example, the majority opinion in Weissman may have been swayed if Bernard Ebbers did not endorse Nasdaq's advertisement. Therefore, if Nasdaq were to eliminate the corporate endorsements and advertised in more neutral venues, it could safely regard itself as protected by the Exchange Act and free from liability.

As to the second argument, Weissman will not create an influx of litigation so long as other courts do not expand the decision beyond the context of state fraud claims. While there may be a significant risk that litigation could increase in the event non-fraud claims were permitted to pierce an SRO's immunity, this is not what the court held in Weissman. An SRO can only be found liable for as many plaintiffs that file suit. Therefore, by the court only addressing state fraud claims, the court has restricted Nasdaq's exposure to liability. Conclusions with respect to non-state fraud claims may not be made since the court can only address the state fraud claim that Weissman's complaint addresses and presents to the court.

V. CONCLUSION

The court's opinion in Weissman is one of the most important recent decisions in securities law. The court effectively disclaimed prior case law favoring SRO immunity and constructs from those cases a fraud exception. The fraud exception, while not yet accepted among other circuits, essentially rewrote the law (that was originally set forth in the Exchange Act) on SRO immunity.

The Weissman decision, however, is unlikely to permit plaintiffs to bring suit against SROs for any state law claim. While the decision is monumental for recognizing a fraud exception, the impact on SROs will still be very minimal. Lawsuits like Weissman's will simply cause SROs, like Nasdaq, to be more cautious about how they portray themselves to the

coterminous with the regulatory activity contemplated by the Exchange Act. This conduct was private business activity . . . . " Weissman v. NASD, Inc. (Weissman IV), 500 F.3d 1293, 1299 (11th Cir. 2007).

137 Id. at 1297 (holding that Nasdaq was not entitled to absolute immunity against an investor's state law fraud claims).

138 Id.

139 A court cannot address claims that were not presented to them. In this case, only state fraud claims were pleaded, and, therefore, this is all the court can address. See Complaint, supra note 44.
public. Although it remains to be seen if other courts will adopt the Eleventh Circuit's reasoning, it is clear for the time being, given the court's emphasis on private versus regulatory actions, that piercing the veil of absolute immunity favors plaintiffs like Steve Weissman when SROs perform any function outside their quasi-governmental role.

Craig J. Springer