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IMMUNOCOMPROMISED: A CALL FOR COURTS TO REDEFINE THE BOUNDARIES OF THE ABSOLUTE IMMUNITY DOCTRINE'S APPLICATION TO NATIONAL SECURITIES EXCHANGES

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Courts currently apply the absolute immunity doctrine to shield national securities exchanges from civil liability when their actions relate, even indirectly, to the exercise of their regulatory powers. This approach is rooted in case law decided when exchanges were nonprofits focused primarily on regulation. But exchanges have evolved into for-profit businesses. Their actions are now often unconnected—or only tangentially related—to their role as regulators. To reflect that reality, the doctrine's application now requires more nuance. While courts have begun carving out an exception from the absolute immunity doctrine for commercial activities that lie well outside an exchange's regulatory functions, they have not yet applied the exception to activities that, despite some regulatory connection, are undertaken primarily in furtherance of an exchange's business interests.

This Article proposes extending the commercial exception to cover such activities. To achieve that goal, this Article contends that courts should carve out an exception from the line of precedents rejecting the consideration of motive in the immunity analysis. By considering motive, courts can ensure that absolute immunity applies only when exchanges are acting as regulators—not when they are making self-interested business decisions. This Article also provides a burden-shifting framework that courts can utilize in this inquiry.

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INTRODUCTION

On the day of an initial public offering (IPO), a securities exchange experiences technological problems with its listing system. The exchange has two choices: it can delay the IPO to address the problems or proceed as planned. A decision to delay could hurt the exchange's ability to attract future listing business. A decision to push ahead could result in catastrophic losses for investors if the listing system malfunctions. The exchange makes a calculated business decision to list. The system fails, and investors lose hundreds of millions of dollars.

A foreign company executes a reverse merger, allowing it to trade publicly without undergoing the usual regulatory scrutiny by the U.S. Securities and Exchange Commission (SEC). The company is a financial house of cards. When the fraud is exposed, the exchange delists the company in order to protect investors.

Under the current case law, an exchange would likely have absolute immunity from civil liability in either scenario because the acts of listing and delisting are "quintessentially regulatory."[1] This Article argues that immunity should attach

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1. Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1214 (9th Cir. 1998). *See also* Weissman v. Nat'l Ass'n of Sec. Dealers, Inc., 468 F.3d 1306, 1312 (11th Cir. 2006), *aff'd on reh'g* 500 F.3d 1293 (11th Cir. 2007) (en banc) ("In listing and de-listing companies like WorldCom, NASDAQ clearly does 'stand in the shoes of the SEC.' "); *id.* at 1318 (Tjoflat, J., dissenting) ("At their core, Weissman's allegations ultimately speak to the duties of NASD and NASDAQ to decide whether or not certain securities should be listed on the exchange[,] . . . duties that fall squarely within the universe of quasi-governmental regulatory functions for which NASD and NASDAQ enjoy immunity from suit."); Opulent Fund, L.P. v. NASDAQ Stock Mkt., No. C-07-03683(RMW), 2007 WL 3010573, at *5 (N.D. Cal. Oct. 12, 2007) ("Here, Nasdaq's actions do not partake of the same 'regulatory' character as suspending trading . . . . "); Dexter v. Depository Trust & Clearing Corp., 406 F. Supp. 2d 260, 263 (S.D.N.Y. 2005) ("NASD's decision to

in only the second case—not where an exchange's actions are primarily motivated by business concerns—and introduces a burden-shifting framework that courts can use to facilitate that result.

Courts have granted national securities exchanges (e.g., NASDAQ and NYSE) absolute immunity from suit for money damages when they act within the scope of their regulatory and general oversight functions because of their status as self-regulatory organizations (SROs).[2] When securities exchanges were member-owned nonprofits, the application of the absolute immunity doctrine was clear-cut because they primarily focused on regulation. The doctrine's application now requires more nuance because exchanges have evolved into for-profit businesses that compete directly with broker-dealers and have offloaded a substantial portion of their regulatory functions to the Financial Industry Regulatory Authority (FINRA).

As for-profit entities, securities exchanges undertake numerous business activities that are completely divorced from, or only tangentially related to, their role as regulators. Though courts have begun to recognize that exchanges wear two hats—business and regulatory—and carve out a commercial exception from the absolute immunity doctrine for activities that lie well outside exchanges' general oversight functions, they have not yet applied the commercial exception to activities that are undertaken primarily for business reasons, but also have some regulatory "hook." Thus, under the commercial exception as currently applied, an exchange has absolute immunity for business activities if those activities have some ancillary connection to the exercise of its regulatory powers.

This Article advocates extending the commercial exception to cover actions primarily taken to further exchanges' business interests, regardless of whether they have some regulatory connection. Exchanges should not have absolute immunity when they are acting as for-profit market participants executing self-interested business decisions, merely because

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authorize (or not to authorize) trading in certain securities is a core regulatory function that is covered by absolute immunity.").

2. National securities exchanges are SROs within the meaning of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78c(a)(26) (2012) ("The term 'self-regulatory organization' means any national securities exchange . . . .").

those decisions relate, in some indirect way, to a regulatory function. Instead, courts should grant immunity to shield exchanges only when they are acting as market regulators.

To achieve that goal, this Article proposes that courts carve out an exception to the line of precedents rejecting the consideration of motive in the immunity analysis. Considering motive would allow courts to see through a regulatory smokescreen and ferret out those activities that are primarily commercial. For example, it would allow courts to differentiate between an exchange's profit-driven decision to proceed with a listing and an exchange's regulatory decision to delist a company to safeguard investors. By considering motive, courts would be able to ensure that absolute immunity applies only when exchanges are acting as regulators—not when they are making self-interested business decisions.

Part I of this Article traces the development of the absolute immunity doctrine and its application to securities exchanges. Part II discusses the current prohibition against considering motive in the immunity analysis. Part III examines the few cases that have found an exchange not immune from suit by carving out an exception for commercial activities. Part IV proposes that courts should consider motive because it helps to identify those activities that are primarily taken in furtherance of an exchange's business interests in cases where there is some regulatory connection. It also introduces a burden-shifting framework that courts can use in this inquiry. This Article concludes that the consideration of motive through the proposed burden-shifting framework strikes the right balance between plaintiffs' need for redress and the purposeful application of the absolute immunity defense.

I.
Application of Absolute Immunity to Securities Exchanges

The doctrine of absolute immunity insulates its recipients from civil liability. When courts first applied absolute immunity to securities exchanges in the mid-1980s, they drew from case law regarding the immunity afforded to judicial officers. As such, courts granted exchanges immunity only for actions taken in connection with the performance of disciplinary proceedings and other adjudicatory functions. Approximately a

decade later, however, there began a subtle, yet significant, shift in the law: courts began viewing exchanges' immunity as derived from the SEC's sovereign immunity. With this doctrinal shift, absolute immunity was no longer cabined to exchanges' conduct in connection with quasi-judicial proceedings. Instead, immunity applied whenever an exchange acted within the broad scope of its regulatory and general oversight functions.

The Fifth Circuit was the first to apply absolute immunity to an SRO—to shield the National Association of Securities Dealers (NASD) for its quasi-judicial conduct in a disciplinary proceeding—in *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*[3] Austin was a company engaged exclusively in the purchase and sale of municipal bonds. Five of its associates brought constitutional and tort claims against NASD and members of a disciplinary committee based on their finding that Austin violated the Securities Exchange Act of 1934 and several Municipal Securities Rulemaking Board rules.[4] Defendants moved for summary judgment, arguing that they had "absolute immunity from suit for actions connected to their official duties."[5]

To navigate these unchartered waters, the court relied on Supreme Court precedent regarding "the immunity of judges, prosecutors, and executive disciplinary officials."[6] In particular, the court employed the three-prong test used in *Butz v. Economou.*[7] The court considered whether (1) defendants' functions shared the characteristics of the judicial process, (2) defendants' activities were likely to result in lawsuits by disappointed parties, and (3) there were sufficient safeguards to control unconstitutional conduct.[8] Applying this test, the court held that NASD had absolute immunity because it "was acting in an adjudicatory and prosecutorial capacity," it was "likely to be the target of recriminatory lawsuits," and there was sufficient regulatory oversight (by the SEC, Congress, and the courts) to "control unlawful NASD conduct."[9]

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3. 757 F.2d 676 (5th Cir. 1985).
4. *Id.* at 681–84.
5. *Id.* at 684.
6. *Id.*
7. 438 U.S. 478 (1978) (discussed at *Austin*, 757 F.2d at 688).
8. *Austin*, 757 F.2d at 688.
9. *Id.* at 692.

While the Second Circuit similarly employed absolute immunity to shield quasi-judicial conduct in *Barbara v. New York Stock Exchange*,[10] its finding that an exchange's immunity flowed from the sovereign immunity of the SEC opened the door to expand the doctrine to cover regulatory functions. When NYSE barred Barbara, a floor broker, from the exchange, he brought various constitutional and tort claims based on NYSE's conduct during his disciplinary proceeding.[11] The district court granted NYSE's motion to dismiss for failure to exhaust administrative remedies and Barbara appealed.[12]

On appeal, the court determined that Barbara's claims should not have been dismissed on exhaustion grounds because the "monetary compensation that he seeks cannot be realized through the administrative review procedures of the Exchange Act."[13] But the court did not stop there. In considering whether NYSE had absolute immunity as an alternative ground for dismissal, the court found "the reasoning in *Austin* persuasive, and h[eld] that the Exchange is absolutely immune from damages claims arising out of the performance of its federally-mandated conduct of disciplinary proceedings."[14] The court reasoned that NYSE, like NASD in *Austin*, satisfied the three-factor *Butz* test.[15] Significantly, the court also noted that, "absolute immunity is particularly appropriate in the unique context of the self-regulation of the national securities exchanges," because exchanges "perfor[m] a variety of regulatory functions that would, in other circumstances, be performed by a government agency," like the SEC, which is "entitled to sovereign immunity from all suits for money damages."[16] "As a private corporation, the Exchange does not share in the SEC's sovereign immunity, but its special status and connection to the SEC influences [the court's] decision to recognize an absolute immunity from suits for money damages . . . ."[17]

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10. 99 F.3d 49 (2d Cir. 1996).
11. *Id.* at 51–53.
12. *Id.* at 51.
13. *Id.* at 57.
14. *Id.* at 58.
15. *Id.*
16. *Id.* at 59.
17. *Id.*

Barbara opened the door to applying absolute immunity to an exchange outside the context of a disciplinary proceeding. Two years later, the Ninth Circuit walked through it in *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*[18] Sparta issued a secondary public offering on NASDAQ.[19] During the first day of trading, NASDAQ delisted Sparta's stock and suspended trading without explanation.[20] While NASDAQ lifted the suspension the following day, Sparta alleged that the damage was already done; the offering was unmarketable.[21] Sparta brought a variety of common law claims against NASD. In evaluating NASD's immunity defense, the court found that "[e]xtending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress."[22] As such, "a self-regulatory organization is immune from liability based on the discharge of its duties under the Exchange Act."[23] In support of its holding that NASD was immune, the court reasoned that, "there are few functions more quintessentially regulatory than suspension of trading," and "[w]hen it acts in this capacity to suspend trading . . . NASD is performing a regulatory function cloaked in immunity."[24]

In *D'Alessio v. New York Stock Exchange, Inc.*,[25] the Second Circuit confirmed that its holding in *Barbara* was not limited to quasi-judicial conduct. Rather, exchanges' absolute immunity is coterminous with the sovereign immunity of the SEC:

> [A]lthough the immunity inquiry in *Barbara* was confined to . . . NYSE's conduct in connection with disciplinary proceedings, *Barbara* stood for the broader proposition that an SRO, such as . . . NYSE, may be entitled to immunity from suit for conduct falling within the scope of the SRO's regulatory and general oversight functions . . . . NYSE, as an SRO, stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance

18. 159 F.3d 1209 (9th Cir. 1998).
19. *Id.* at 1211.
20. *Id.*
21. *Id.*
22. *Id.* at 1213.
23. *Id.*
24. *Id.* at 1214–15.
25. 258 F.3d 93 (2d Cir. 2001).

> with those laws. It follows that . . . NYSE should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority.[26]

The Second Circuit further solidified the absolute immunity doctrine's broad application in *Standard Investment Chartered, Inc. v. National Ass'n of Securities Dealers, Inc.*[27] Plaintiffs (members of NASD) brought claims related to the consolidation of NASD and NYSE to create FINRA.[28] Plaintiffs alleged that the proxy statement issued by NASD to solicit their votes to change NASD's bylaws, in connection with the consolidation, misrepresented the maximum amount that NASD could pay plaintiffs under IRS regulations.[29] Defendants moved to dismiss, arguing that they were immune from suit for their involvement in the proxy solicitation.[30] The district court agreed, "conclud[ing] that the proxy was incident to NASD's regulatory functions and otherwise issued in connection with powers delegated to NASD by the SEC."[31] The Second Circuit affirmed: "As the district court explained, the bylaw amendments were incident to the regulatory function of the SROs insofar as they were a necessary prerequisite for consolidation . . . ."[32]

The doctrine of absolute immunity has come a long way from protecting securities exchanges for only quasi-judicial conduct to shielding them whenever they are acting in connection with the broad scope of their delegated regulatory powers.

II.
MOTIVE

The well-established rule is that courts should not consider motive in the immunity analysis. Instead, courts take a "functional approach" that looks only at whether an exchange

26. *Id.* at 105–06.
27. 637 F.3d 112 (2d Cir. 2011).
28. *Id.* at 114.
29. *Id.* at 115.
30. *Id.*
31. *Id.*
32. *Id.* at 114.

was "acting within the scope of the powers granted to [it]."[33] Consequently, under current law, even if an exchange makes a self-interested, profit-driven business decision, the exchange could still be immune from suit if the activity in question has some—even indirect—relation to a regulatory function.

As stated by the Eleventh Circuit in *Weissman v. National Ass'n of Securities Dealers, Inc.*, "[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. The test is not an SRO's subjective intent or motivation."[34] Thus, "allegations of bad faith, malice, and even fraud . . . cannot, except in the most unusual of circumstances, overcome absolute immunity."[35] In other words, the immunity analysis, as currently fashioned, does not take into account *why* an exchange acts, but only the function it is performing and whether that function is related (even tangentially) to an exchange's regulatory powers.

For example, in *Dexter v. Depository Trust & Clearing Corp.*,[36] a former shareholder of UCFC (a bankrupt corporation) brought an action against NASD for improperly authorizing trades in UCFC shares that included rights to distributions from a litigation trust, which should have gone to plaintiff. Plaintiff alleged that, "NASD's actions were taken in bad faith to protect the interest of its members who had profited by trading in cancelled shares of UCFC."[37] NASD moved to dismiss, arguing that it was immune from suit.[38] The court

33. *In re* NYSE Specialists Sec. Litig., 503 F.3d 89, 96 (2d Cir. 2007).

34. 500 F.3d 1293, 1297 (11th Cir. 2007). *See also id.* at 1300 (Pryor, J., concurring) ("It is irrelevant whether the alleged conduct was intended . . . to increase trading volume and, as a result, company profits . . . . [W]e must be careful not to allow our consideration of context to lead us to speculate about the motivation or intent of an SRO."); *In re NYSE*, 503 F.3d at 96 ("The [absolute immunity] doctrine's nature is such that it accords protection from any judicial scrutiny of the motive for and reasonableness of official action . . . ."); Dexter v. Depository Trust & Clearing Corp. 406 F. Supp. 2d 260, 263 (S.D.N.Y. 2005) ("When a governmental agent has absolute immunity, its motivation in performing its governmental functions is irrelevant to the applicability of absolute immunity.").

35. DL Capital Grp., LLC v. NASDAQ Stock Mkt., Inc., 409 F.3d 93, 98 (2d Cir. 2005) (emphasis removed).

36. 406 F. Supp. 2d 260, 264.

37. *Id.* at 262.

38. *Id.* at 261.

agreed, holding that regardless of whether its actions were profit-driven or taken in bad faith, NASD was "absolutely immune from suit" because "NASD's decision to authorize (or not to authorize) trading in certain securities is a core regulatory function."[39] Had the court been able to consider motive, however, plaintiff's allegations that defendants were engaged in "proprietary profit-making activities" may have been sufficient to survive.[40]

As evinced by the court's decision in *Dexter*, the inability of courts to consider motive makes it exceedingly difficult to penetrate the fortress of immunity that surrounds an exchange when performing an activity—even an activity clearly taken for business reasons—related to the exercise of its broad regulatory authority.

III.
The Commercial Exception

Courts have begun recognizing that exchanges are no longer the member-owned nonprofits primarily focused on regulation that they once were. Instead, exchanges are for-profit companies that often act with only their commercial interests at heart. As such, courts have started to poke holes in exchanges' shield of absolute immunity by carving out an exception for commercial activities.

The Eleventh Circuit took the lead in fashioning the commercial exception in *Weissman*.[41] Plaintiff purchased WorldCom stock. After the company collapsed, plaintiff brought various statutory and state-law claims against NASDAQ (the exchange on which WorldCom stock traded) based on NASDAQ's WorldCom-related marketing activities, including mentioning WorldCom in various advertisements and disseminating its financial statements. Plaintiff claimed that defendants "intentionally made false laudatory representations regarding WorldCom while concealing their direct profit motive and interest in generating purchases of WorldCom shares."[42] For example, plaintiff alleged that, "[t]he purpose of NASDAQ's advertising campaign to build the 'NASDAQ

39. *Id.* at 263–64.
40. *Id.* at 263 (internal quotation marks omitted).
41. 468 F.3d 1306.
42. *Id.* at 1310.

Brand' is to generate revenue through maintaining its listings, obtaining new listings and to jointly market shares with the listed companies."[43]

In considering plaintiff's allegations, the court noted that an SRO has absolute immunity "[o]nly when [it] is acting under the aegis of the Exchange Act's delegated authority . . . ."[44] Accordingly, the court held that NASDAQ was entitled to absolute immunity for dissemination of WorldCom's financial statements because NASDAQ disseminated those statements pursuant to its regulatory authority "to remove impediments and perfect the free market."[45] But immunity did not apply to NASDAQ's commercial marketing and advertising activities:

> [T]he rest of Weissman's complaint expressly and exclusively relates to [NASDAQ's] for-profit commercial activity, without any reliance on [its] quasi-governmental enforcement or regulatory functions. The complaint mainly concerns [NASDAQ's] advertising activities, which, according to Weissman, fraudulently touted WorldCom's stock in order to profit from resulting increases in trading volume. This conduct does not fall under the aegis of [NASDAQ's] delegated disciplinary or regulatory authority and therefore is not shielded by absolute immunity . . . . This conduct was private business activity; and when conducting private business, SROs remain subject to liability.[46]

The district court in *Opulent Fund, L.P. v. NASDAQ Stock Market*[47] employed the reasoning of *Weissman* to similarly reject NASDAQ's defense of absolute immunity. Plaintiff shorted put options on the NASDAQ-100.[48] It alleged that NASDAQ did not properly calculate the index's value, which resulted in plaintiff losing money on its contracts.[49] Plaintiff thus brought claims against NASDAQ for negligence and negligent misrep-

43. *Id.*
44. *Id.* at 1311.
45. *Id.*
46. *Id.* at 1311–12.
47. 2007 WL 3010573 (N.D. Cal. Oct 12, 2007).
48. *Id.* at *1.
49. *Id.*

resentation. NASDAQ moved to dismiss on grounds of immunity.[50] Reasoning that "every case that has found an SRO absolutely immune from suit has done so for activities involving an SRO's performance of regulatory, adjudicatory, or prosecutorial duties in the stead of the SEC,"[51] the court held that NASDAQ was not immune:

> The Opulent Funds argue that pricing an index is not a "regulatory function" and therefore not conduct cloaked with absolute immunity. Upon examining the nature and functions of NASDAQ's alleged actions, the court agrees. NASDAQ wished to create a derivatives market based on the stocks listed on its exchange . . . . In choosing to create the index and disseminate this price information, NASDAQ "represents no one but itself."[52]

Most recently, an Illinois appellate court applied the commercial exception in *Platinum Partners Value Arbitrage Fund, L.P. v. Chicago Board Options Exchange*.[53] Plaintiff sued the Chicago Board Options Exchange (CBOE) and Options Clearing Corporation (OCC) for their alleged private disclosure of option-pricing information to a select group of market participants before they made the information public. The lower court held that CBOE and OCC had absolute immunity from suit, and plaintiff appealed. Relying heavily on *Weissman*, the appellate court held that while the option price adjustment itself might have been a regulatory decision subject to absolute immunity, the manner in which CBOE and OCC disclosed it was not:

> In addition to its quasi-governmental functions, defendants CBOE and OCC have a private, for-profit business, and in the private disclosure of the price-adjustment decision to the John Doe defendants, they were acting in their private capacity and for their own corporate benefit. Therefore, this nonpublic announcement cannot be construed as conduct under

50. *Id.* at *2.
51. *Id.* at *4.
52. *Id.* at *5.
53. 976 N.E.2d 415 (Ill. App. 1st Dist. 2012).

> the delegated authority of the Securities Exchange Act.[54]

Though courts have started down the right path by carving out an exception for activities that are clearly collateral to exchanges' regulatory and general oversight functions, they have not gone far enough. These decisions do not adequately account for activities that have some facial regulatory connection, but are undertaken primarily for business reasons. Consider again the example of an exchange making a profit-driven decision to proceed with a listing when it is having technological difficulties. In that situation, the exchange is not acting as a regulator when deciding whether to pull the trigger on the listing (the exchange's self-interested conduct is actually putting investors at risk). It is a business decision, pure and simple. Based on current case law, however, it is unlikely that a court would apply the commercial exception to the exchange's conduct. Instead, the exchange would claim that listing is a core regulatory function—unlike, for example, the advertising at issue in *Weissman*, the creation and dissemination of an index in *Opulent*, or the sharing of nonpublic information in *Platinum*—and hide behind the immunity shield. A court, unable to consider the exchange's motives, would likely be compelled to agree.

IV.
Proposed Standard

Now that exchanges have offloaded a significant amount of their regulatory activity to FINRA[55] and have evolved into publicly traded companies that compete directly with broker-dealers, it is time for courts to apply a standard that levels the playing field and eliminates the moral hazard that results from being able to make high-risk business decisions without fear of potential liability. To accomplish that objective, courts need a

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54. *Id.* at 422.

55. *See* SEC Release, No. 34-56145, "Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc." (July 26, 2007) (discussing the transfer of oversight of securities firms, dispute resolution, and market regulation to FINRA).

better way to differentiate exchanges' business activities from their regulatory activities, so that exchanges are not able to claim that their commercial conduct is subject to immunity based on some incidental regulatory aspect. One viable solution is for courts to start asking why an exchange is performing the activity in question. Considering an exchange's motives will allow courts to more easily parse out those activities that are primarily commercial in situations involving some regulatory component.

The introduction of motive could be accomplished with a simple burden-shifting framework. Defendant has the burden of demonstrating its entitlement to absolute immunity.[56] An exchange presently meets that burden by showing that it acted "in connection with" the exercise of its regulatory power.[57] Under the proposed standard, once an exchange has met its initial burden of showing some regulatory connection, plaintiff would have the opportunity to demonstrate that the exchange's activity was commercial; that is, regardless of whether there is some regulatory connection, the exchange was primarily acting to further its own business objectives. If plaintiff cannot make that showing, then absolute immunity attaches. If, however, plaintiff meets its burden, the exchange would have one last opportunity to establish that it should be entitled to absolute immunity by showing that it would have taken the exact same action regardless of those business interests.[58]

To further the "policy requiring early determination of immunity," courts could impose a heightened pleading standard, making plaintiff state with factual detail and particularity why the exchange cannot maintain the defense of absolute immunity.[59] To satisfy that standard, "plaintiff must provide some factual allegation in his complaint that will serve to ward off a potential immunity defense; if he does not, the immunity is apparent from the face of the complaint and dismissal is appropriate under Rule 12(b)(6)."[60] While the proposed standard would sometimes require courts to engage in a fact-inten-

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56. Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 637 F.3d 112, 116 (2d Cir. 2011).

57. *Id.* at 123.

58. *C.f.* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (applying burden-shifting scheme in Title VII case).

59. *Weissman*, 500 F.3d at 1309 (Tjoflat, J., dissenting).

60. *Id.*

sive inquiry in order to determine whether the exchange would have acted the same absent its business interests, imposing a heightened requirement would help to "resolve the defense on the basis of the pleadings."[61]

Though this proposal contravenes longstanding precedent regarding the consideration of motive, it is important to note that the motive rule was not established in cases addressing the application of absolute immunity to dual-purpose entities engaged in regulatory and for-profit activities—like modern-day securities exchanges. Moreover, the fact that *every* court that has applied the commercial exception thus far has inadvertently considered motive in its analysis lends further support to the proposed rule.

For example, in *Weissman*, after noting that "[t]he test is not an SRO's subjective intent or motivation,"[62] the court went on to cite the following in support of its holding that NASDAQ was not immune: "As a private corporation, NASDAQ places some advertisements that 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, company profits*."[63] Similarly, in *Opulent*, the court denied NASDAQ immunity based on the following: "NASDAQ encouraged investors to create instruments based on the index's value and chose to disseminate this information. NASDAQ took this course of action *because it profits from selling the market price data*."[64] Finally, in *Platinum*, the court based its decision on the fact that defendants "were acting in their private capacity and *for their own corporate benefit*."[65]

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61. *Id.* at 1309 n.6.

62. *Id.* at 1297.

63. *Id.* at 1299 (emphasis added); *see also id.* at 1314 (Tjoflat, J., dissenting) ("Moreover, the majority is obviously swayed by its perception that NASDAQ was acting with a profit motive in allegedly trying to increase trading—this despite the majority's earlier correct observation that '[t]he test is not an SRO's subjective intent or motivation . . . .'") (text alterations in original); *Weissman*, 468 F.3d at 1312 ("More generally, the whole point of the advertisements was to entice investors to buy stock on NASDAQ's exchange—such as NASDAQ's exchange-traded fund, QQQ, which included WorldCom. This, too, is a non-regulatory action.").

64. *Opulent*, 2007 WL 3010573, at *5 (emphasis added).

65. *Platinum*, 976 N.E.2d at 422 (emphasis added).

CONCLUSION

The consideration of motive would assist courts in ensuring that absolute immunity is applied only when an exchange is truly acting in a regulatory capacity. Implementation of the proposed burden-shifting framework provides courts with a way to consider motive that is fair and systematic. The framework allows plaintiff the opportunity to demonstrate that conduct primarily taken in furtherance of an exchange's business interests should not be protected, regardless of whether the conduct has some regulatory connection. At the same time, the new standard is not overly demanding on exchanges. If a plaintiff cannot meet its burden, the exchange is in the exact same place as it is now under the current law. On the other hand, if a plaintiff makes the required showing, the exchange still has an opportunity to demonstrate that its conduct should nonetheless be protected. The proposed framework thus "strike[s] a fair balance between plaintiffs' need for redress and a meaningful application of immunity defenses."[66]

66. *Weissman*, 500 F.3d at 1309 (Tjoflat, J., dissenting).