SJC-12737

NTV MANAGEMENT, INC. vs. LIGHTSHIP GLOBAL VENTURES, LLC, & another.[1]

Suffolk. November 5, 2019. - March 5, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Contract, Performance and breach, Implied covenant of good faith and fair dealing. Consumer Protection Act, Unfair act or practice, Attorney's fees. Securities, Registration of broker-dealer. Practice, Civil, Affirmative defense, Waiver, Consumer protection case, Attorney's fees.

Civil action commenced in the Superior Court Department on January 29, 2016.

Motions for summary judgment were heard by Mitchell H. Kaplan, J.; the remaining issues were tried before Edward P. Leibensperger, J., and posttrial motions were heard by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Daniel N. Marx for the plaintiff.

H. Joseph Hameline for the defendants.

Laurie Flynn, Special Assistant Attorney General, & Diane Young-Spitzer, for Office of the Secretary of the Commonwealth, Securities Division, amicus curiae, submitted a brief.

[1] G. Kent Plunkett.

LENK, J. Plaintiff NTV Management, Inc. (NTV), sued defendant Lightship Global Ventures, LLC (Lightship), alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of G. L. c. 93A. NTV also sued Lightship's principal, defendant G. Kent Plunkett, for violations of G. L. c. 93A. A jury found Lightship liable for breach of contract and breach of the implied covenant of good faith and fair dealing; the jury also found both Lightship and Plunkett liable for violations of G. L. c. 93A, and awarded treble damages. On the defendants' motion, the judge subsequently set aside the jury verdict in its entirety, after concluding that NTV's failure to register as a securities "broker-dealer" rendered its contract with Lightship void and unenforceable.

The principal question presented in this case is whether a contract requiring NTV to "source capital and structure financing transactions from agreed-upon target investors and/or lenders" for Lightship triggered an obligation for NTV to register as a securities broker-dealer under Massachusetts and Federal securities laws. If so, the contract would be invalid and unenforceable. We conclude that the contract in question did not require a transaction in "securities," and thus did not trigger an obligation that the plaintiff register as a broker-

dealer. Therefore, the jury award for breach of the enforceable contract, breach of the implied covenant of good faith and fair dealing, and treble damages under G. L. c. 93A must be reinstated.[2]

1. Background. Lightship, represented by its principal, Plunkett,[3] hired NTV to provide "consulting and advisory services" in connection with Lightship's efforts to acquire "the business and assets" of the website Salary.com from International Business Machines Corporation (IBM).[4] Plunkett, who started Lightship for the purpose of acquiring Salary.com, had commenced negotiations with IBM, but lacking the financial resources to complete the transaction, sought partners to help finance the purchase.

a. The contract. Lightship and NTV executed a contract under which NTV agreed to "serve as consultant and advisor" to Lightship, under the "coordination, oversight, and direction" of

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[2] We acknowledge the amicus brief of the Secretary of the Commonwealth, securities division.

[3] G. Kent Plunkett was the chief executive officer of Lightship Global Ventures, LLC (Lightship), a company he founded in order to pursue this transaction.

[4] Plunkett founded Salary.com and served as its chief executive officer; he subsequently left the company, which eventually was acquired by International Business Machines Corporation (IBM). Plunkett, along with Yong Zhang, the former chief operations officer of Salary.com, then sought to reacquire their former company from IBM.

Plunkett, in "the acquisition" of Salary.com and the "financing transactions" necessary to "facilitate" the acquisition. As "mutually agreed," but with "final determination" by Lightship, NTV was to "source capital" from "agreed-upon target investors and/or lenders," and to assist Lightship, in a "mutually agreed" manner, in "structur[ing] financing transactions" and "facilitat[ing] and participat[ing] in meetings and due diligence with capital sources." If NTV succeeded in finding sources of capital that ultimately were accepted by Lightship and provided capital for the final acquisition, NTV would earn a commission commensurate with that amount of capital. If NTV did not introduce any sources of capital that actually were used in the purchase, but introduced at least ten "qualified sources of capital," it would earn an "advisory fee" of $330,000.

b. The dispute. The parties' relationship quickly soured. Eventually, Lightship terminated the contract and completed its acquisition of Salary.com with the support of a partner not introduced by NTV. Under the terms of the resulting transaction, Lightship and its financial partner agreed to form a new business venture, which in turn would purchase Salary.com from IBM. The financial partner received a majority stake (sixty percent) in that business. Yong Zhang was appointed chief operations officer, and Plunkett was appointed chief executive officer; both Plunkett and Zhang received identical

salaries and were to serve under three-year, renewable contracts. Lightship then took the position that NTV had earned neither a commission nor an advisory fee in the acquisition of Salary.com.

2. Prior proceedings. NTV commenced an action in the Superior Court against Lightship, raising, inter alia, claims of (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) violations of G. L. c. 93A.[5] NTV also raised a G. L. c. 93A claim against Plunkett individually. On the defendants' motion for summary judgment, a Superior Court judge determined that NTV had failed to present sufficient evidence that, even if the defendants had honored the contract, NTV successfully would have introduced capital and earned a commission.[6] The motion judge accordingly limited NTV's

[5] NTV Management, Inc. (NTV), also raised claims against Lightship and Plunkett of (1) promissory estoppel, (2) unjust enrichment, (3) intentional misrepresentation, (4) and violations of the Uniform Fraudulent Transfer Act, and (5) sought to reach and apply against the stock or assets of Salary.com. These claims were dismissed on the defendants' motion for summary judgement, a decision from which NTV appeals. As we conclude that NTV can recover for breach of contract, we need not consider whether NTV could recover under any alternate theory.

[6] NTV likewise appealed from this decision; NTV did not, however, pursue the matter in its brief or in argument before this court, and we therefore deem it waived.

claims to the defendants' failure to pay NTV the $330,000 advisory fee.

A Superior Court jury, at a trial over which a judge who was not the motion judge presided, subsequently found Lightship liable for breach of contract and breach of the implied covenant of good faith and fair dealing, and awarded NTV damages of $330,000.[7] The jury also found that Lightship and Plunkett knowingly or willfully had engaged in unfair or deceptive practices in violation of G. L. c. 93A, and awarded NTV treble damages.

The defendants then moved to "invalidate" the verdict, on the ground that NTV had not registered as a broker-dealer, in violation of the Massachusetts Uniform Securities Act (Massachusetts act), G. L. c. 110A, § 201 (a), and the Federal Securities Exchange Act of 1934 (Federal act), 15 U.S.C. § 78o(a).[8] Under each act, such violations render a contract

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[7] Because of the motion judge's determination on the defendants' motion for summary judgment that NTV had not put forth sufficient evidence that it would have been entitled to collect a commission under the contract, the jury were instructed that the appropriate measure of damages was $330,000, i.e., the amount of the contracted "advisory fee."

[8] As discussed infra, prior to trial, the defendants raised the question of NTV's failure to register as a broker-dealer as an affirmative defense. At a pretrial conference, the parties elected not to put the defense to the jury, but chose instead to resolve it by motion before the judge after the jury trial; for

unenforceable. See 15 U.S.C. § 78cc(b); G. L. c. 110A, § 410 (f).[9] The trial judge concluded that NTV had been required to register as a broker-dealer, and that its failure to do so rendered the contract invalid and unenforceable. The trial judge further concluded that, absent a valid contract, NTV could not sustain its claim under G. L. c. 93A, and therefore, he vacated the jury award in its entirety.[10]

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reasons that are not entirely clear, the trial judge agreed to this procedure.

[9] The Federal act provides that "[e]very contract made in violation of any provision of [the act] . . . , and every contract . . . the performance of which [violates the act] . . . shall be void." 15 U.S.C. § 78cc(b). The Massachusetts act similarly provides that "[n]o person who has made or engaged in the performance of any contract in violation of any provision of [the act] . . . may base any suit on the contract." G. L. c. 110A, § 410 (f).

[10] Following the jury trial, the defendants filed two motions: a motion to "invalidate" the verdict and a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. With respect to the latter motion, the defendants argued that there was insufficient evidence to support the contract claims and the G. L. c. 93A award, and took issue with the judge's decision to submit to the jury the question of the parties' intent regarding the use of "ambiguous words" in the contract (the meaning of the phrase "to introduce" qualified sources of capital).

In denying the motion, the trial judge noted that there was sufficient evidence to support the jury finding on the claims of breach of contract and violations of G. L. c. 93A, and that it had been proper to submit to the jury the question regarding ambiguous terms in the contract. Thus, but for the determination that NTV's failure to register as a broker-dealer precluded its claims, the trial judge concluded that "there [was] no reason to disturb the jury's verdict."

3. Discussion. On appeal, NTV argues that the defendants waived the broker-dealer defense, that its contract with the defendants did not require it to register as a broker-dealer, and that, even if the contract did so require, it still could recover from the defendants based on the violations of G. L. c. 93A. We conclude that there was no waiver, but that the judge erred in determining that the contract required NTV to register as a broker-dealer.

a. Waiver of broker-dealer defense. NTV argues that the defendants waived any affirmative defense under the Massachusetts act by failing to raise the argument explicitly in their answer to the complaint.[11] In their original answer, the defendants asserted the affirmative defense that the contract was "unenforceable and/or void due to violations of the securities laws and regulations." In response to a discovery

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The defendants filed a notice of cross appeal seeking review of the judge's order insofar as the order denied the defendants' motion for judgment notwithstanding the verdict. In their brief before this court, as in their initial brief in the Appeals Court, the defendants did not elaborate on this issue, and we discern no reason to disturb the judge's decision.

[11] NTV does not argue that the defendants waived any defense under the Federal act, presumably because NTV views the Massachusetts act's arguably broader prohibition against "bas[ing] any suit" on an unlawful contract as more likely to preclude its claims under G. L. c. 93A. G. L. c. 110A, § 410 (f). In light of our conclusion that NTV's contract was enforceable, we need not, and do not, decide whether such an interpretation of the Massachusetts act is correct.

request from NTV seeking to clarify what securities laws NTV was alleged to have violated, the defendants specified that they were referring to the requirement to register as a broker-dealer under the Federal act, a position they reiterated in their motion for summary judgment, and again in the joint pretrial memorandum.

During a pretrial conference, the parties agreed that the judge, not the jury, should determine whether the contract required NTV to register as a broker-dealer, and whether it was invalid and thus unenforceable under the Federal act in light of the fact that NTV was not so registered. The parties further agreed that the judge would decide the issue on motions submitted after the jury trial. In a subsequent memorandum on the eve of trial, the defendants, for the first time, argued that NTV also was required to have registered under the Massachusetts act. NTV argues that the defendants' failure explicitly to incorporate the Massachusetts act in their original answer constitutes waiver. We disagree.

"Ordinarily, a 'failure to plead an affirmative defense results in a waiver and exclusion of the defense from the case.'" Alicea v. Commonwealth, 466 Mass. 228, 236 n.12 (2013), quoting Demoulas v. Demoulas, 428 Mass. 555, 575 n.16 (1998). The purpose of this rule, however, "is to provide notice to the plaintiffs of defenses that will be raised." See Demoulas,

supra (no waiver where, inter alia, affirmative defense "was raised by both parties in briefs and at a hearing" in connection with defendant's motion for directed verdict).

Here, NTV has not demonstrated that it lacked sufficient notice of the defendants' contention that NTV was required to register as a broker-dealer. Although the defendants did not specifically indicate the relevant statutory provisions in their answer, they did raise an affirmative defense concerning "violations of the securities laws." In response to NTV's request, the defendants identified the applicable Federal statutes during discovery. NTV thus had ample notice at least with respect to the Federal act. Because, as discussed infra, the relevant provisions of the Massachusetts and Federal acts are essentially identical, NTV cannot claim any prejudice from the defendants not sooner specifying the Massachusetts act. In addition, NTV agreed that the question whether it needed to register as a broker-dealer could be resolved through a motion filed after the jury trial, thus suggesting that NTV had ample time in which to prepare a response. Hence, the defendants did not waive the broker-dealer defense.

b. Whether NTV could enforce the contract absent registration as a broker-dealer. The central issue in this appeal is whether NTV's contract with Lightship is invalid and unenforceable under Massachusetts and Federal securities law in

light of the fact that NTV was not registered as a broker-dealer. The defendants argue that the "equity and debt" investments NTV agreed to solicit were securities transactions, and that NTV's contemplated active involvement in the process, as well as its ability to earn a commission based on the size of the investments it facilitated, mean that NTV agreed to act as a broker-dealer.

i. Standard of review. The interpretation of a contract is a question of law, which we review de novo. See EventMonitor, Inc. v. Leness, 473 Mass. 540, 549 (2016). At root, the guiding question in interpreting the meaning of a contract is the intentions of the signatories when the contract was signed. See MacDonald v. Gough, 326 Mass. 93, 96 (1950). In making these determinations, absent ambiguous provisions, we look solely to the language of the contract and do not consider extrinsic evidence. See Bank v. Thermo Elemental, Inc., 451 Mass. 638, 648 (2008). Moreover, "we construe a contract as a whole, so as 'to give reasonable effect to each of its provisions'" (citation omitted). James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 669 (2018).

ii. Statutory background. The Massachusetts act provides that it is "unlawful for any person to transact business in [the Commonwealth] as a broker-dealer . . . unless he [or she] is registered." See G. L. c. 110A, § 201 (a). The Federal act has

a substantively identical requirement. See 15 U.S.C. § 78o(a).[12] Both acts likewise provide that "[n]o person who has made or engaged in the performance of any contract" that violates the securities laws may enforce the contract. G. L. c. 110A, § 410 (f). See 15 U.S.C. § 78cc(b).[13]

iii. Definition of a broker-dealer. Under the Massachusetts Act, a broker-dealer is "any person engaged in the business of effecting transactions in securities for the account of others or for his own account." See G. L. c. 110A, § 401 (c). This definition is virtually identical to that in the Federal act. See 15 U.S.C. § 78c(a)(4).[14] Two inquiries are necessary to determine whether a contract on its face triggers an obligation to register as a broker-dealer: (1) whether the contract requires that the transactions "effected" be in "securities"; and (2) whether the contract requires a person to "effect" such transactions. Put differently, we must consider (1) whether the instrument that is the subject of the

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[12] The Federal act provides, "It shall be unlawful for any broker or dealer [to effect transactions in securities] unless such broker or dealer . . . is registered . . . ." See 15 U.S.C. § 78o(a).

[13] See note 9, supra.

[14] The Federal act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others"; the act separately defines "dealer," but the distinction is immaterial to the present case. 15 U.S.C. § 78c(4)-(5).

transaction is a "security," and, if so, (2) whether the conduct required by the contract amounts to "effecting transactions."

iv. Whether NTV contracted to act as a broker-dealer. In order to establish that NTV "made" a "contract in violation [of the securities laws]," see G. L. c. 110A, § 410 (f), the contract must have required NTV to act as a broker-dealer. Cf. Pransky v. Falcon Group, Inc., 311 Mich. App. 164, 192-193 (2015) (declining to hold contract unenforceable where, by its terms, it did not require affected party to act as broker-dealer). We therefore look to the terms of the contract on which NTV bases its suit. See Indus Partners, LLC v. Intelligroup, Inc. 77 Mass. App. Ct. 793, 795 (2010) (Indus Partners).[15] We consider first whether NTV was required to engage in transactions that involve securities.

A. The definition of "security." Under the Massachusetts act, "unless the context otherwise requires," a "security" includes

> "any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust

[15] Although the jury heard evidence regarding NTV's performance under the contract, the parties agreed that the judge could decide the motion to "invalidate" based solely on the language of the contract, and NTV's stipulation that it was not registered as a broker-dealer. We likewise limit our review to the language of the contract and NTV's stipulation that it was not registered as a broker-dealer.

> certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 'Security' does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period."

G. L. c. 110A, § 401 (k).[16] As the relevant provisions of the Massachusetts act closely mirror those of the Federal act, decisions interpreting the Federal act with respect to the meaning of "security" are instructive. See Valley Stream Teachers Fed. Credit Union v. Commissioner of Banks, 376 Mass. 845, 857-858 (1978). In addition, the Massachusetts act "shall be . . . construed . . . to coordinate the interpretation and administration of [the act] with the related [F]ederal regulation." G. L. c. 110A, § 415. Thus, we look to decisions under the Federal act for guidance.

The scope of the term "security" is "quite broad" and includes "ordinary stocks and bonds, along with the 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" See Marine Bank v. Weaver, 455 U.S. 551, 555-556 (1982), quoting Securities & Exch.

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[16] The Federal act contains a substantially identical definition of "security." See 15 U.S.C. § 78c(a)(10).

Comm'n v. W.J. Howey Co., 328 U.S. 293, 299 (1946) (Howey). When Congress originally defined the term in the Federal context, however, it did not "intend to provide a broad . . . remedy for all fraud." Marine Bank, supra at 556.

As explicitly stated in both the Massachusetts and Federal acts, the examples of securities enumerated in the statutory definitions are to be considered securities "unless the context otherwise requires." See G. L. c. 110A, § 401; 15 U.S.C. § 78c(a). Thus, whether a particular instrument is, in fact, a security is a nuanced inquiry, one that is context dependent. The United States Supreme Court has developed a number of tests to determine whether an instrument is a security, depending on the specific type of instrument at issue. Where, for example, the instrument at issue is "stock," and bears the traditional features of "stock," the Court has held that the instrument is a security regardless of the economic substance of the transaction.[17] See Landreth Timber Co. v. Landreth, 471 U.S. 681, 690 (1985) (Landreth).

[17] The traditional features of stock include (1) the right to receive dividends from the profits; (2) negotiability; (3) the ability to be pledged; (4) the conferral of voting rights in proportion to the number of shares; and (5) the potential to appreciate in value. See United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851 (1975).

Similarly, an instrument described as a "note" is presumed to be a security unless it bears a "family resemblance" to the categories of notes that have been deemed not to be securities.[18] Reves v. Ernst & Young, 494 U.S. 56, 64-65 (1990). See Silvia v. Securities Div., 61 Mass. App. Ct. 350, 356-357 (2004) (discussing Reves, supra). To determine whether a note is a security requires consideration of four factors, known as the "Reves factors": (1) the motivations of the parties, (2) the distribution scheme, (3) the reasonable expectations of the investing public as to whether the note indeed is a security, and (4) the availability of other risk-reducing mechanisms. See Reves, supra at 66-67.

Where the precise character of a particular instrument is less clear, courts often consider whether the instrument is an "investment contract." The Supreme Court defines an investment contract as "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." See United

[18] Notes that are not securities include "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an assignment of accounts receivable, . . . a note which simply formalizes an open-account debt incurred in the ordinary course of business," and "notes evidencing loans by commercial banks for current operations" (citations omitted). See Reves v. Ernst & Young, 494 U.S. 56, 65 (1990).

Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975) (Forman). The investment contract standard proves useful where the form of instrument is unclear, because it is designed to capture the "countless and variable" forms that securities transactions may take, regardless of their formal characterization. See Howey, 328 U.S. at 298-299. A transaction likely involves an investment contract, and thus securities, where an investor, on the promise of profits, provides capital to a venture over which the investor has no meaningful control. See Forman, supra.

B. Whether the contract required NTV to "effect" a transaction in "securities." The posture in which this case arises is unusual. In the cases that set forth the various standards for determining whether a particular instrument is a security, the Court had before it evidence of actual performance. See, e.g., Reves, 494 U.S. at 58 ("demand notes" issued); Landreth, 471 U.S. at 683-684 (sale of timber company); Marine Bank, 455 U.S. at 552-553 (loan guarantee in return for stake in profits); Forman, 421 U.S. at 842 (issuance of "stock" in housing cooperative); Howey, 328 U.S. at 295-296 (investors purchased stakes in citrus groves). In each of these cases, unlike here, there was evidence of the instrument used, the parties involved, and the economic realities of the transaction.

Here, the contract provided that NTV was to "source capital and structure financing transactions from agreed-upon target

investors and/or lenders," and that "NTV expect[ed] to introduce and facilitate investment from third party sources collectively able to finance all levels of the transactions (i.e., both equity and debt)." The contract did not define key terms such as "capital," "equity," and "debt." NTV further agreed that it would "facilitate and participate in meetings and due diligence with capital sources, structuring and negotiating terms, and closing financing," and would be "included in such process as may be mutually agreed [upon by NTV and Lightship]." Lightship, however, had the right to determine "whether or not to enter into a definitive arrangement," and agreed to "act in good faith with NTV to determine the capital structure and sources of capital" that were in its best interest.

The issue then becomes whether the contractual language necessitates the conclusion that NTV was required to "effect" a transaction in "securities."[19] Because the contract does not identify a specific type of instrument, such as "stock" or a "note," that would be used to facilitate the sought-after financing, we cannot rely upon the standards outlined in

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[19] We reject NTV's argument that, because it agreed to assist Lightship with the purchase of the "assets" of Salary.com, it was engaged in an asset purchase, and not a securities transaction. NTV's specific role was to facilitate financing; if the contract required that such financing take the form of securities, then it would require NTV to effect transactions in securities.

Landreth, 471 U.S. at 690 (transaction that involves "stock" is transaction in securities), or in Reves, 494 U.S. at 65-67 (four-factor test for when "note" is security). Even resorting to the far more flexible standard for determining whether a transaction involves an "investment contract" -- and thus is a transaction in securities -- does not suffice to resolve the question.

For a transaction to involve an investment contract, it must include (1) "an investment in a common venture," that (2) is "premised on a reasonable expectation of profits," where such profits are (3) "to be derived from the entrepreneurial or managerial efforts of others." See Forman, 421 U.S. at 852. Here, the only evidence we have is the contract between NTV and Lightship, which does not definitively state the nature of the financing transactions NTV would facilitate. To the contrary, the terms of the contract do not require NTV to facilitate any particular form of transaction, but instead allow Lightship to determine which types of transactions to pursue. Although the contract refers to "all levels of the transactions," including "equity and debt," it also makes clear that the financing obtained could be obtained from "investors and/or lenders," thereby implying that different forms of financing would be possible. In any event, the contract states that NTV would solicit such financing only from "agreed-upon" sources, over

which Lightship retained the rights of "coordination, oversight, and direction." Thus, the specific types of transactions to be pursued were indeterminate, and subject to future agreement.

Moreover, neither an "equity" transaction nor a "debt" transaction necessarily implies a "transaction in securities."[20] Because "equity" is not specifically enumerated in the statutory definition of security, it is best analyzed under the flexible "investment contract" framework.[21] See Howey, 328 U.S. at 298-299 (investment contract is flexible standard designed to reach "the countless and variable schemes" that constitute securities transactions). As discussed supra, one of the essential elements of an investment contract is that any profits "be derived from the entrepreneurial or managerial efforts of others." See Forman, 421 U.S. at 852.

Hence, a critical question in determining whether "equity" financing is an "investment contract" is the degree of control the financing party obtains in the venture. See, e.g., Marine Bank, 455 U.S. at 559-560 ("unique agreement, negotiated one-on-

[20] As explained supra, the question whether a "transaction in securities" has taken place rarely is resolved, as it was here, solely on the face of a contract. While the Appeals Court relied exclusively on the contract in Indus Partners, LLC v. Intelligroup, Inc. 77 Mass. App. Ct. 793 (2010), it was undisputed in that case that the contract required a transaction in securities. See id. at 793 n.1.

[21] See G. L. c. 110A, § 401 (k); 15 U.S.C. § 78c(a)(10).

one by the parties" was not investment contract, and thus not security, where terms of agreement afforded investors uncharacteristic level of control over operations of venture); Howey, 328 U.S. at 295-296, 299-300 (opportunity to purchase stake in citrus grove was investment contract where investors were reliant on third party to manage citrus-growing operations and where offerings included standardized terms not subject to negotiation by investors). Here, because the contract does not include any specific parameters regarding the intended structure of a transaction, the degree of control over the venture that the transaction would afford a potential investor is equally indeterminate.[22] We therefore cannot ascertain whether the "equity" transactions alluded to in the contract would be transactions in securities.

Nor does the broad reference to "debt" necessitate the conclusion that a securities transaction was involved. Although "evidence of indebtedness" is included as an example of a security in the Massachusetts act, see G. L. c. 110A, § 401 (k), this cannot be read to imply that any form of debt is

[22] For example, were an "equity" transaction to result in a single investor receiving a majority of the equity in the venture, that investor would be able to direct the operations of the company and would not expect to derive its profits from "the entrepreneurial or managerial efforts of others." See Forman, 421 U.S. at 852.

automatically a security. Several types of notes, for example -- any of which could be considered "evidence of indebtedness" -- are not considered to be securities.[23] See Reves, 494 U.S. at 65. See also Valley Stream Teachers Fed. Credit Union, 376 Mass. at 857-858 (neither "loans" nor "sale of loan participation interests" in indebtedness of credit union securities were securities, where, inter alia, transactions lacked "[the] obvious characteristics of a security such as pledgeability, appreciability in value and concomitant voting rights").

The defendants argue -- and the trial judge determined -- that the parallels between the contract in this case and the contract at issue in Indus Partners indicate that here, too, broker-dealer registration was required. We do not agree. In that case, it was undisputed that the contract required a transaction in securities. The plaintiff was to advise the defendant on a transaction that was defined to include a "sale . . . [of] securities . . . (whether outstanding or newly issued)" (emphasis supplied). See Indus Partners, 77 Mass. App. Ct at 793 n.1. The issue before the Appeals Court, therefore, was only whether the services described in the contract required the plaintiff to "effect transactions." See id. at 798-799.

[23] See note 18, supra.

Here, because we conclude that the contract does not, by its terms, require a transaction in securities, we need not consider whether the services described would require NTV to "effect" such transactions.

We also note that, subsequent to the Appeals Court's decision in Indus Partners, there has been considerable evolution at the Federal level regarding bespoke investment transactions similar to the ones at issue in this case. For example, a 2014 "No-Action" letter[24] issued by the Securities and Exchange Commission (SEC) stated that the SEC would not require broker-dealer registration where a person facilitates the sale of a privately held business, provided that the circumstances of the transaction mitigated the risks inherent in a typical transaction in securities.[25] See M&A Brokers, SEC No-Action Letter (Jan. 31, 2014). The no-action letter recognizes that

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[24] "No-Action" letters do not have the force of law, but nonetheless are an instructive guide as to the circumstances that, in the view of the Securities and Exchange Commission (SEC), implicate broker-dealer registration requirements.

[25] The SEC identified a number of factors that would have to be present in order for a person to be able to forgo registration as a broker-dealer in such transactions. For example, the broker could not have the authority to bind the parties to the transaction. In addition, the broker was required to disclose to the purchaser any compensation it received for helping the purchaser obtain financing. Further, the purchaser of the business must either actively operate or otherwise control the business going forward. See M&A Brokers, SEC No-Action Letter (Jan. 31, 2014).

financing transactions resembling those at issue in the present case may not implicate the concerns that motivate broker-dealer registration requirements.

We conclude that the contract, on its face, did not require NTV to "effect" transactions in "securities." As the purported obligation to register as a broker-dealer was the sole basis for the judge's decision that NTV could not maintain its breach of contract and G. L. c. 93A claims, the judge's decision to vacate and set aside the jury verdict was erroneous.[26]

v. Appellate attorney's fees. NTV seeks an additional award of attorney's fees and costs in connection with this appeal. See T&D Video, Inc. v. Revere, 450 Mass. 107, 116-117 (2007). NTV's motion is allowed. NTV may submit, within fourteen days of the date of issuance of the rescript in this case, a petition for fees and costs, together with supporting documentation, as discussed in Fabre v. Walton, 441 Mass. 9, 10-11 (2004). The defendants shall have fourteen days thereafter to respond.

4. Conclusion. The judge's order setting aside the jury verdict is vacated, and the original judgment in favor of NTV shall be reinstated, as shall the award of $990,000 in damages

[26] Accordingly, we need not, and do not, decide whether, absent an enforceable contract, NTV could seek to recover under G. L. c. 93A.

for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of G. L. c. 93A.

On NTV's motion for attorney's fees in the amount of $405,724, and costs in the amount of $13,576.10, the judge determined that, if he were to award attorney's fees and costs, absent the issue of registration, he would have allowed $265,157 in attorney's fees and $10,517.23 in costs. An order shall enter in the Superior Court awarding NTV these amounts.

The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.