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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 07-1261-BLS2

*Not Present  
7/29/08*

*A.S.L.  
C.L.M. LLP*

BULLDOG INVESTORS GENERAL PARTNERSHIP,  
et al.<sup>1</sup>

*A.G.  
P.G.C.*

vs.

*G+C*

WILLIAM F. GALVIN, IN HIS OFFICIAL CAPACITY  
AS SECRETARY OF THE COMMONWEALTH

*PWC*

MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S PARTIAL MOTION TO DISMISS

*P.O.C.*

*AAG*

*(md)*

INTRODUCTION

The background of this action appears in this Court's Memorandum of Decision and Order on Plaintiffs' Motion for Preliminary Injunction, issued December 26, 2007. Since that decision, the plaintiffs have filed a Revised Second Amended Complaint ("the complaint"), docketed on March 28, 2008. Now before the Court is the Defendant's Partial Motion to Dismiss (Count Two). For the reasons that will be explained, the motion will be allowed.

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<sup>1</sup>Opportunity Partners, L. P., Full Value Partners, L.P., Opportunity Income Plus Fund, L.P., Kimball & Winthrop, Inc., Full Value Advisors, LLC, Spar Advisors, LLC, Phillip Goldstein, Steven Samuels, Andrew Dakos, Rajeev Das, and Leonard Bloness.

## BACKGROUND

The complaint alleges the following facts.<sup>2</sup> Plaintiff Bulldog Investors General Partnership is a general partnership. Three of its general partners are private investment partnerships known as hedge funds: the plaintiffs Opportunity Partners, L.P., Full Value Partners, L. P., and Opportunity Income Fund, L.P. Plaintiff Kimball & Winthrop, Inc., is the sole general partner of Opportunity Partners Fund and managing general partner of Bulldog. Plaintiffs Full Value Advisors, LLC, and Spar Advisors, LLC, are the sole general partner and investment advisor to Full Value Fund and Income Plus Fund, respectively. Plaintiffs Phillip Goldstein, Steven Samuels, Andrew Dakos, and Rajeev Das are principals of one or more of the above-described entities. These entities and individuals will be referred to herein collectively as Bulldog Investors, or Bulldog.<sup>3</sup> Plaintiff Leonard Bloness, according to the complaint, is a resident of Massachusetts who “desires to have access to and to

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<sup>2</sup>The complaint includes conclusions and characterizations as well as allegations of fact. The Court disregards those. See e.g. *Boston & M.R.R. v. County Com'rs of Middlesex County*, 239 Mass. 127, 131 (1921).

<sup>3</sup>Opportunity Partners, L.P. is organized under the laws of Ohio. Full Value Partners L.P. and Opportunity Income Plus Fund L. P. are organized under the laws of Delaware. The complaint does not identify the residence or state of organization of any of the other Bulldog plaintiffs. The hearing officer found that Opportunity Partners L. P. has at least one limited partner who is a resident of Massachusetts, and that Kimball & Winthrop is an Ohio Corporation. She made no other findings regarding residence or state of organization of any of the Bulldog parties.

read the information contained in the Bulldog Investors website . . . but is not interested in investing in any security mentioned or described in that website . . . .”

Bulldog began operating a website on or about June 9, 2005. The website is hosted on a server located in Michigan. The website is structured such that anyone who visits is able to view the opening page, a printable brochure and press articles. A visitor who attempts to access other portions of the website is brought to a screen containing a disclaimer, as follows:

Disclaimer

*Please read the information below and click “I agree” at the bottom of the page.*

This website is issued by Bulldog Investors. The information is available for information purposes only and does not constitute solicitation as to any investment service or product and is not an invitation to subscribe for shares or units in any fund herein.

For the avoidance of doubt this website may not be used for the purpose of an offer or solicitation in any jurisdiction or in any circumstances in which such offer or solicitation is unlawful or not authorized. Whilst every effort has been made to ensure the accuracy of the information herein, Bulldog Investors accepts no responsibility for the accuracy of information, nor the reasonableness of conclusions based upon such information, which has been obtained from third parties.

The pages referring specifically to investment products offered by Bulldog Investors are only available for view with a username and password, which can be obtained by contacting the company on the Registration Form provided. The value of investments and the income from them can fall as well as rise. Past performance is not a guarantee of future performance and investors may not get back the full amount invested. Changes in the Rates of exchange may affect the value of investments.

There follows a button marked "I Agree," on which the visitor clicks to proceed. That leads to a registration screen, in which the visitor enters personal information including name, address, telephone and fax numbers, and e-mail address. Another "I agree" box appears on the registration screen, followed by a box marked "Send Feedback." The visitor is instructed "Before you submit your registration form, please confirm that you have read and agree with our Legal terms below." The "Legal terms" reiterate the contents of the disclaimer on the previous screen. Upon clicking "I agree" and "Send Feedback," the visitor is registered with the site. Bulldog then provides the visitor with information about the funds, financial performance, and specific examples of investments.

On November 10, 2006, Massachusetts resident Brendan Hickey registered on the Bulldog website. Hickey, the complaint alleges, did so not out of any interest in investing, but at the direction of RMR Hospitality and Real Estate Fund, with which Bulldog was involved in a dispute. In response to Hickey's registration, Steven Samuels sent Hickey an email reading as follows:

While we are proud to have one of the best long term records in the business, it is very difficult to adequately describe what, why, and how we do what we do in a quick response to an e-mail inquiry. Performance numbers for example show nothing of the risk taken to achieve those returns. I have attached some basic information on our management including performance and philosophy. I would be happy to spend a few minutes on the phone if you wish to discuss in more detail. Please contact me at [a telephone number provided].

Attached to the e-mail were materials providing information about the funds' investment strategy and philosophy, the backgrounds of their managers, performance and recent successes, along with news articles about the funds and about Goldstein.

Hickey did not make any investment in any Bulldog fund or purchase any securities from Bulldog. According to the complaint, no one may invest in any Bulldog fund without obtaining a private placement memorandum and written limited partnership agreement, executing a subscription agreement certifying that the investor is an "accredited investor" as defined in Rule 501(a) of the regulations promulgated pursuant to the Securities Act of 1933, and receiving approval by a principal of the general partner. The complaint further alleges that, "[a]t no time could anyone obtain copies of any these documents solely by communicating with or through the Bulldog Investors website." Hickey, according to the complaint, "never asked for, nor was offered by or received from any plaintiff, copies of, or information concerning, any limited partnership agreement, private placement memorandum or subscription agreement issued by any of the Bulldog Investors funds."

In 1992 and 2001, respectively, Opportunity Partners and Full Value Fund each filed with the Securities and Exchange Commission ("SEC") a "Form D,"

claiming exemption from registration requirements.<sup>4</sup> The complaint does not allege that Bulldog has ever registered any securities with the SEC.

On January 31, 2007, the enforcement section of the Massachusetts Securities Division filed an administrative complaint with the Acting Director of the Securities Division against Bulldog,<sup>5</sup> alleging that Bulldog had offered securities for sale in the Commonwealth that were not properly registered or exempt, in violation of G. L. c. 110A, the Massachusetts Uniform Securities Act, and regulations thereunder, 950 C. M. R. § 10 *et seq.*, by means of the information appearing on the website and in the email sent to Hickey. The enforcement section sought a cease and desist order, an administrative fine, and other relief. Bulldog Investors answered the administrative complaint on February 21, 2007, denying the allegations and raising, as defenses allegations that the complaint abridged its free speech and free press rights under the First Amendment to the United States Constitution and Article XVI of the Massachusetts Declaration of Rights, and its due process rights under the Fourteenth Amendment to the United States Constitution. The Secretary appointed his chief legal counsel as hearing officer to conduct an adjudicatory hearing on the

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<sup>4</sup>Form D refers to a filing under Rule 506 of SEC Regulation D. Under that rule, companies are permitted to raise unlimited funds through private offerings without registration, provided they follow certain requirements, including a restriction against general advertising or solicitation of offers to buy securities. See 17 C. F. R. §§ 230.501-508. Massachusetts regulation 950 C. M. R. § 14.402(B)(13)(I) requires compliance with that federal rule.

<sup>5</sup>The administrative complaint named all the Bulldog parties to this case, including the individual principals.

administrative complaint. On July 25, 2007, after proceedings on a motion for summary decision, the hearing officer issued recommended findings of fact and conclusions of law. On October 17, 2007, the Secretary issued a Final Order, adopting the hearing officer's recommendations in their entirety.

The hearing officer's decision, as adopted by the Secretary in his final order, finds and rules as follows. The Massachusetts Securities Act, G. L. c. 110A, § 301, makes it unlawful for any person to offer securities for sale in the Commonwealth unless the securities are registered, the transaction is exempt, or the security is "federally covered." The Act defines an offer to sell to include "every attempt or offer to dispose of or solicitation of an offer to buy a security or interest in a security for value." G. L. c. 110A, § 401(2). The Act further provides that it should be construed so as to coordinate its interpretation and administration consistently with federal securities law. G. L. c. 110A, § 415. Under federal case law and SEC decisions, an offer extends beyond the common law contract concept, to include information that "conditions the public interest in particular securities." See *SEC v. Cavanaugh*, 155 F.3d 129, 135 (2d Cir. 1998), and *Carl M. Loeb, Rhodes & Co.*, 38 S. E. C. 843, 850 (1959). Under that definition, "it is clear respondents have offered securities for sale in the Commonwealth," by disseminating the information on the website, in combination with the e-mail communication directed to Hickey.

Citing SEC decisions, the hearing officer rejected the contention that the website material did not constitute an offer because a visitor to the site who sought specific information about funds would have to register, indicating agreement to the disclaimer. The hearing officer went on to rule that Bulldog had not proved that it was exempt from registration requirements. The only exemption invoked was that under 950 C. M. R. § 14.02(b)(13)(m), which exempts offers communicated through the internet if not “directed toward any investor or group of investors in the Commonwealth,” and presumes that such an offer is not so directed if it “contains indications that the offer is not being made in jurisdictions where it is not registered or appropriately exempted.” That exemption did not apply, the hearing officer ruled, because of the e-mail, with attached material, directed specifically at a Massachusetts resident. The hearing officer also ruled that Bulldog’s activities were not exempt under other specified regulatory provisions that condition exemption on compliance with a ban on general advertising. The hearing officer further found that Bulldog’s due process rights were not violated and ruled that jurisdiction over Bulldog was proper. Based on those findings and rulings, the Securities Division ordered that Bulldog cease and desist from further violations, comply with the act, and pay an administrative fine of \$25,000.

Based on these factual allegations, the complaint sets forth two counts, each alleging violation of the federal civil rights act, 42 U. S. C. § 1983. Count two, which is the subject of the present motion, alleges that the Secretary’s enforcement action

and final order “abridge the plaintiffs’ constitutional right not to be deprived of liberty or property without due process of law by purporting to exercise Massachusetts jurisdiction over the plaintiffs based on the operation of the Bulldog Investors website, or the single exchange of electronic mail with Brendan Hickey on November 6, 2006, or both.”<sup>6</sup> The complaint seeks declaratory and injunctive relief and attorneys fees.<sup>7</sup> The Secretary now moves to dismiss Count two for failure to state a claim on which relief may be granted.

### DISCUSSION

The Supreme Judicial Court has recently addressed the standard applicable to a motion to dismiss, and has adopted the newly established federal standard, as articulated in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007): “While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)

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<sup>6</sup>The Court infers that the date specified is in error, and that the intended date is November 10, 2006, the date of Samuels’s e-mail to Hickey as alleged in paragraph 25 of the complaint.

<sup>7</sup>The complaint in this case does not allege any error by the Secretary in finding the facts or in interpreting or applying the Massachusetts Securities Act. For purposes of this case, therefore, the Court treats the Secretary’s findings and rulings as undisputed. Bulldog has filed a separate action, Suffolk Civil Action No. 07-5038, seeking review of the Secretary’s Final Order pursuant to G. L. c. 30A, § 14.

...” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 626 (2008), quoting *Bell Atl. Corp.*, 127 S. Ct. 1955 at 1964-1965 (internal quotations omitted). At the pleading stage, the plaintiff must present “‘factual allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief, in order to ‘reflect[ ] the threshold requirement of [Fed.R.Civ.P.] 8(a)(2) that the ‘plain statement’ possess enough heft to ‘show[ ] that the pleader is entitled to relief.’” *Iannacchino*, 451 Mass. 626, quoting *Bell Atl. Corp.*, 127 S. Ct. at 1966. In applying this standard, the Court accepts factual allegations of the complaint as true, but disregards characterizations and conclusions. See e.g. *Boston & M.R.R. v. County Com’rs of Middlesex County*, 239 Mass. 127, 131 (1921).

The comments of counsel at argument indicate that the parties agree that the allegations of the complaint present the plaintiffs’ strongest case for the claim asserted in count two. If this motion is denied, Bulldog asserts its intention to move for judgment on the pleadings on count two, based on the allegations of the complaint. The Secretary suggests that, if the motion is denied, he may seek to conduct discovery as to Bulldog’s contacts with Massachusetts, so as to determine whether a basis exists for a finding of general jurisdiction; Bulldog would resist that effort, arguing that the Secretary is bound by the jurisdictional basis established in the record of the administrative proceeding. It thus appears that the claim of lack of jurisdiction will not improve with further proceedings, although it may deteriorate. The Court considers the present motion in that light.

## DISCUSSION

### 1. Statutory Jurisdiction.

Section 406 of the Massachusetts Securities Act, G. L. c. 110A (“the Act”), authorizes the Secretary of the Commonwealth to investigate and conduct administrative prosecution and enforcement against any alleged violation of the provisions of the Act or of regulations promulgated under it. Under Section 414(a), the Act applies to “persons who . . . offer to sell when [] an offer to sell is made in the commonwealth . . . .” Section 414(c) provides that “[a]n offer to sell . . . is made in the commonwealth, whether or not either party is then present in the commonwealth, when the offer . . . is directed . . . to the commonwealth and received at the place to which it is directed . . . .” Thus, the Act authorizes the Secretary to conduct administrative enforcement action against persons who are not present in the Commonwealth based on conduct constituting an offer to sell that is directed to and received in the Commonwealth. Accepting, for purposes of this action, that Bulldog’s communication with Hickey constituted an offer to sell for purposes of the Act, as the Secretary ruled that it did (and Bulldog has not disputed in this case), it follows that the Secretary had statutory jurisdiction to take enforcement action in response to that conduct. Bulldog does not argue otherwise; its challenge in this action is solely constitutional.

## 2. Due Process.<sup>8</sup>

The United States Supreme Court's most recent decision on personal jurisdiction under the due process clause is *Burger King Corp. v. Rudzewicz*, 471 U. S. 462 (1985). In that case the Court observed:

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations. By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due process clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or related to those activities.

*Id.* at 471-472 (internal quotations and citations omitted). The Court went on,

[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum state . . . . the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there . . . . This

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<sup>8</sup>The Secretary suggests that the Court should apply the standard of legislative, rather than judicial or adjudicative jurisdiction. See *Adventure Comm. v. Ky. Registry of Elec. Fin.*, 191 F.3d 429, 435 (4<sup>th</sup> Cir. 1999) ("Legislative jurisdiction refers to . . . 'the power of a state to *apply* its laws' whereas adjudicative jurisdiction is 'the power of a state to try a particular action'" *Id.* at 435, quoting *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 581 n. 3 (8th Cir. 1981) (emphasis in original); see also *Martin v. Steubner*, 485 F. Supp. 88, 98 (S.D. Ohio 1979). The cases cited do not establish a clear or significant distinction between the two standards. In any event, the Secretary's decision here is clearly adjudicative. The Court therefore applies the well established standard of judicial jurisdiction.

purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state.

Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. Thus courts in appropriate cases may evaluate the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

*Id.* at 474-477 (internal quotations and citations omitted).

In *Tatro v. Manor Care, Inc.*, 416 Mass. 763 (1994), the Supreme Judicial Court recognized three components to this standard: 1) the party over whom jurisdiction is asserted must have minimum contacts with the forum, established by means of some act by which that party purposefully avails itself of the benefits of conducting activities within the forum state, thus invoking the benefits and protections of its laws; 2) the claim must arise out of, or relate to the party's contacts with the forum; and 3) the assertion of jurisdiction must not offend traditional notions of fair play and substantial justice, in light of such factors as the

burden of litigating in the forum, the forum's interest in adjudicating the dispute, and the claimant's interest in obtaining relief. *Id.* at 772-773.

Here Bulldog's contact with Massachusetts consists of its operation of a website accessible by Massachusetts residents as well as residents of any other location, along with the single e-mail and attachments sent by Samuels to Hickey, in response to Hickey's registration. The Secretary's action indisputably arises from that contact, and Bulldog does not contend that Massachusetts's assertion of jurisdiction over it is unduly burdensome or otherwise unfair in light of the interests at stake. The dispute, therefore, centers on whether Bulldog's contact with Massachusetts is sufficient to satisfy the requirement of minimum contacts. The Court concludes that it is.<sup>9</sup>

As indicated *supra*, contact satisfying the due process requirement must consist of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," so that the party can reasonably foresee that it will be haled into court in the forum. *Burger King Corp.*, 471 U.S. at 474-475 (internal quotations and citations omitted). A single contact satisfies that requirement if it creates a

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<sup>9</sup>At argument, Bulldog suggested that, even if jurisdiction exists with respect to Samuels, based on his e-mail, it does not necessarily follow that jurisdiction exists over all the Bulldog entities and individuals named in the Secretary's order. That argument does not appear in Bulldog's memorandum, nor does anything in the materials appended to the complaint suggest that the various Bulldog parties sought to differentiate themselves in the proceeding before the Secretary, who apparently proceeded on the basis that Samuels acted on behalf of all of them. The Court therefore does not address the issue.

“substantial connection” with the forum state. *Burger King Corp.*, 471 U.S. at 475, n.18, citing *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, (1957); see also *Pritzker v. Yari*, 42 F.3d 53, 61 (1<sup>st</sup> Cir. 1994) (one “meaningful” contact is sufficient).

Electronic communications into a state can suffice to establish minimum contacts, depending on the “nature and quality” of the communications. See *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 714 (4<sup>th</sup> Cir. 2002), quoting *Zippo Manufacturing v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W. D. Pa. 1997); *Zidon v. Pickrell*, 344 F. Supp. 2d 624, 632 (D.N.D. 2004). Evaluation of the “nature and quality” of the communications focuses on the degree of interactivity involved, as well as the relationship between the communications and the cause of action. *ALS, supra*; *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 540 (E.D. Pa. 1999). Operation of “a passive website that does little more than make information available to those who are interested in it” will not suffice. See *ALS, supra*, quoting *Zippo*, 952 F. Supp. at 1124; See *S. Morantz, supra*, at 541. Jurisdiction exists when a person: “(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.” *ALS, supra*. If these factors are present, the quantity of communications is immaterial; indeed, a single e-mail can suffice. See *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 778-80 (S.D. Miss 2001).

In *ALS Scan, Inc.*, 293 F. 3d 707, the Court held the defendant's communications with the forum state insufficient because, although not entirely passive, they were unrelated to the plaintiff's claim. *Id.* at 715. Similarly, in *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921-23 (D. Or. 1999), the Court held the plaintiff's contacts with the forum insufficient partly because the claim did not arise from those contacts.<sup>10</sup> *S. Morantz, supra*, 79 F. Supp. 2d 537, on which Bulldog also relies, rejected jurisdiction based on a website with "a few minimally active features" that did not target the forum and did not "give rise to any significant levels of contact with users in the forum." *Id.* at 541-542.

Here, Bulldog operated a website on which it invited interested persons to register by giving identifying information, so as to obtain more detailed information about Bulldog's investment vehicles. Bulldog made the website available to anyone, anywhere, and expressed no limitation as to locations from which visitors would be permitted to register. When a Massachusetts resident did register, providing his Massachusetts address, Bulldog was on notice of that person's location. Bulldog also was on notice of Massachusetts law, including the prohibition on offering unregistered securities, and the broad definition of offering to be applied under

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<sup>10</sup>The Court in *Millenium* also focused attention on the fact that one of the defendant's contacts relied on as a basis for jurisdiction – an internet sale – occurred at the initiation of the plaintiff, as "an attempt to manufacture a contact" with the forum so as to establish jurisdiction. 33 F. Supp. 2d at 911. Bulldog attempts to draw an analogy based on its allegation that Hickey acted on behalf of an entity with which Bulldog was involved in a dispute. The analogy fails, because nothing in the complaint suggests any involvement by the Secretary in that dispute or in Hickey's activities.

Massachusetts law based on federal and SEC decisions. Bulldog was therefore in a position to know that in responding to Hickey's registration by sending detailed information about unregistered securities, it would risk violating Massachusetts law and subjecting itself to enforcement action in Massachusetts. In doing so, therefore, Bulldog purposefully availed itself of the benefits of conducting activity in Massachusetts. That very activity – Bulldog's electronic communications into Massachusetts – formed the substance and basis of the Secretary's action against it.

Bulldog argues that the e-mail was insignificant because no actual injury occurred, in that Hickey did not purchase any securities, and was never interested in doing so. The argument misperceives the nature of the Secretary's enforcement action. No actual securities transaction is required to constitute injury; the injury in issue is the violation of Massachusetts law against offering of unregistered securities, with its potential for erosion of regulatory protection of the capital markets that this Court discussed at length in its preliminary injunction decision.

Bulldog argues that its contact with Massachusetts was merely fortuitous, attenuated, or involuntary. See *Burger King Corp.*, 471 U.S. at 475 (a party cannot "reasonably anticipate" potential out-of-state litigation based on a "random," "fortuitous," or "attenuated" contact); *Workgroup Tech. Corp. v. MGM Grand Hotel, LLC*, 246 F. Supp 2d 102, 114 (D. Mass. 2003) ("contacts with the forum state must be voluntary – that is, not based on the unilateral actions of another party or third person"). The facts alleged do not support Bulldog's characterization. As has been

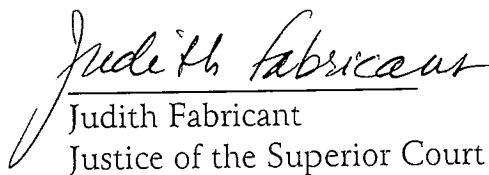
discussed, Bulldog's website invited registrations such as Hickey's, from any geographic source. Once Hickey registered, Bulldog was on notice of his residence. It was thus in a position to decide whether and how to respond to Hickey's registration, fully aware of the legal risk it incurred in doing so. On the facts alleged, Bulldog's contact with Massachusetts was not fortuitous, attenuated, or involuntary, but was deliberate and intentional, despite notice of the potential consequences. The Secretary's assertion of jurisdiction based on that contact imposes no unfairness.

Bulldog asserts that "contact with the forum state that responds to a communication from the forum state is categorically insufficient." Nothing in any of the cases cited supports such a general rule. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003), on which Bulldog relies, rejected jurisdiction over a claim arising from an internet sale because the seller lacked notice of the location of the buyers, and had structured its website in a manner that did not encourage purchase orders from the forum. The facts presented here contrast sharply with those, and indeed conform to that court's statement of the facts necessary for jurisdiction: "If a defendant web site operator . . . knowingly conducts business with forum state residents via the site, then the 'purposeful availment' requirement is satisfied." *Id.* at 452; See also *Burger King*, 471 U.S. at 478 (determination of jurisdiction must not be based on "mechanical tests"). Based on the facts alleged in the complaint, the Court

concludes that the Secretary's exercise of jurisdiction over Bulldog did not violate due process. Count two of the complaint therefore must be dismissed.<sup>11</sup>

### CONCLUSION AND ORDER

For the reasons stated, the Defendant's Partial Motion to Dismiss (Count Two) is ALLOWED.

  
Judith Fabricant  
Justice of the Superior Court

July 28, 2008

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<sup>11</sup>The Court does not address the Secretary's arguments regarding a potential claim addressed to the possibility of future enforcement action based on the website alone, because the complaint does not appear to include any such claim, and Bulldog does not argue that it does.