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August 6, 2007

Nancy M. Morris
Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-18-07 -- Revisions of Limited Offering Exemptions in Regulation D

Dear Ms. Morris:

After the overwhelming negative response by investors to the Commission's rule proposing a massive increase in the minimum wealth needed to invest in a hedge fund[1] it is surprising that the Commission has proposed a similar rule for unregistered securities. If investors are paying attention, there will likely be a similar uprising to the proposed imposition of very high wealth requirements to invest in an unregistered security.

The objective of a safe harbor for offering non-registered securities should be to filter out investors that are unable to "fend for themselves"[2] A wealth standard is both over-inclusive because it prevents knowledgeable investors that are not wealthy from purchasing suitable securities and under-inclusive because it allows wealthy but unsophisticated investors to purchase unsuitable securities. Wealth is a poor proxy for investing skill and the Commission should eschew rules that unnecessarily and paternalistically limit investor choice and smack of class legislation.

However investment acumen is measured, the Commission should provide a means to accommodate investors that wish to invest in an unregistered security. The Commission has broad authority to exempt any person from its rules. Why not allow a blanket exemption for an investor who submits a letter to the Commission stating in substance the following?

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[1] The release states:

> Finally, in last year's Private Pooled Investment Vehicle Release, we solicited comment on two new rules that would establish a new category of accredited investor, "accredited natural person," that individuals would need to satisfy in order to invest in certain private pooled investment vehicles relying on Rule 506.30 We received approximately 600 comments on that proposal, many of which generally disfavored our proposal, which would raise individual investor thresholds for such investments. We are continuing to consider those comments, and solicit further comment on the proposed definition of accredited natural person made in the Private Pooled Investment Vehicle Release. The Commission may act on the new proposals in this release and the December 2006 proposals at the same time.

[2] SEC v. Ralston Purina, 346 U.S. 119, 125 (1953),

> I understand that the Commission believes that investing in unregistered securities carries inherent risks. Nevertheless, I have performed my own due diligence on XYZ Inc. and I wish to invest in its securities. I have not been unduly influenced by anyone to make this investment and I am willing to accept the risks of my decision. I will not hold the Commission responsible for any losses I may incur as a result of investing in securities issued by XYZ Inc.

Such an exemption is consistent with the philosophy underlying the federal securities laws, i.e., investors should be able to make informed decisions about their investments.

More importantly, the prohibition on "general solicitation and general advertising" of unregistered securities should be eliminated, not merely liberalized. (Of course, false or misleading solicitations or advertising will continue to be prohibited.) This reform should be a first step to eliminating all securities regulations that violate the First Amendment. Since Regulation D was adopted as a safe harbor for private securities offerings in 1982,[3] there have been many instances in which courts including the United States Supreme Court have found various restrictions on truthful commercial speech to violate the First Amendment. In fact, it is fair to say that virtually any prohibition on truthful nonmisleading communications about a public or private securities offering would probably be declared unconstitutional today.

Currently, Bulldog Investors is the target of an enforcement action initiated by Massachusetts Secretary of State William Galvin a/k/a "the Nifong of the North." See: (http://www.bluemassgroup.com/showDiary.do;jsessionid=18AFE22E9E885AB073EF8572E4E6581B?diaryId=6146). The complaint alleges that we violated that state's prohibition on general solicitation and advertising of unregistered securities, i.e., interests in our hedge funds. Mr. Galvin's silly politically motivated complaint stems from our truthful response to an unsolicited inquiry by a visitor to the Bulldog Investors website. (The visitor falsely pretended to be a potential investor in order to entrap us.) The complaint is available at http://www.sec.state.ma.us/sct/sctbulldog/bulldogidx.htm.

We did nothing wrong. Therefore, in addition to contesting the enforcement action, we filed a complaint against Secretary Galvin in the Superior Court of Massachusetts for violating our right to free speech under color of state law. Our brief and the administrative hearing officer's Findings of Facts and Conclusions of Law are attached. Suffolk County Superior Court Judge Ralph D. Gants has indicated that he will consider our First Amendment claim and our motion to enjoin the enforcement action promptly after the an adverse order is issued (which is likely a fait accompli because the administrative hearing officer and the Acting Director of the Securities Division virtually always rubber stamp Secretary Galvin's enforcement actions).

In a press report about our case, former SEC Chairman Harvey Pitt said: "I think that the court cases have made it clear that in the absence of fraud it's going to be very, very hard to clamp down on people's right to speak" and "whether Mr. Goldstein has a claim in that

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[3] Rule 506 of Regulation D expressly forbids general solicitation and advertising.

regard, I don't know, but I think that the Supreme Court has warned people to be very cautious of impinging on corporate rights to free speech."

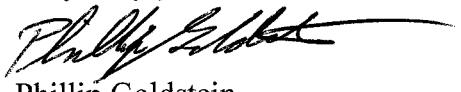
In short, since *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Com'n of N. Y.*, 447 U.S. 557 (1980), courts have applied a three-part test to a regulation that prohibits truthful nonmisleading commercial speech. For such a regulation to withstand constitutional scrutiny, the government must prove that the regulation (1) relates to a substantial government interest; (2) directly and materially advances the asserted state interest; and (3) is narrowly tailored. For example, in *Washington Legal Foundation v. Friedman* 13 F. Supp.2d 51 (1998), the Washington D.C. District Court found that the FDA could not prohibit drug manufacturers from distributing journal articles that described so called "off label," i.e., non-FDA approved uses of pharmaceuticals or medical devices, stating:

> If there is one fixed principle in the commercial speech arena, it is that "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it." *44 Liquormart*, 517 U.S. at 497... To endeavor to support a restriction upon speech by alleging that the recipient needs to be shielded from that speech for his or her own protection, which is the gravamen of the FDA's claim here, is practically an engraved invitation to have the restriction struck."

The *Central Hudson* test has been operational for twenty-seven years. There is no obvious reason to distinguish securities regulations that restrict truthful nonmisleading commercial speech from pharmaceutical or any other regulations that restrict truthful nonmisleading commercial speech.

To conclude, there is no exemption from the First Amendment for securities regulations. Therefore, the Commission should review the current state of commercial speech jurisprudence and then develop a comprehensive plan to eliminate any regulations that do not comport with it. A good place to begin is by entirely eliminating any prohibition on general solicitation and advertising of unregistered securities.

Very truly yours,



Phillip Goldstein
Principal

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

BULLDOG INVESTORS GENERAL PARTNERSHIP, 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 & LEONARD BLONESS, PLAINTIFFS, v. WILLIAM GALVIN, SECRETARY OF THE COMMONWEALTH, & PATRICK AHEARN, CHIEF OF ENFORCEMENT, SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH, DEFENDANTS.	DOCKET NO. _____

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION AND A 7-DAY SHORT ORDER OF NOTICE

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INTRODUCTION

Through causes of action created by the federal and Massachusetts civil rights statutes, 42 U.S.C. § 1983, and M.G.L.c. 12, §11I, plaintiffs seek a short order of notice and, after a hearing, a preliminary injunction against enforcement against them by the Secretary of the Commonwealth, through an administrative complaint pending against plaintiffs[1] or otherwise, of securities laws and regulations which on their face, and as applied to a website that will be referred to herein as the "Bulldog Investors website," purport to proscribe and punish the constitutionally-protected dissemination of truthful information about several of the plaintiffs, some of which are Bulldog hedge funds.

In this motion for a preliminary injunction, plaintiffs contend that securities laws and regulations that condition the exemption of an issuer of securities from being deemed to have engaged in a "public offering" on refraining from truthful "advertising" or "solicitation" violate free speech and free press protections guaranteed by the federal and Massachusetts constitutions. *See Thompson v. Western States Medical Center,* 535 U.S. 357, 370-372 (2002). Though Plaintiff Leonard Bloness does not desire to invest in hedge funds, he is an interested potential reader of the website so as to become more informed about hedge funds, and the Bulldog funds in particular. Mr. Bloness seeks a preliminary injunction because the prosecution of the Secretary's administrative complaint infringes on his constitutional right to obtain access to and read truthful information about the Bulldog funds.

[1] A copy of the defendants' administrative complaint is attached as Exhibit 1 to the instant civil rights complaint.

The Secretary's administrative complaint seeks the imposition of sanctions including a cease and desist order that would operate as an unconstitutional prior restraint against, and an equally unconstitutional "administrative fine" to impose deterrent punishment for, making certain truthful information accessible through the Bulldog Investors website.

The plaintiffs are suffering irreparable harm every day that they are chilled and prevented from exercising their free speech and free press rights. But for the threat of sanctions and the litigation burden imposed by the Secretary, the Bulldog Investors website would continue to operate as it did prior to the Secretary's action. However, the website's continued operation is being chilled, deterred and prevented by the Secretary's unconstitutional actions under color of Massachusetts law.

This court should issue a preliminary injunction to prevent the use of securities laws and regulations as instrumentalities of unconstitutional censorship and suppression of constitutionally-protected communications.

I. STANDARDS GOVERNING THE ISSUANCE OF A PRELIMINARY INJUNCTION TO PREVENT INFRINGEMENT OF FREE SPEECH AND PRESS RIGHTS.

The federal and Massachusetts civil rights statutes (42 U.S.C. § 1983 and M.G.L.c. 12, § 11I) provide for injunctive relief for violations of federal and state constitutional rights committed by those acting under color of state law.[2] State agencies and

[2] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

municipalities are not immune from injunctions that proscribe violations of the First Amendment. *See e.g., Globe Newspaper Co. v. Commissioner of Revenue,* 410 Mass. 188 (1991) (Commissioner of Revenue enjoined from enforcing tax on newspapers that violated First Amendment); *T&D Video, Inc. v. Revere,* 423 Mass. 577 (1996) (upholding issuance of preliminary injunction where plaintiff asserted that its First Amendment rights were violated by city's adult entertainment zoning ordinances).

Further, plaintiffs are not required to exhaust their constitutional claims in administrative proceedings before seeking injunctive relief. *See T&D Video, Inc. v. Revere,* 3 Mass.L.Rep. 427, 1994 Mass. Super. LEXIS 5 (December 8, 1994), at *7, n.5, ("It is well settled that there is no requirement of exhaustion of administrative remedies where, as here, the action is for a violation of civil rights under 42 U.S.C. § 1983[,]" citing *Urbanizadora Versailles, Inc. v. Rios,* 701 F.2d 993 (1st Cir. 1982) and *Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982)). In any event, Mr. Bloness is not a party to any administrative proceeding.

Preliminary injunctive relief is appropriate where (a) there is a substantial likelihood that the moving party will succeed on the merits, (b) the moving party will suffer irreparable harm if injunctive relief is not granted, (c) the harm likely to be suffered by the moving party if the injunction is denied is greater than the harm likely to be suffered by the defendant if the injunction is granted, and (d) if the injunction is

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M.G.L.c. 12, § 11I provides: "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

sought against a governmental agency, whether issuance of the injunction will promote the public interest or will not adversely affect the public. *See Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-618, n.12 (1980); *Siemens Bldg. Techs., Inc. v. Div. of Asset Capital Mgmt.*, 439Mass. 759, 762 (2003); *Jet-Line Servs., Inc. v. Board of Selectmen of Stoughton,* 25 Mass.App.Ct. 645, 649 (1988). A court's determination whether to grant a preliminary injunction primarily involves a balancing of the risk of harm to each party in the context of assessing the movant's chance of success on the merits.

> [W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits.

Packaging Indus. Group, Inc., 380 Mass. at 617 (footnotes omitted). If the balance of harms favor the plaintiffs, as is true here, they need only show a substantial possibility of success on the merits. "[I]f the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction imposes no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrant issuing the injunction." *Id.* at 617. n.12 (emphasis added). A preliminary injunction should be granted because the plaintiffs meet either standard: a substantial likelihood or a substantial possibility that their free speech and press claims will prevail.

Irreparable harm from infringement of free speech and press rights is defined so as to require courts considering injunctive relief to immediately and urgently prevent any governmental attempt to censor or punish constitutionally-protected speech. The Supreme Judicial Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *T&D Video v. City of Revere*, 423 Mass. *supra* at 582, citing *Elrod v. Burns*, 427 U.S. 347, 373-4 (1976) (plurality).

The balance of harms and equities strongly favors the issuance of a preliminary injunction. Plaintiffs have suffered, and will continue to suffer, irreparable harm from infringement of their free speech and press rights if the Secretary is not enjoined. The administrative complaint does not allege that any harm resulted from the plaintiffs' alleged violations of the securities laws. Ordering injunctive relief will impose virtually no risk of harm to the defendants' ability to protect the public. Issuance of the preliminary injunction will not prevent the defendants from using available law enforcement means that do not involve impermissible infringements on free speech and free press rights to prevent issuers of unregistered securities from selling them to unsophisticated persons who are not "accredited" investors as defined in the securities laws. The issuance of injunctive relief promotes the public interest by assuring that our constitutional rights to obtain and exchange important information and ideas are not infringed.

FACTS

A. THE BULLDOG INVESTORS WEBSITE DOES NOT PROPOSE A TRANSACTION; MUCH LESS CREATE A RISK OF AN ILLEGAL TRANSACTION.

The Bulldog Investors website has been operational since June 9, 2005. Affidavit of Phillip Goldstein ("Goldstein Aff.") at ¶ 2. At no time have the plaintiffs engaged in any fraudulent or otherwise unlawful transaction involving the sale of an unregistered security to an unaccredited investor or anyone else. In their administrative proceeding, the defendants have not said otherwise. An issuer may lawfully sell an unregistered security to accredited investors. Investors in Bulldog Investors hedge funds must sign subscription agreements and be interviewed to verify their accredited investor status, as specified in Section 2(a)(15) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(15)) and under Section 501(a) of SEC Rule D. 17 C.F.R. 230.501. Goldstein Aff. at ¶ 10. In sum and without contradiction of anything in the administrative complaint, there is no evidence that during the entire period the Bulldog Investors website was in operation, beginning on June 9, 2005, any harm sought to be prevented by any securities law has been suffered by any investor, or that any investor been put at risk of any such harm.

The Bulldog Investors website provided accurate, non-misleading information of interest to persons who do not necessarily desire to purchase unregistered securities issued by Bulldog funds, including journalists, academics, legislators, regulators, and others interested in hedge funds and the activities of Bulldog Investors.

B. THE BULLDOG INVESTORS WEBSITE AND E-MAIL COMMUNICATIONS WITH BRENDAN HICKEY.

The Goldstein Affidavit states the following.

"Bulldog Investors" is an umbrella name for several private investment partnerships (or "hedge funds") including Opportunity Partners L.P., Full Value Partners L.P. and Opportunity Income Plus Fund L.P. Goldstein Aff. at ¶ 2.

The Bulldog Investors website referred to in the administrative complaint was activated on or about June 9, 2005. At no time could anyone engage in an investment transaction by communicating with or through the Bulldog Investors website. *Id.*

Attached to the Goldstein Affidavit as Exhibit A is a true and correct copy of the opening screen of the Bulldog Investors website. The administrative complaint alleges that passwords and information were provided to visitors to the Bulldog Investors website "simply after such persons acknowledge that he or she has read the website disclaimer." Administrative Complaint at ¶ 50. (attached at Exhibit 1 to the Complaint) This is not accurate. No one could view any part of the website, other than the opening screen, a printable brochure and several press articles accessible from that screen, without expressly agreeing that the website did not constitute or include a solicitation to buy, or an offer to sell, any security. A true and accurate copy of the printable brochure is attached to the Goldstein Affidavit as Exhibit B. The pertinent language posted on the opening screen of the Bulldog Investors website states:

> 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 the conclusions based upon such information, which has been obtained by third parties.

> The pages referring specifically to investment products offered by Bulldog Investors are only available to 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 is a button bearing the words, "I agree" which the website viewer could choose to push in order to communicate his agreement with the above-quoted conditions. Goldstein Aff. at ¶ 3. Only upon making this agreement could a website viewer obtain access to detailed financial performance information concerning any of the hedge funds. *Id.* at ¶ 4.

To obtain detailed financial performance information about specific hedge funds, a website visitor must have registered with Bulldog Investors, and requested such information by clicking a button entitled "Send Feedback." Before that request could be made, however, anyone seeking to register must have again expressly agreed that the website, and information provided by the website, is not a solicitation to buy or an offer to sell. The text of this website registration page reads: "Before you submit your registration form, please confirm that you have read and agree with our Legal terms below." The website viewer must place a checkmark in a box which is labeled "I Agree" in order to receive a password and further information from the Bulldog Investors website. Attached to the Goldstein Affidavit is a true and correct copy of the registration page by which a website visitor could make a request for information by expressing the visitor's agreement that the visitor is neither being solicited to buy nor receiving an offer to sell any securities. *Id.* at ¶ 5.

Only after a website visitor has registered, agreed that the website and information provided is neither a solicitation nor an offer, and requested information by pressing the "Send Feedback" button, would Bulldog Investors provide information about particular funds, financial performance, and specific examples of investments. *Id.* at ¶ 6.

The defendants' effort to suppress and censor information available through the Bulldog Investors website as a prohibited public "offer" of unregistered securities rings hollow when the even more detailed financial performance information, biographical information concerning managers and investment strategies concerning large numbers of hedge funds are available in frequently published sources online and at the Boston Public Library. *See* Affidavit of Ellen Rheaume and Elizabeth Rose, filed herewith.

The administrative complaint is predicated in part on Bulldog communications with an individual named Brendan Hickey of Quincy, Massachusetts. All communications on or about November 10, 2006, between Brendan Hickey and any plaintiff herein (which communications are documented in Exhibits B and C-1 through C-6 attached to the administrative complaint) occurred only after Mr. Hickey expressly agreed through the above described process that the information that he would receive via the Bulldog Investors website did not constitute a solicitation or offer to invest. Mr. Hickey was not offered anything for sale and did not purchase anything from any of the plaintiffs. Goldstein Aff. at ¶ 9.

No person can invest in any of the Bulldog Investors funds without first obtaining a private placement memorandum and a written limited partnership agreement, and then executing a subscription agreement issued by these limited partnerships which must be subsequently approved by a principal of the general partner. At no time could anyone

obtain copies of any these documents solely by communicating with or through the Bulldog Investors website. *Id.* at ¶ 10.

In fact, no person may invest in any of the Bulldog Investors funds without (a) first speaking to and being approved by a principal of the fund's general partner and (b) approval by the general partner of a signed subscription agreement certifying, among other things, that the investor is an "accredited investor" as defined in Rule 501(a) of the 1933 Securities Act. *Id.*

Mr. Hickey never asked for and was never 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. *Id.* at ¶ 11.

These facts establish the following:

- The Bulldog Investors website had been functioning since June 9, 2005 without a single illegal transaction occurring.
- In view of the website disclaimer agreement mechanism which functioned at all times, no transaction was being proposed.
- The website communicated for non-transactional, information purposes only.
- Through the above-described exchange of e-mails, Brendan Hickey obtained Bulldog Investors website-sourced information about particular hedge funds, but only after expressly agreeing that no solicitation or offer was being made.

C. THE DEFENDANTS' ADMINISTRATIVE COMPLAINT AND PROCEEDINGS SEEK TO IMPOSE A PRIOR RESTRAINT ON PLAINTIFFS' SPEECH AND TO PUNISH THEM FOR THEIR CONSITUTIONALLY-PROTECTED COMMUNICATIONS.

On or about January 31, 2007, the Secretary and Mr. Ahearn caused the administrative complaint to be filed in the Office of the Secretary of the Commonwealth and to be served on the respondents, all of whom are plaintiffs in this civil rights action. A copy of the administrative complaint is attached to the instant civil rights complaint as Exhibit 1.

The administrative complaint alleges that exemption of securities from registration is conditioned on issuers of unregistered securities refraining from communications that constitute "advertising" or "solicitation." Conversely, the administrative complaint alleges that the securities regulations provide that any "advertising" or "solicitation" constitute a public "offer," thereby triggering registration requirements. The defendants allege that the Bulldog Investors website's communications were "advertising" and "solicitation" that constituted an illegal public "offer" of unregistered securities.

The administrative complaint alleges that the website and Hickey e-mail chain constituted an illegal public offer to sell and/or solicitation to buy unregistered securities in Bulldog hedge funds in violation of M.G.L. c. 110A, § 301, even though there is no evidence to support a conclusion or finding that, at any time since its inception on June 9, 2005, the Bulldog Investors website (1) proposes a transaction; (2) communicates any false or misleading information; (3) has ever influenced anyone to engage in an illegal transaction involving an unaccredited investor or anyone else; (4) creates a risk that anyone will be influenced or encouraged to engage in an illegal transaction.

The defendants assert that certain securities laws and regulations empower them to censor and suppress the plaintiffs' truthful communications because these

communications are deemed to be a public "offer" of unregistered securities that defeats the exemption that otherwise allows the securities to be issued and sold without registration and compliance with many other regulatory requirements. Specifically, the defendants assert in the administrative complaint and proceeding that a security issuer's truthful communications that they deem to be a "solicitation of an offer to buy " or "advertising" are sufficient to constitute a public "offer," and that such communications may be subjected to a prior restraint and punished unless the securities are registered. The Massachusetts Uniform Securities Act defines "offer" of "offer to sell" as to include "a solicitation of an offer to buy" as follows:

> 'Offer' or 'offer to sell' included every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Mass. Gen. Laws ch. 110A, § 401 (i) (2). The state and federal definitions of "offer" are nearly identical. *See* 15 U.S.C. § 77b(a)(3) ("The term 'offer to sell,' 'offer for sale,' or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.")

Most significantly for the instant constitutional claims, the defendants seek to suppress and censor as a prohibited public "offer" any communication by an issuer of unregistered securities that includes truthful information that "even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities."[3] In so doing, the defendants rely upon and seek to enforce an unconstitutionally broad SEC interpretation of what constitutes an "offer." *See Carl M. Loeb, Rhoades & Co.,* 38 SEC 843, 850-51, Sec. Exch. Act Release No. 5870 (Feb. 9,

[3] The defendants' seek to enforce this sweepingly broad interpretation of "offer" in the Enforcement Section's Memorandum In Support of Its Motion for Summary Decision filed on March 1, 2007, in the administrative proceeding. A copy of that lengthy memorandum will be provided to the Court upon request.

1959). The SEC in that proceeding further described the broad scope of "offer" as follows:

> These are broad definitions, and designedly so. It is apparent that they are not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security.

Id. At 848.

The defendants further assert that "general solicitation or general advertising" and "an offer toward a specific investor (allegedly to Mr. Hickey)" by an issuer of unregistered securities violates Section 506(b)(1) [17 CFR 230.506(b)(1)] and Section 502(c) [17 CFR 230.502(c)] of Regulation D under the Securities Act of 1933. According to the administrative complaint, "advertising" by an issuer of unregistered securities also violates M.G.L. c. 110A, § 402(b)(9), because such "advertising" is deemed to be an "offer" to more than 25 persons. The Bulldog investors website is also alleged to have been an offer by an issuer of unregistered securities by means of "general advertising" in violation of 950 CMR § 14.402(B)(9). *See* Administrative complaint ¶¶ 67-80 at pp.13-16.

In sum, the defendants' administrative complaint and proceedings seek to censor and punish the communication of truthful information about a product (namely unregistered securities) that may be lawfully sold to accredited investors: (1) no matter how disconnected or remote the communication may be from the consummation of any sale or transaction involving unregistered securities, much less an illegal sale or transaction, and (2) no matter how non-existent the risk created by the communication

that an unregistered security might be unlawfully sold to an unaccredited Massachusetts investor.[4]

As explained below, the sweeping overbreadth of the prohibitions of communications sought to be enforced by the defendants cannot survive constitutional scrutiny. Plaintiffs contend that, on their face and as applied to the Bulldog Investors website and the e-mail chain involving Brendan Hickey through the prosecution of the defendants' administrative complaint, the above provisions of the securities laws and regulations infringe on their free speech and free press rights.

If not enjoined by this Court, the censorial effect of the defendants' proceeding cannot be doubted. The administrative complaint seeks a cease and desist order that would operate as a prior restraint upon the respondents from making truthful information accessible to visitors to the Bulldog Investors website. The administrative complaint also seeks the imposition of an administrative fine in amount to be determined by the Secretary to punish and coerce the respondents from making truthful information accessible to visitors to the Bulldog Investors website. *See* Administrative Complaint \ at pp. 17- 18.

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[4] The defendants' effort to enforce sweepingly broad interpretations of what constitutes an offer appears to be out of step with various SEC Commissioners who are considering narrowing the restrictions on advertising and solicitations by issuers of unregistered securities. Paul S. Atkins, Speech by SEC Commissioner: Remarks before the 9th Annual Alternative Investment Roundup at the U.S. Securities and Exchange Commission in Scottdale (Arizona, 29 January 2007), *at* http://www.sec.gov/news/speech/2007/spch012907psa.htm; William Hutchings, *SEC's Fear of Advertising Keeps Public in the Dark*, FINANCIAL NEWS ONLINE U.S. (7 March 2007), *at* http://www.financialnews-us.com/?page=ushome&contentid=2447322722;Letter from Jonathan Hoenig, Managing Member of CAPITALISTPIG ASSET MANAGEMENT LLC to the chairman and commissioners of the Securities and Exchanges Commission about the regulation of hedge funds (8 February 2007), *at* http://www.sec.gov/comments/s7-25-06/jhoenig3393.pdf;Letter from Steven Jay Seidemann, General Counsel of D.E. Shaw & Co., L.P. to Nancy M. Morris, Federal Advisory Committee Management Officer at the Securities and Exchange Commission, Re: File No. 265-23 (3 April 2006), *at* http://www.sec.gov/rules/other/265-23/deshaw040306.pdf. Moreover, the Supreme Court rejected the SEC's effort to impose a cap on the number of persons to whom a private "offer" can be made. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).

Plaintiffs' communications are also being burdened by the expenditure of time and money to defend the administrative proceeding. On February 21, 2007, the respondents named in the administrative complaint filed and served a pleading entitled Answer and Affirmative Defenses in the Office of the Secretary of the Commonwealth. The affirmative defenses included, among others, an assertion that the conduct alleged in the administrative complaint is protected by the free speech and free press guarantees in the First Amendment to the Constitution of the United States and Article XVI of the Massachusetts Declaration of Rights. On February 23, 2007, the Secretary appointed Laurie Flynn, the Chief Legal Counsel to the Secretary, to serve as Presiding Officer for the adjudicatory hearing concerning the administrative complaint.

On March 1, 2007, the Secretary's Enforcement Section filed and served a document entitled Motion for Summary Decision with an accompanying memorandum and exhibits. In the Memorandum in Support of Its Motion for Summary Decision, the Secretary's Enforcement Section contends that Secretary's Presiding Officer lacks authority to decide the merits of the respondents' constitutional defenses to the administrative complaint.

The respondents named in the administrative complaint must file their opposition to the Motion for Summary Decision on or before March 26, 2007, and a hearing on the Motion for Summary Decision is scheduled to occur on April 11, 2007.

D. PLAINTIFFS ARE SUFFERING AND WOULD CONTINUE TO SUFFER IRREPARABLE HARM UNLESS THEIR REQUEST FOR A PRELIMINARY INJUNCTION IS GRANTED.

Due to the pending administrative action the Bulldog Investors website is currently unavailable to the public. Bulldog Investors does not intend to make it

available until the threat of sanctions sought by the defendants' administrative complaint is lifted. But for the threat of such litigation and sanctions, including fines, the website would be re-activated so that anyone can obtain truthful information about the Bulldog hedge funds even if they cannot or do not intend to invest in them. Goldstein Aff. at ¶¶ 21-22. Similarly, but for the suppressive effect of the administrative complaint, plaintiff Leonard Bloness would have access to and would read the information published by the Bulldog Investors website. Affidavit of Leonard Bloness ("Bloness Aff.") at ¶ 3. Manifestly, plaintiffs will suffer irreparable harm to their free speech and press rights if the requested preliminary injunction is not granted. *T&D Video v. City of Revere*, 423 Mass. *supra* at 582, citing *Elrod v. Burns*, 427 U.S. 347, 373-4 (1976) (plurality).

E. DUE TO THE AVAILABILITY TO THE DEFENDANTS OF MEANS THAT DO NOT INFRINGE ON FREE SPEECH TO PREVENT AND DETER ISSUERS OF UNREGISTERED SECURITIES FROM UNLAWFULLY SELLING THEM TO UNACCREDITED INVESTORS, THE DEFENDANTS WOULD SUFFER LESS HARM FROM THE ISSUANCE OF AN INJUNCTION THAN THE PLAINTIFFS WOULD SUFFER IF THE INJUNCTION IS DENIED, AND AN INJUNCTION WILL PROMOTE THE PUBLIC'S INTEREST IN THE PROTECTION OF CONSTITUTIONAL RIGHTS WITHOUT HARMING THE PUBLIC INTEREST IN PREVENTING THE SALE OF UNREGISTERED SECURITIES TO UNACCREDITED INVESTORS.

Obviously, the defendants presently have authority to bring an enforcement action against an issuer who unlawfully sells an unregistered security to a Massachusetts investor who is not accredited. If the preliminary injunction is granted, the defendants' ability to enforce the securities laws that make such sales illegal would suffer no cognizable harm if issuers of unregistered securities were allowed to freely disseminate, as the plaintiffs have done, truthful information that "even though not couched in terms of an express offer," do no more than "condition the public mind or arouse public interest

in the particular securities." In fact, the allegedly dangerous information that is the subject of the administrative complaint which was available on the Bulldog Investors website is currently accessible to the public on the Secretary's own website.

On the other hand, it is difficult to overstate the paramount public interest in the free exchange of ideas and information about unregistered securities, including the Bulldog funds, which would be effectuated by the issuance of the preliminary injunction.

II. A PRELIMINARY INJUNCTION IS APPROPRIATE AND NECESSARY IN THIS CASE TO PROTECT THE PLAINTIFFS' FREE SPEECH AND PRESS RIGHTS.

A. THE RIGHT TO PUBLISH AND TO RECEIVE INFORMATION ABOUT FINANCIAL PRODUCTS AND SERVICES IS FULLY PROTECTED BY THE FEDERAL AND MASSACHUSETTS CONSTITUTIONS.

The defendants' administrative complaint and proceeding seeks to apply securities laws and regulations so as to impose broad advertising and solicitation bans that virtually never survive First Amendment review. "To endeavor to support a restriction upon speech by alleging that the recipient needs to be shielded from that speech for his or her own protection, which is the gravamen of [the defendants'] claim here, is practically an engraved invitation to have the restriction struck." *Washington Legal Foundation v. Friedman,* 13 F.Supp. 2d. 51, 58 (D.D.C. 1998) (bracketed words supplied). These bans are content-based attempts to censor speech on financial and investment- related subjects. Communications concerning securities-related subject matter (including communications concerning unregistered securities and Bulldog Investors securities in particular), are no less entitled to the fullest First Amendment and Article XVI protection than communications that do not concern securities.

In *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976),* the Court held that speech that does "no more than propose a commercial transaction" was protected by the First Amendment, and struck down a ban on price advertising regarding prescription drugs. The Court observed that a "particular consumer's interest in the free flow of commercial information" may be as keen as, or keener than, his interest in "the day's most urgent political debate," *id. at 763,* and that "the proper allocation of resources" in our free enterprise system requires that consumer decisions be "intelligent and well informed," *id. at 765.* The Court also explained that, unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how that system ought to be regulated or altered." *Ibid.* See also *id. at 765-766, n. 19-20.* The Court sharply rebuffed the State's argument that consumers would make irresponsible choices if they were able to choose between higher priced but higher quality pharmaceuticals accompanied by high quality prescription monitoring services resulting from a "stable pharmacist-customer relationshi[p]," *id. at 768,* on the one hand, and cheaper but lower quality pharmaceuticals unaccompanied by such services, on the other:

> The State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> . . . .
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

> Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is." *Id. at 769-770* (citation omitted).

Regulators may protect the state interest in preventing issuers of unregistered securities from selling them to unaccredited investors. They may not prevent public, educational and media acquisition of nothing more than information about unregistered securities.

B. REQUIRING AN ISSUER TO REGISTER SECURITIES AS A PRECONDITION TO COMMUNICATING INFORMATION ABOUT THEM THAT "EVEN THOUGH NOT COUCHED IN TERMS OF AN EXPRESS OFFER" DOES NO MORE THAN "CONDITION THE PUBLIC MIND OR AROUSE PUBLIC INTEREST IN THE PARTICULAR SECURITIES" IMPOSES AN UNCONSTITUTIONAL SPEECH-LICENSING REQUIREMENT.

Unless enjoined, the defendants' administrative complaint and proceeding seeks to punish and deter the plaintiffs from publishing and receiving information about securities and securities-related services unless the securities are registered. Plaintiff Leonard Bloness has a clear constitutional right to read and receive information available via the Bulldog Investors website.

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont v. Postmaster General, 381 U.S. 301 (1965),* the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972),* we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "'necessarily protects the right to receive.'" And in *Procunier v. Martinez, 416 U.S. 396, 408-409 (1974),* where censorship of prison inmates' mail was under examination, we thought it

> unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See, e.g., *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. Struthers, 319 U.S. 141, 143 (1943).* If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976) (emphasis supplied, footnotes omitted).

Fundamental First Amendment law forbids any form of licensing or registration requirement as a pre-condition to the exercise of the right to publish or receive information. *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Securities laws and regulations that purport to infringe on speech and communications are not immune from First Amendment scrutiny. *Lowe v. SEC*, 472 U.S. 181, 211-236 (1985)(concurring opinion); *SEC v. Bount*, 61 F.3d 938, 941-43 (D.C. Cir. 1995); *SEC v. Blavin*, 557 F.Supp.1304, 1309-10 (E.D. Mich. 1983); *See also Commodity Trend Service, Inc v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 686 (7th Cir. 1998) (Commodity Exchange Act's registration requirement implicating First Amendment); *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, No. 97 C2362, 1999 U.S. Dist. LEXIS 15877, at *47 (N. D. Ill September 29, 1999) (striking Commodity Exchange Act's registration requirement).

C. UNLESS ENJOINED, THE DEFENDANTS WOULD SEEK TO IMPOSE AN UNCONSTITIONAL PRIOR RESTRAINT ON SPEECH.

The cease and desist order sought in the defendants' administrative proceeding would broadly and prospectively prohibit plaintiffs from communicating truthful information about unregistered securities issued by the Bulldog funds which may be lawfully sold to accredited investors. If the prior restraint against publication of the Pentagon Papers failed to survive strict First Amendment scrutiny, there can be no doubt that the order sought to be imposed by the defendants would be constitutionally infirm. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931).

D. THE BROAD CONTENT-BASED BAN ON COMMUNICATIONS SOUGHT BY THE DEFENDANTS MUST OVERCOME STRICT FIRST AMENDMENT SCRUTINY, INCLUDING THE LEAST RESTRICTIVE ALTERNATIVE REQUIREMENT.

The sweepingly broad prohibition sought by the defendants on communications to the public concerning unregistered securities-related subject matter, including communications concerning securities issued by the Bulldog funds, is a content-based speech ban that must overcome strict scrutiny, including the requirement that the government use the least restrictive means to advance a compelling government interest. *United States v. Playboy Entm't Group,* 529 U.S. 803, 813 (2000); *Benefit v. Cambridge,* 424 Mass. 918, 926 n.6 (1997); *Boston v. Back Bay Cultural Ass'n,* 418 Mass. 175, 182 (1994). As we have noted, there are certainly far less restrictive and effective means to prevent issuers of unregistered securities from selling them to unaccredited investors without imposing the ban on speech sought to be imposed by the defendants.

E. THE PLAINTIFFS' SPEECH IS NOT COMMERCIAL SPEECH TO WHICH LOWER FIRST AMENDMENT SCRUTINY WOULD APPLY.

The core notion of commercial speech is "speech which does `no more than propose a commercial transaction.'" *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 762, *quoting, Pittsburgh Press Co. v. Human Relations Comm'n.,* 413 U.S. 376, 385 (1973). The record shows that no one may invest in the Bulldog funds without being interviewed and signing a written subscription agreement warranting that they are an accredited investor. Goldstein Aff. at ¶ 10. No one, including Brendan Hickey, could obtain detailed financial performance information from the Bulldog Investors website without expressly agreeing that the website did not constitute or include a solicitation to buy, or an offer to sell, any security. Goldstein Aff. at ¶ ¶ 5, 6 and 9.[5] The Bulldog Investors website provided accurate, non-misleading information of interest to persons who do not desire to purchase unregistered securities issued by Bulldog funds, including journalists, academics, legislators, regulators, and others interested in hedge funds, including Plaintiff Leonard Bloness. Bloness Aff. at ¶ ¶ 2-3. Moreover, the Plaintiffs' speech includes discussion of shareholder activist strategies, which constitute an important form of political, economic and financial democracy and debate.[6] *See* pages from Bulldog Investors Website, attached to this

[5] Such agreements, sometimes referred to as "click-wrap agreements," are valid and enforceable contracts. *See, e.g., Waters v. Earthlink, Inc.*, No. BACV01-11887WGY, 2006 WL 1843583 , at *3 (Mass. Super. Ct. June 19, 2006) ("A click-wrap agreement insures that a party clicks his agreement to a contract before proceeding to use certain electronic material."); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp.2d 756, 783 (N.D. Tex. 2006) ("[T]he Court finds that clickwrap licenses, such as at issue here, are valid and enforceable contracts."); *Seibert v. Amateur Athletic Union of U.S., Inc.*, 422 F.Supp.2d 1033, 1039-1040 (D. Minn. 2006) ("The AAU requires that those wishing to become members "click" on the page which states that any disputes are subject to arbitration. This Court finds that the 'click' represents assent to the contract, including the arbitration clause. Most courts which have considered the issue have upheld . . clauses in so-called 'clickwrap' or 'shrinkwrap' form contracts. These occur when the terms are provided online, or only after plaintiffs have manifested assent.")

[6] Pubic debate about shareholder activism and strategies is intense and widespread. Ethiopis Tafara, Director, Office of International Affairs, U.S. Securities and Exchange Commission, Remarks on UK and US Approaches to Corporate Governance and on the Market for Corporate Control, Madrid, Spain and London, England (February 8-9, 2007) *available at*

Complaint as Exhibit 1 and to the Administrative Complaint as Exhibit A, at *3-5; Bulldog presentation, attached to Administrative Complaint as Exhibit C-3, at *3-4, 6-13; Dear Partner letter, attached to Administrative Complaint as Exhibit C-4, Press articles entitled "Activism Boosts Manager's Returns," and "Blair Seeks to Raise $180M," attached to Administrative Complaint as Exhibit C-6 (discussions of shareholder activism investment strategies and its benefits). On this record, no commercial transaction is being proposed so as to make the commercial speech standard of review applicable.

F. EVEN IF THE SPEECH AT ISSUE IS DEEMED TO BE COMMERCIAL SPEECH, THE DEFENDANTS' ENFORCEMENT ACTION UNCONSTITUTIONALLY RESTRICTS THE PLAINTIFFS' RIGHTS TO SPEAK AND RECEIVE INFORMATION CONCERNING UNREGISTERED SECURITIES ISSUED BY THE BULLDOG FUNDS.

The Supreme Court has acknowledged that five Justices (Stevens, Kennedy, Ginsburg, Thomas and Scalia) have expressed doubt that a less strict level of First Amendment scrutiny should apply to commercial speech. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 554 (2001). Justice Thomas summarized the reasons for doubt that the commercial speech standard will remain the law:

> In case after case following *Virginia Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market

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http://www.sec.gov/news/speech/2007/spch020807et.htm; Frel, Jan, Corp Watch, *'Tis the Season for Shareholder Activism*, (5/4/05) *available at* http://www.corpwatch.org/article.php?id=12195; Friends of the Earth International, *Confronting Companies Using Shareholder Power: A Handbook on Socially-Oriented Shareholder Activism*, Friends of the Earth International (June 1999), at http://www.foe.org/international/shareholder; Grefe, Edward & Martin Linsky, *The New Corporate Activism: Harnessing the Power of Grassroots Tactics for Your Organization* (McGraw-Hill 1995).Martin Lipton and Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 THE BUSINESS LAWYER, November 2003, at 67; Michael Rubach, *Institutional Shareholder Activism: The Changing Face of Corporate Ownership* (Garland 1999); Public Citizen, *Corporate Cronies: How the Bush Administration Has Stalled a Major Corporate Reform and Placed the Interests of Donors over the Nation's Investors*, Committee of Concerned Shareholders (October 2004), at http://www.concernedshareholders.com/CCS_Corporate_Cronies.pdf.

> economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 520 (1996) (concurring opinion) (footnote omitted).

Even if the communications at issue here could be deemed commercial speech under existing federal constitutional standards, this Court should decline to apply lowered scrutiny because Article XVI of the Massachusetts Declaration of Rights can and should be interpreted to provide greater protection to free speech than the First Amendment. *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 190-191 (2005) ("Federal rule [did] not adequately protect the rights of the citizens of Massachusetts under art. 16.").

G. EVEN IF THE COMMUNICATIONS AT ISSUE ARE DEEMED TO BE COMMERCIAL SPEECH TO WHICH LOWER FIRST AMENDMENT SCRUTINY APPLIES, THE DEFENDANTS' ENFORCEMENT ACTION SHOULD BE ENJOINED AS UNCONSTITUTIONAL.

The Supreme Court established a four-part test to determine the constitutionality of a ban on commercial speech. First, the speech must not be misleading or propose an illegal transaction. Second, the government must have a substantial interest to be achieved by restricting the speech.[7] Third, the regulation must directly advance the substantial state interest. Fourth, the regulation cannot be more extensive than necessary to serve the government interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001), quoting *Central Hudson v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

[7] Unlike the rational basis test, the court is not permitted to substitute its own perceived state interests for those articulated by the government. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

Nothing in the record provides a basis for the government to argue, much less a basis for a judicial finding, that the communications at issue were false, misleading, or concern an illegal transaction. Unregistered securities issued by Bulldog Funds may be sold lawfully to accredited investors. Hence, the communications concern the sale of a lawful product or service.

The governmental interest served by the ban on communications is to prevent issuers of unregistered securities from selling them to unaccredited investors. That interest is arguably substantial because of concern that unaccredited investors are not sophisticated enough about securities and markets and wealthy enough to evaluate and bear the risk of investing in unregistered securities.

With respect to *Central Hudson's* third prong, "the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564 (emphasis added). The ban sought to be enforced here would apply to any communication by an issuer of unregistered securities that includes information that "even though not couched in terms of an express offer," does no more than "condition the public mind or arouse public interest in the particular securities." Manifestly, the ban sought to be enforced by the defendants does not directly advance a government interest in preventing an issuer of unregistered securities from selling them to unaccredited investors. Because the ban applies (1) no matter how disconnected or remote the communication may be from the consummation of any sale or transaction involving unregistered securities, much less an illegal sale or transaction, and (2) no matter how remote the risk created by the communication that an unregistered security might be unlawfully sold to an unaccredited

Massachusetts investor, it advances the government's interest, at most, only in an indirect, ineffective, unfocused and remote manner.

Central Hudson's fourth prong (whether the restriction is "not more extensive than necessary" to serve the government's interest, 447 U.S. at 566) is the most demanding and invalidates virtually all restrictions on truthful advertising of lawful products and services. The Court has elaborated the fourth prong by holding that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, it must do so." *Thompson v. Western States Medical Center, supra,* 535 U.S. at 371. Here, the defendants seek to enforce a ban on communications that do no more than "condition the public mind or arouse public interest in the particular securities." This is anything but a non-speech-restrictive means of preventing issuers of unregistered securities from selling them to unaccredited investors, and broadly suppresses an issuer's communications with persons who have no interest in purchasing unregistered securities, including journalists, academics, and the intellectually curious such as plaintiff Leonard Bloness. Indeed, the evidence will show that Mr. Hickey sought to obtain information from the Bulldog Investors website, not with any thought of purchasing securities, but solely for the purpose of using it in a lawsuit.

The *Thompson* case controls here because its facts and analysis fit this case tightly. In *Thompson*, "compounded" drugs created by a pharmacy by mixing, combining, or altering ingredients so as to customize them for a narrow category of patients for whom they are prescribed by a doctor, are exempt from regulatory requirements imposed on all new drugs by amendments to the Food, Drug and Cosmetic Act ("FDAMA"), just as unregistered securities (which may be sold only to accredited

investors) are exempt from registration and other requirements imposed by the securities laws and regulations. The FDAMA exempted "compounded" drugs so long as prescriptions for them were "unsolicited" and that providers of them "not advertise or promote the compounding of any drug, class of drug, or type of drug" just as the securities laws and regulations sought to be enforced here ban similar communications with respect to unregistered securities. 535 U.S. at 364-5. The Court held that the FDAMA could not constitutionally condition the exemption of a pharmacy that produces compounded drugs from FDA regulation (here, an issuer of unregistered securities exemption from securities law requirements) on refraining from advertising and solicitation for failure to satisfy the *Central Hudson* test's final prong. *Id.* 371-373 ("If the First Amendment means anything, it means regulating speech must be a last – not first—resort. Yet it seems to have been the first strategy the government thought to try."). The FDAMA restricted advertising and solicitation "of course, not just to those who do not need compounded drugs, but to those who do need compounded drugs and their doctors." *Id.* 375-376. Here, the securities laws, as applied to the Bulldog Investors website and communications with Brendan Hickey, ban "advertising" and "solicitation" to accredited and unaccredited investors alike. The Court rejected government arguments that the FDAMA's bans would reduce demand for unregulated drugs from patients for whom such drugs are inappropriate or even potentially harmful because they have no way to evaluate the risks to health posed by such drugs. This Court should reject similar arguments to support broad bans on "solicitation" and "advertising" of unregistered securities.

The truthful communications the defendants seek to ban are useful and beneficial to both accredited and unaccredited investors including Mr. Bloness, to financial journalists, academia, shareholder activists, and the merely curious. The *Thompson* opinion teaches that the defendants' broad bans on useful communications cannot survive free speech and free press scrutiny. "If the Government's failure to justify its decision to regulate speech were not enough to convince us that the FDAMA's advertising restrictions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be." *Id.* 376.

The defendants seek to restrict issuers of unregistered securities from communicating any information about such securities to anyone who is not an accredited investor. Their rationale is that unless this unconstitutionally overbroad restriction is enforced, an unaccredited investor might be induced or tempted to buy unregistered securities from the issuer even if the issuer (like Bulldog Investors) does not permit unaccredited investors to purchase its securities. This makes no sense. Moreover, the government cannot enforce a sweepingly overbroad, prophylactic prohibition against issuers' communications about unregistered securities to prevent unaccredited investors from buying unregistered securities, because such a "fence around the law" suppresses constitutionally-protected speech.

The First Amendment and Article XVI do not permit truthful communications about lawfully saleable unregistered securities to be confined, by the defendants' unconstitutional threat of a cease and desist order and a fine, to word-of-mouth circulation among the rich. In *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001), the Court invalidated for failure to comply with the fourth prong of the *Central Hudson* test

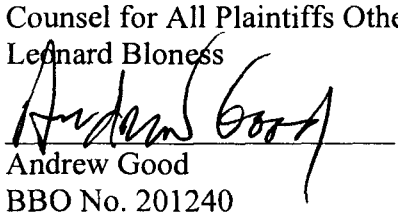
Massachusetts regulations that banned outdoor and point-of-sale advertising of tobacco products near schools even though Massachusetts had a substantial interest in suppressing tobacco sales to children. *Lorillard* forbids a government-enforced restriction of an issuer's advertising of, or solicitations to buy, its unregistered securities so that the communications reach only the rich.

CONCLUSION

For the foregoing reasons, plaintiffs have shown far more than a substantial likelihood that their free speech and free press claims will prevail. Alternatively, because the balance of harms and equities favor them strongly, the plaintiffs certainly have shown a substantial possibility that these claims will succeed. The plaintiffs should neither be burdened by the threat of government imposed sanctions for exercising their constitutional rights to reactivate the Bulldog Investor website, nor should they be burdened by having to expend time and money to oppose the administrative complaint. The movants' motion for a preliminary injunction should be allowed.

Respectfully submitted,

Counsel for All Plaintiffs Other Than Leonard Bloness



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The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth

Laurie Flynn
Chief Legal Counsel

July 25, 2007

Diane Young-Spitzer
Acting Director
Securities Division
One Ashburton Place
Boston, MA 02108

Dear Ms. Young-Spitzer:

Pursuant to 950 CMR 10.02 (b)8 and 10.09 (p) enclosed please find Recommended Findings Of Fact And Conclusions Of Law Relative To The Division's And Respondents' Motions For Summary Decision In The Matter of Bulldog Investors General Partnership, et. al., Respondents, Docket No. E-07-002.

Please note that I did not specify the amount of the administrative fine to be paid by Respondents. If you need additional information to determine the appropriate amount, you may refer the issue back to me for further proceeding in accordance with 950 CMR 10.09 (p).

If you determine to issue a Final Order without further proceedings, the Division has requested a ten (10) day stay of the imposition of sanctions against Respondents to allow the Massachusetts Superior Court to rule upon Respondents' motion for a preliminary injunction in the matter of *Bulldog Investors Gen. Partn. v. Galvin* BLS No. 07-1261 (Mass Super. Mar 23, 2007).

Respectfully submitted

Laurie Flynn
Presiding Officer

LF/prg

COMMONWEALTH OF MASSACHUSETTS
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In the Matter of: BULLDOG INVESTORS GENERAL PARTNERSHIP, 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 and RAJEEV DAS, Respondents	)	Docket No.: E-07-0002

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATIVE TO THE DIVISION'S AND RESPONDENTS' MOTIONS FOR SUMMARY DECISION

Introduction And Relevant History

On January 31, 2007 the Enforcement Section ("Enforcement Section") of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth ("Division") initiated this adjudicatory proceeding against respondents Bulldog Investors General Partnership, 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 and Rajeev Das for violating M.G. L. c.110A, the Massachusetts Uniform Securities Act (the "Act") and 950 CMR 10.00 et seq.

("Regulations"). The Complaint alleges that Respondents offered securities for sale in the Commonwealth that were not properly registered or exempt in accordance with section 301 of the Act. The Enforcement Section seeks an order instructing Respondents to permanently cease and desist from committing any further violations of the Act, to pay an administrative fine in an amount and upon such terms as may be ordered, and to take any and all actions necessary to ensure that the offer or sale of securities in the Commonwealth are in accordance with Section 301 of the Act and to take any other appropriate action, which may be in the public interest and necessary for the protection of Massachusetts investors. Respondents answered on February 21, 2007 denying the allegations in the Complaint and raising certain affirmative defenses, including that the Complaint abridged Respondents free speech in violation of the First Amendment to the United States Constitution and the Massachusetts Declaration of Rights and due process rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Massachusetts Declaration of Rights.[1]

The matter is before me on the Division's motion for summary decision and Respondent's opposition thereto and Respondent's cross-motion for summary decision and Division's opposition thereto. The Division alleges that Respondents violated section 301 of the Act by offering securities for sale in the Commonwealth that were not registered, were not exempt from being registered and were not federally covered securities. Conversely, Respondents claim the Division has failed to establish that Respondents made a non-exempt offer of securities in the Commonwealth, failed to establish jurisdiction over Respondents and

[1] On March 23, 2007 Respondents filed a Motion to Stay the Administrative Proceedings to pursue the infringement of Respondents' free speech and free press rights. The Motion to Stay was denied on March 26, 2007. Respondents also filed a corresponding action in Suffolk Superior Court, Bulldog Investors General Partnership, et. al v. William F. Galvin, Secretary of the Commonwealth, et al, Civil Action No. 07-1261-BLS.

failed to establish individual liability for each Respondent. Finally, Respondents argue that if an offer of securities was made in the Commonwealth, the transaction was exempt pursuant to the Internet Offering Exemption.

SUMMARY DETERMINATION

The Massachusetts Code of Regulations for the Conduct of Adjudicatory Proceedings before the Securities Division (950 CMR 10.00) authorizes the presiding officer to direct summary decision as to all or any part of a matter (950 CMR 10.07(f)). Summary Decision is appropriate where the pleadings, affidavits and admissions establish all material facts and that the moving party is entitled to judgment as a matter of law. E Amanti & Sons Inc. v. RC Griffin Inc., 53 Mass. App. 245, 249 (Nov. 21, 2001); Blount v. Denault, 27 Mass. App. 524 (June 29, 1989). The record must be examined in the light most favorable to the party opposing the motion.

UNDISPUTED FACTS

The evidence presented through the pleadings, affidavits, admissions and documents establish the following undisputed facts:

1. Bulldog Investors General Partnership ("Bulldog Investors") is a general partnership. Bulldog Investors' general partners include Opportunity Partners L.P., Full Value Partners L.P., and Opportunity Income Fund, L.P., each of which is a private investment partnership ("hedge fund"); Kimball & Winthrop, Inc. is a managing general partner of Bulldog Investors. (Respts. Ans. ¶¶ 6, 10).

2. Opportunity Partners Limited Partnership ("Opportunity Partners Fund"), organized under the laws of Ohio, is a general partner of Bulldog Investors with at least one limited partner who is a resident of Massachusetts. It is one of three distinct investment vehicles offered by Bulldog Investors. (Respts. Ans. ¶ 7, Exhibit D p. 5, 6).
3. Full Value Partners L.P., ("Full Value Fund") a Delaware limited partnership, is a general partner of Bulldog Investors. (Respts. Ans. ¶ 8, Goldstein Aff. ¶ 11). It is one of three distinct investment vehicles offered by Bulldog Investors. (Exhibit D p.5, 6).
4. Opportunity Income Plus Fund ("Income Plus Fund") Limited Partnership, a Delaware limited partnership, is a general partner of Bulldog Investors. (Respts. Ans. ¶ 9, Goldstein Aff. ¶ 13). It is one of three distinct investment vehicles offered by Bulldog Investors. (Exhibit D p.5, 6).
5. Opportunity Partners L.P., Full Value Partners L.P. and Opportunity Income Plus Funds L.P. operate under the name "Bulldog Investors". (Goldstein Aff. ¶ 2).
6. Kimball & Winthrop, Inc. ("Kimball & Winthrop"), an Ohio corporation, is a managing general partner of Bulldog Investors. Kimball & Winthrop is the sole general partner of the Opportunity Partners Fund and is the advisor to Bulldog Investors and the Opportunity Partners Fund. (Respts. Ans. ¶ 10).
7. Full Value Advisors, LLC ("Full Value Advisors") is the sole general partner and investment advisor to the Full Value Fund. (Respts. Ans. ¶ 11).
8. Spar Advisors LLC ("Spar Advisors") is the sole general partner and investment advisor to the Income Plus Fund. (Respts. Ans. ¶ 12).

9. Phillip Goldstein ("Goldstein") is the president of Kimball & Winthrop and co-founder of Bulldog Investors. Goldstein is a managing member of both Full Value Advisors and Spar Advisors. (Respts. Ans. ¶ 13).

10. Steven Samuels ("Samuels") is a co-founder and principal of each of Respondent entities. Samuels is a registered representative of Samuels Chase & Co., Inc. His Central Registration Depository ("CRD") number is 1001046. (Respts. Ans. ¶ 14).

11. Andrew Dakos ("Dakos) is a principal of each of the Respondent entities. Dakos was formerly registered with Elmhurst Capital, Inc. and his CRD number is 4881082. (Respts. Ans. ¶ 15).

12. Rajeev Das ("Das") is a principal of Bulldog Investors. Das was formerly registered with Muriel Siebert & Co., Inc. and his CRD number is 2265104. (Respts. Ans. ¶ 16).

13. On or about June 9, 2005 and continuing through January 5, 2007 Bulldog Investors maintained an interactive website at http://www.bulldoginvestors.com. (Exhibit A).

14. The web site provided information about investment products offered by Bulldog Investors. (Exhibit A).

15. Certain information, including press articles, and a printable brochure identifying Bulldog and its investment funds (Exhibit A) were readily available. The brochure provided in part:

> "**INVESTMENT SERVICES**
>
> Bulldog offers three distinct investment vehicles:
>
> **Opportunity Partners**
>
> Opportunity Partners is a highly diversified fund primarily invested in publicly-traded closed-end mutual funds and operating companies that are selling substantially below their intrinsic

values. Opportunity Partners applies the firm's proprietary investment methodology to "unlock" these values. Opportunity Partners will also hedge when deemed appropriate.

Full Value Partners

Full Value Partners is a fund that concentrates on taking substantial positions in undervalued operating companies and closed-end mutual funds. Full Value Partners acts as a catalyst to "unlock" these values through proprietary means. Full Value partners will hedge when deemed appropriate.

Income Plus Fund

Income Plus Fund is a low-risk fund that primarily invests in undervalued income producing closed-end funds, real estate investment trusts, and other investments. Income Plus Fund attempts to produce better current returns with less risk than is achievable in the bond markets. The fund also anticipates compounding of capital in addition to generating high current income. Income Plus Fund will hedge as deemed appropriate."

This information was also available by clicking on the hyperlink identified as "services". (Exhibit D) Further, if one clicked on the hyperlink entitled "The Key" the following message would appear:

"Bulldog Investors has delivered a net average annual return significantly higher than that of the S&P 500 Index. Moreover Bulldog has performed especially well in difficult investment periods like 2000 through 2002." (id.)

16. Additional information could be accessed by clicking "I Agree" to the following 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 the conclusions based upon such information, which has been obtained from third parties.

The Rates 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."

I AGREE

(Goldstein Aff. ¶ 6).

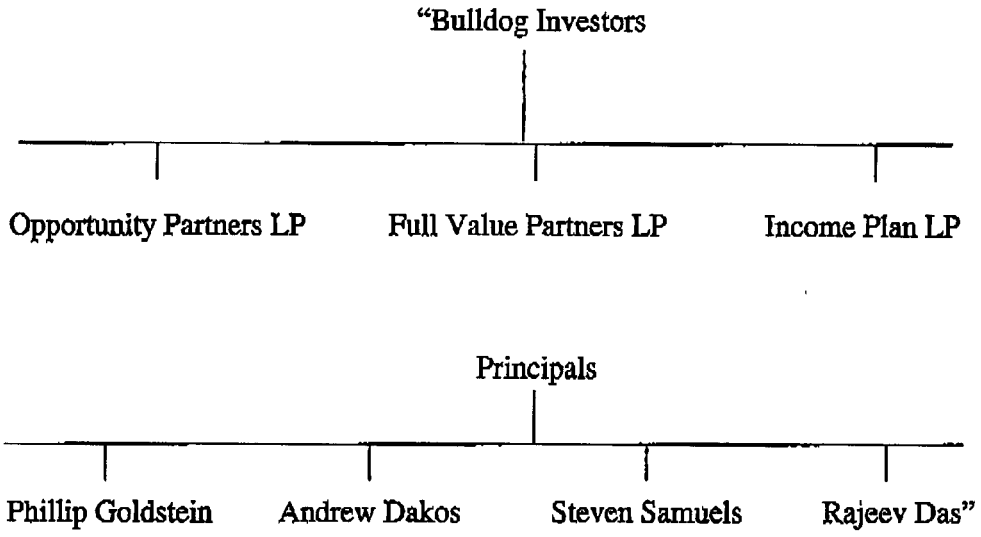
17. More specific information about the hedge funds and their financial performance was available by registering with Bulldog Investors and requesting such information by clicking on a button labeled "send feedback". (Respts. memorandum in support of their cross motion for summary decision ¶ 13).

18. At least one Massachusetts resident ("resident") provided his name, address, telephone fax number and e-mail address to Bulldog Investors via the website. Consequently, Steven Samuels, provided the resident additional information about the hedge funds, financial performance data, and specific examples of investments. (Respts. Ans. ¶ 28, Goldstein affidavit Exhibit B). The e-mail provided as follows:

> "Thank you for your interest in Bulldog Investors. 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 203 222 0609. Regards, Steven Samuels Bulldog Investors (203) 222-0609" (Respts. Ans. 34).

19. One of the attachments to the e-mail contained investment strategy, manager backgrounds and fund performance for Full Value Partners, L.P. (Respts. Ans. 36, Exhibit C1).

20. Another attachment provided a presentation that included firm overview for Bulldog Investors as follows:



21. The presentation also included a investment philosophy, investment process, an investment table comparing Bulldog's returns to the S& P 500, performance updates for the three funds, several examples of the funds' recent success and the summary information regarding the background of Goldstein, Samuels, Dakos and Das. (Exhibit C1).

22. Another attachment included a letter from Dakos and Goldstein addressed "Dear Partner" and which contains performance data and investment strategies. (Exhibit C1).

23. Another attachment provided a detailed monthly breakdown of return estimate for the Full Value Fund L.P. (Exhibit C1).

24. Three additional attachments included news articles concerning Goldstein and/or Bulldog Investors. (Exhibit C1).

25. Goldstein and Samuels of Kimball & Winthrop filed a Form D – Notice of Sale of Securities pursuant to Regulation D, Section 4(6) and/or Uniform Limited Offering

Exemption ("Form D") with the SEC on or about December 17, 1992 on behalf of the Opportunity Partners Funds. (Respts. Ans. ¶ 51).

26. Goldstein, Dakos and Samuels of Full Advisors LLC filed a Form D with the SEC on or about October 17, 2001 on behalf of the Full Value Fund pursuant to Rule 506 of the Securities Act of 1933. (Respts. Ans. ¶ 54).

CONCLUSIONS OF LAW

PART I– Offer of securities for sale in the Commonwealth

The Act 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 a federally-covered security. (G.L. c.110A § 301). It (the Act) defines an "offer" or "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)). Further, the Act provides that it should be construed to coordinate its interpretation and administration in a manner consistent with related federal regulation. (G.L. c.110A § 415).

Whether or not published material constitutes an offer depends upon all the facts and circumstance. See Carl M. Loeb, Rhodes and Co., 38 SEC 843. An "offer" for purposes of securities regulation, extends beyond the common law concept of offer. SEC v. Cavanaugh, 155F 3rd 129, 135 (2nd Cir 1988). It includes information that even though not couched in terms of an express offer, conditions the public interest in particular securities. See Carl M. Loeb, Rhodes & Co., 38 SEC 843, 850.

Applying those concepts to the matter at hand, it is clear respondents have offered securities[2] for sale in the Commonwealth. Respondents are in the business of providing investment opportunities to sophisticated investors. They are not journalists or academicians or others involved in the business of education or providing information to the general public. The information provided referenced specific investment opportunities in funds they offered for investment, including detailed performance information and investment strategy, manager background, investment and fee information. It compared returns of their securities with the S & P 500 index and included a letter addressed "Dear Partner". Finally, the information was directed via e-mail attachments to a Massachusetts resident.

Respondents argue that the website did not constitute an offer because in order to access information beyond the opening page, resident had to agree that:

> "the information 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 circumstance in which such offer or solicitation is unlawful or not authorized."

Additionally, respondents argue, in order to obtain more specific information about the funds and their performance, resident was required to register and request such information. The registration process also required resident to indicate agreement that the information provided was not an offer or solicitation. They argue that such an

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[2] There is no doubt that the products offered by Respondents are securities. Respondents Opportunity Partners L.P., Full Value Partners L.P. and Opportunity Income Plus Fund L.P. are investment companies which operate under the name Bulldog Investors. Opportunity Partners Fund L.P. and Full Value Partners L.P. have filed form D with the SEC pursuant to Rule 506 of the Securities Act of 1933.

agreement is a "click wrap agreement" and is valid and enforceable under Massachusetts law.

Respondents' argument is not persuasive. The Act, like its federal counterpart, is remedial in nature. It is designed to protect the public by requiring full disclosure from those offering securities for sale in the Commonwealth. Consequently, a disclosure such as the one provided by respondents cannot be used to defeat a claim that an offer has been made. This position is consistent with the position of the SEC, which has consistently declined to allow disclaimers similar to the one in the instant matter to defeat a claim that an offer has been made. Kenman Corp., Admin. Rec. file No. 3-6505, 1985 SEC Lexis 17217 (April 19, 1985; SEC v. Liberty Petroleum Corp. [1971-1972 Transfer Binder]; Fed. Sec. L. Rep (CCH) ¶93, 209 (N.D. Ohio Sept. 2, 1971)). Similarly, the registration requirement cannot be used to defeat such a claim where the information requested would not enable respondents to judge the recipient's financial sophistication. See Use of Electronic Media, Securities Act Release No. 33-7856 (Apr. 28, 2000).

PART II – Unless the security is registered under the Act, the security or transaction is exempt under section 402, or the security is a federally-covered security

Respondents concede that the securities were not registered with the Division.[3] In fact, Respondents argue the securities were exempt from registration because the securities were not offered publicly. Further, they argue the Internet Offering Exemption expressly exempts the offering at issue from registration.

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[3] Respts. Ans. ¶ 17.

With regard to whether the website and e-mail constitute a public offering of the type regulated by the Act, Respondents argue that the record before me is not sufficient to determine whether the purported offering is "public." They argue that whether an offering is public or private is a question of fact that must be resolved by the particular circumstances of each case. See Faye L. Roth Revocable Trust v UBS Paine Webber Inc., 323 F Supp 2d 1279, 1293—194 (SD Fla 2004); Mary S Krech Trust v Lakes Apartments, 642 F2 98, 101 (5th Cir 1981). Further, they argue that in order to determine whether an offer is public or private, one must evaluate the information available to the offerees to determine whether it is the type of information available in a registration statement. See Mary S Krech Trust, 642 F2d at 101. In each case cited by Respondents, the offeror met all the requirements of an applicable exemption to registration. The issue, then, is not whether the offering is public or private, but whether the securities were registered in the event of a public offering or met the requirements of an applicable exemption in the event of a private offering. The question remains whether there is an exemption or exception available to Respondents in the instant matter.

Section 402 (d) of the Act provides that in any proceeding under the Act, the burden of proving an exemption or exception is on the person claiming it. The only exemption Respondents have raised in this proceeding is the Internet Offering Exemption. That exemption is found at 950 CMR 14.02(b)(13)(m) and provides:

> "Internet offers An offer but not a sale, of a security communicated through proprietary or "common carrier" electronic delivery systems, Internet and World Wide Web or similar medium, provided that such offers are not directed toward any investor or group of investors in the Commonwealth and no sales are made in the Commonwealth unless the securities are registered or exempt from

registration under the Act and 950 CMR 14.400. If an offer hereunder contains indications that the offer is not being made in jurisdictions where it is not registered or appropriately exempted, then it will be presumed that the offer is not specifically directed to prospective investors in the Commonwealth."

Respondents argue that the exemption expressly recognizes the validity of the type of disclaimer employed on the Bulldog Investors website and establishes a presumption that the "offer is not directed to Massachusetts residents". The presumption cited by Respondents is not conclusive. It merely gives rise to the inference that an offer has not been made in the Commonwealth by the mere availability of offering material on a website if that website also contains a disclaimer that an offer is not being made in any jurisdiction where it is not registered or exempt. That presumption was rebutted in the matter at hand when Samuels, on behalf of Bulldog Investors, directed an e-mail containing offering material to a resident in Quincy, Massachusetts.

Such a construction of the Internet Exemption is consistent with the Division's Interpretive Opinion on the use of the Internet for the dissemination of information on products and services by broker dealers, broker dealer agents, investment advisors and investment advisor representatives. See Concerning Broker-Dealers, Investment Advisors, Broker-Dealer Agents and Investment Advisor Representatives Using the Internet for General Dissemination of Product and Services, Mass. Sec. Div. Interpretive Opinion, Blue Sky Law Rep. (CCH) P 31, 639 June 1, 1997. That opinion sets forth the Division's position that broker dealers, investment advisors, broker dealer agents and investment advisor agents/representatives who use the Internet to distribute information on products or services will not be deemed to be transacting business for purposes of

Sections 201(a) and 201(c) if no follow-up individualized responses are directed to persons in the Commonwealth.

The Division also established that Respondents' securities were not exempt pursuant to 950 CMR 14.402 (B)(13)(1) and Rule 506. 950 CMR 14.402 (B)(13)(1)(i) exempts from registration any offer or sale of securities offered or sold in compliance with the securities act of 1933, Regulation D, Rule 506. Respondents Opportunity Partners L.P. and Full Value Fund L.P. each filed a form D with the SEC pursuant to Rule 506 of the Securities Act of 1933. (Respt. Ans. 51-54 Exhibit I). Nevertheless, Respondents cannot rely on the exemption because the website and e-mail do not comply with the prohibition on general solicitation or general advertising contained in Rule 502 of Regulation D applicable to Rule 506 offerings. (17 CRF 230.502(c)). See Use of Electronic Media, Securities Act Release No. 33-7856 (April 28, 2000); see also Use of Electronic Media for Delivery Purposes, Securities Act Release No. 33-7233 (October 6, 1995). Neither can respondents rely on 950 CMR 14.404(B)(9), the Massachusetts private placement exemption because it also contains a ban on general advertising.

PART III - Personal jurisdiction

Respondents assert that the Division does not have jurisdiction over non-resident respondents under the long arm statute or otherwise. Respondents argue they did not personally transact business in the state and have no legally recognizable nexus to the Commonwealth. Consequently, the assertion of jurisdiction in this matter violates both the Massachusetts Constitution and Respondents' fundamental due process rights guaranteed by the United States Constitution.

M.G.L. c. 233 A § 3 is not applicable to regulatory proceedings. It applies only to actions brought in the courts of the Commonwealth. Further § 414 (c) of the Act expressly contemplates that an offer to sell or buy can be made in the Commonwealth whether or not a party is present in the Commonwealth. Finally, Respondents' argument that jurisdiction does not attach because only one e-mail was directed into the Commonwealth is without merit. Clearly § 301 of the Act applies to single and multiple offers. Respondents' conduct violated § 301 of the Act. Such conduct created a sufficient nexus to the Commonwealth to permit the exercise of personal jurisdiction over them by the Division.

Part IV – Individual liability

Respondents argue that the Enforcement Section has named eleven (11) separate Respondents in the complaint without any legal basis to impute liability among the Respondents. They argue that in the securities context, courts impute one corporate member's liability upon others only in the case of fraud and only where scienter is relevant to the underlying securities charge. See SEC v Manor Nursing Centers, Inc., 458 F 2d 1082, 1089 n 3 (2nd Cir 1972).

The business associations involved in the instant matter are not corporations, with one exception, Kimball & Winthrop, Inc. They consist of partnerships and limited liability companies, which are unincorporated forms of business organizations. Further, with regard to the corporation, Kimball & Winthrop, Inc., the Division is not seeking to impute liability for its actions to any shareholder, officer or director, nor is it seeking to impute the actions of shareholders, officers or directors to it. The case cited is inapplicable to the issue before me.

Nevertheless, it is appropriate to examine the organizational structure and basis of liability for each Respondent.

Bulldog Investors General Partnership is a general partnership. (Respts. Ans. ¶¶ 6, 10). Its partners include Opportunity Partners L.P., Full Value Partners, L.P., Opportunity Income Fund, L.P. and Kimball & Winthrop, Inc. Kimball & Winthrop, Inc. is the managing general partner of Bulldog. (Respts. Ans. ¶ 10). Bulldog maintained a website which indicated that it, "Bulldog", offers three distinct investment vehicles, Opportunity Partners, Full Value Partners and Income Plus Fund. (Exhibit A). The information on the website pertinent to the funds constituted offering material for each fund and was readily accessible to resident by a simple registration process. Full Value Advisors, LLC and Spar Advisors LLC are the sole general partners to the Full Value Fund and the Income Plus Fund respectively. (Respts. Ans. ¶¶ 11, 12). It is well established that general partners in a general or limited partnership manage and direct the business of the partnership and are liable for its obligations. Consequently, each partner of Bulldog and each general partner of the Full Value Fund and Income Plus Fund is liable for the activities of the partnership that constituted a violation of § 301 of the Act.

The website also identified Philip Goldstein, Andrew Dakos, Steven Samuels and Rajeer Das as principals of Bulldog. (Exhibit C1). The term "principal" in agency law and used in this context means a person who controls and directs another to act. The clear implication from the information contained on the website is that Goldstein, Dakos, Samuels and Das directed and controlled Bulldog and its partners relative to the

investment opportunities. Samuels also directed the e-mail containing offering material into the state on behalf of Bulldog and its partners.

The imposition of liability for each Respondent in this matter is consistent with the standard set forth in Section 410 (b) of the Act. That section provides, in pertinent part, for joint and several liability for every person who directly or indirectly controls a seller liable under subsection (a), and every partner, officer or director of such a seller.

In conclusion, I find the Division has established that each respondent named has violated § 301 of the Act by offering unregistered and non-exempt securities for sale in the Commonwealth.

The Division's Motion for Summary Decision is granted. Respondents' Motion for Summary Decision is denied.

PROPOSED ORDER

Having determined that Respondents' conduct violated § 301 of the Act, the actions recommended below are appropriate, in the public interest and are consistent with the purposes fairly intended by the policy and provisions of the Act. Respondents are:

a) instructed to permanently cease and desist from committing any further violation of the Act;

b) directed to pay an administrative fine in an amount not to exceed $25,000.00 as determined by the Acting Director; and

c) to take any and all action necessary to ensure that the offer and sale of securities in the Commonwealth are in accordance with § 301 of the Act.

Respectfully submitted,

Laurie Flynn

Date: July 25, 2007

Laurie Flynn

COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY OF THE COMMONWEALTH
SECURITIES DIVISION
ONE ASHBURTON PLACE, 17TH FLOOR
BOSTON, MASSACHUSETTS 02108

IN THE MATTER OF: BULLDOG INVESTORS GENERAL PARTNERSHIP, 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 RESPONDENTS.	DOCKET NO. E-07-0002

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this date I caused a true and accurate copy of the attached Letter of July 25, 2007 from the Presiding Officer, Laurie Flynn to Diane Young- Spitzer, Acting Director of the Massachusetts Securities Division in this matter and Recommended Findings of Fact and Conclusions of Law Relative to the Division's and Respondents' Motions for Summary Decision issued on July 25, 2007, to be served on the persons listed below:

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Staff Attorney

Dated: July 25, 2007