COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. No. 2018-P-1339

NTV MANAGEMENT, INC.,
Plaintiff-Appellant,

v.

LIGHTSHIP GLOBAL VENTURES, LLC and KENT PLUNKETT,
Defendants-Appellees

Brief of Plaintiff-Appellant NTV Management, Inc. on Appeal from the Business Litigation Session of the Suffolk Superior Court

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ISSUES PRESENTED

After trial, a jury found Defendant-Appellee Lightship Global Ventures, LLC ("LGV") breached its Consulting and Advisory Services Agreement ("Agreement") with Plaintiff-Appellant NTV Management, Inc. ("NTV") by failing to pay an advisory fee of $330,000. The jury also found that both LGV and its CEO, Defendant-Appellee Kent Plunkett, willfully engaged in unfair and deceptive conduct in violation of G.L. c.93A, §§ 2(a), 11, and, on that basis, awarded trebled damages of $990,000.

Nevertheless, the trial judge (Liebensperger, J.) vacated the jury's verdict and entered judgement for LGV and Plunkett. The judge concluded that, because NTV was not a registered broker under the Massachusetts Uniform Securities Act ("MUSA") or the Securities Exchange Act ("SEA"), all its claims against LGV and Plunkett, including its c.93A claims, must be dismissed. Specifically, he ruled that under G.L. c.110A, § 410(f), NTV could not "base any claim on" its Agreement with LGV, and that under 15 U.S.C. § 78cc(b), the contract was "void."

The issues presented to this Court are whether the trial judge erred, where:

1. The Agreement called for NTV to provide services to LGV only in connection with the purchase of assets from IBM, not any transaction in securities, and thus, it did

not require NTV to register as a securities broker under Massachusetts or Federal law;

2. Assuming that NTV was required to register as a securities broker and that its Agreement with LGV violated applicable law, neither § 410(f) nor § 29(b) barred NTV's c.93A claims, because those statutory claims were not "based on" the Agreement and did not depend on the validity of the contract;

3. Regardless, LGV and Plunkett failed to establish an affirmative defense under the MUSA or the SEA, because they waived any argument under § 410(f) in their answer and failed to present sufficient evidence at trial to warrant rescission of the Agreement under § 29(b); and

4. The jury found Plunkett personally liable for c.93A violations, and neither § 410(f) nor § 29(b) barred NTV's c.93A claims against Plunkett in his individual capacity, because Plunkett was not a party to the Agreement, but he willfully engaged in unfair and deceptive conduct.

STATEMENT OF THE CASE

On January 29, 2016, NTV filed a civil action in the Suffolk Superior Court, Business Litigation Session, against LGV and Plunkett. A1, 7-24. On March 11, 2016, LGV and Plunkett answered and filed counterclaims. A1, 31-49. But on March 28, 2017, they stipulated to the dismissal of all their counterclaims. A2.[1]

The parties cross-moved for summary judgment, and, on May 31, 2017, the motion judge (Kaplan, J.) denied NTV's motion and denied in part LGV and Plunkett's motion. A3, 94-107. As a result, remaining for trial were NTV's claims for (1) breach of contract against LGV [Count I]; (2) breach of the implied covenant of good faith and fair dealing against LGV [Count II]; and (3) unfair and deceptive conduct in violation of c.93A against both LGV and Plunkett [Count VI].

From November 9 through 17, 2017, the parties tried the case to a jury. Following the close of evidence, the trial judge (Liebensperger, J.) denied LGV and Plunkett's directed verdict motion and, over their objection, sent all NTV's claims – including its c.93A claims – to the jury. A4, 648-49, 762.

On November 17, 2017, the jury returned a unanimous verdict for NTV. A4, 831-32. The jury found LGV breached its Agreement with NTV and the implied covenant. The

[1] Counterclaim Plaintiff Salary.com and Counterclaim Defendant Chris Whalen are not parties to this appeal.

jury also found both LGV and Plunkett willfully violated c.93A, and on that basis, it awarded trebled damages of $990,000 to NTV.

On December 22, 2017, LGV and Plunkett moved to invalidate the jury's verdict. They argued that, because NTV was not a registered securities broker, § 410(f) barred NTV from bringing any claims "base[d] on" the Agreement and § 29(b) rendered the contract "void."

On March 8, 2018, the trial judge allowed LGV and Plunkett's post-trial motion and vacated the jury's verdict. A5, A984-1001. Nevertheless, the trial judge noted that, if NTV had prevailed on its c.93A claims, he would have awarded attorneys' fees and costs of $275,674 to NTV. A999-1001.

On March 28, 2018, the trial judge entered judgment for LGV and Plunkett. A5, 1002.

On April 27, 2018, after the trial judge denied a motion for reconsideration, NTV filed its timely notice of appeal. A6, A1003-4.

STATEMENT OF THE FACTS

A. Plunkett's "Great White Whale": the Purchase of Salary.com from IBM

Plunkett founded Salary.com in 1999 and took the company public in 2007. A446, 448-49, 570. Kenexa acquired Salary.com in 2010 and removed Plunkett as the CEO. A338, 449, 570. After IBM acquired Kenexa in 2014, Plunkett set out to reacquire Salary.com. A248, 449. But over "a protracted period," Plunkett was not "able to get a deal done" with IBM: "Salary.com was Kent's great white whale." A231.

In November 2014, Plunkett formed LGV, a LLC, to buy Salary.com. A449. Pursuant to a non-disclosure agreement, IBM gave LGV access to confidential data, A452, and they entered an agreement for the acquisition of "certain assets and liabilities." A837-43. LGV engaged Stifel to assist with the asset purchase, A248, 455-57, 850-57, but by July 2015, however, Stifel was not "able to close" with any investors, and "IBM was going to disappear," A679.

Around that time, Plunkett met David Hendren, a former NTV partner, and they discussed the Salary.com acquisition. A180-81. Plunkett "complained very bitterly" that "the deal had stalled." Id. In "profanity-laden diatribes," he was "very critical" of Stifel, which had not "gotten things done." Id.

B. Plunkett's Misrepresentations to Hendren

Plunkett intentionally misrepresented to Hendren that (1) LGV had "an exclusive right worked out with IBM to buy [Salary.com]," A181-82, 251, 301, and also that (2) LGV was "done with Stifel," because Plunkett had "fired them," A180-81, 192.

In fact, LGV's exclusive opportunity with IBM had already expired. A301, 861-62. Meanwhile, neither LGV's exclusive agreement nor its working relationship with Stifel had ended. A459 (Q: "[T]he Stifel engagement letter was still in force at the time you entered into the agreement with NTV, right?" A: "I certainly presume so, yes."), 470 ("I've agreed that Stifel was doing work in the fall on this deal.").

Plunkett also misled Hendren to believe LGV was an operating company that would acquire Salary.com and compensate NTV. A202, 208. Hendren later learned that, although LGV entered the Agreement with NTV, it was a shell company with no capital. A454-55, 477.

C. The Agreement between LGV and NTV

On August 4, 2015, LGV and NTV entered into their Consulting and Advisory Services Agreement ("Agreement"). A863-67. Pursuant to that contract, NTV agreed to "serve as consultant and advisor to [LGV] in connection with [LGV]'s effort to acquire, and finance the acquisition of, the business and assets of

Salary.com." Id. (emphasis added). In exchange, LGV agreed to "pay ... transaction fees ... at closing":

> A success fee equal to the greater of 3% of the value of the capital that NTV introduces to the project that is invested, or
>
> [A] $330,000 advisory fee in consideration of the team's effort, advisory services, time, and opportunity cost associated with working with management, preparing materials, communication with potential sources of capital, and other services, provided that NTV shall have introduced at least 10 qualified sources of capital and remained engaged with [LGV] and available to provide advice and support.

Id., 200-02. The "advisory fee," or "break-up fee," A917, was critical. In exchange for that minimum compensation, NTV agreed to forego exclusivity with LGV and a monthly retainer. A184-85, 189, 215-18.

D. NTV's Good-Faith Efforts to Introduce Potential Investors to the Salary.com Deal

NTV immediately went to work identifying potential partners to purchase Salary.com. Whalen contacted 23 investors with whom he had "done business" and had "long relationships," A341, and whom Plunkett pre-approved, A342-43, 400.

Whalen followed up with these prospects, exchanging calls and emails. A341-43, 405-06. Based on information from Plunkett, Whalen sent an anonymized presentation to the 12 firms that "expressed some interest" in the deal. A344-47, 929-43.

Between August 2015, when NTV began consulting about the asset purchase, and December 2015, when the deal closed, Whalen spent 80 percent of his professional time working on the Salary.com acquisition. A343. As Hendren recounted, Whalen "work[ed] his tail off," "communicat[ed] regularly with Kent," and "ke[pt] an updated spreadsheet of contacts." A271.

Plunkett was "perfectly aware of the nature of the very hard work" that Whalen performed. Id. And for NTV, the opportunity costs were significant, because "making the decision to do this work in good faith with Plunkett and [LGV] meant that [NTV was] devoting time and effort to this [deal] that [it was not] spending on ... [its] own business or work for other clients." A217.

E. LGV and Plunkett's Deceptive Strategy to Use NTV as a "Stalking Horse"

LGV never intended for NTV to succeed: for Plunkett, that was not the point. Rather, from the outset, LGV manipulated NTV to create the appearance of competition for Salary.com, which Plunkett hoped would lead to a quicker closing at a better price. Hendren described that unfair scheme as follows:

> [NTV] could do our work. We could stimulate interest in this deal, which oftentimes, will enhance the interest of people already at the table. "Wait a minute, there's competition, there's some other people in the mix." [Plunkett] could be [saying], in these conversations [with potential investors], "well, you better do this fast, because

> there's some other people looking at this deal."

A192, 255 ("[I]n all the conversations Kent Plunkett was having with others, he would be able to represent that other investors are looking at this, so you better hurry up."). Put simply, LGV and Plunkett deceptively used NTV as "a stalking horse to create ... interest" in Salary.com. A192.

F. LGV and Plunkett's Unfair Scheme to String Along NTV But Not Pay Any Compensation

Within weeks of executing the Agreement, Plunkett decided NTV had "failed," and he "didn't expect [NTV] to succeed." A531-32. Yet, Plunkett chose not to end the LGV-NTV engagement. Instead, to generate "buzz" about the transaction, Plunkett pressed Whalen to introduce investors, and he expected Whalen to be available at all times. A374, 533-34.

It was all a charade, however. Plunkett gave disingenuous reasons for not pursuing investors whom Whalen introduced. For example, after Whalen arranged a call with the person who "runs direct investing in growth-stage companies for Goldman Sachs," Plunkett implausibly insisted Goldman Sachs was not "a qualified source of capital." A361-63. Plunkett rejected a call with Vector Capital, a private equity firm that invests in this "type of deal," vaguely telling Whalen, "I don't like the way they do business." A364-65. Plunkett would

not even talk to Princeton Capital, an investment firm that was "extremely interested," because a partner had "[gotten] him fired from Salary.com." A365-66, 413.

Plunkett also undermined NTV by engaging in unprofessional, dishonest behavior with investors. For example, Whalen arranged an introduction with North Bridge Capital, LLC, a Boston-based venture firm. Although the Salary.com acquisition was "in the sweet spot of what [North Bridge] looks for," A359-60, the meeting did not go as planned.

> Q: Tell us how the meeting went.
>
> A: We had scheduled a meeting [for Plunkett with North Bridge], we'd confirmed it for ... one o'clock on that day.... I spent two hours sitting in the meeting with [North Bridge] tap-dancing around, talking as much as I could about Salary.com waiting for Kent and calling him periodically saying, basically, "where are you?" Kent was over two hours late and then said, "well, actually I'm only an hour late because I wrote ... the wrong time down." [Kent w]ouldn't tell me where he had been, other than he had been in downtown Boston. And at that point, they only had about 20 minutes to listen to the pitch[.]
>
> Q: Well, how did North Bridge react to Mr. Plunkett's being late?
>
> A: It was not good. I only got [North Bridge] to start talking to me again about three weeks ago.

A360-61. Plunkett misled Whalen, claiming he had "hit traffic." A510-11. The truth was that Plunkett nearly missed the meeting with North Bridge, because he had

double-booked with H.I.G. Capital, LLC, a $30-billion private equity firm. Id.

Plunkett also abruptly cancelled a meeting with Solamere Capital LLC, an investment company owned by the Romney family. As Hendren explained, the Romneys are "major players" in private equity, so it was "not trivial to have this particular, very blue chip, investor lined up for a meeting with Kent and [LGV]." A224.

> Q: [W]hat happened with that meeting?
>
> A: The evening before the meeting, Kent cancelled the meeting, both by email and he called me saying, he didn't believe they're a qualified investor because he didn't believe they'd actually do the deal...
>
> Q: What was your reaction to that email?
>
> A: Well, particularly since we had just reconfirmed [with Solamere], I was really looking forward to it, and they were a great fit.... they really could have done the entire deal if they wanted to. They have extraordinarily deep pockets. So I was looking forward to it and when it was canceled at the last minute, I'm pretty angry and, to be honest, to this day, Tagg [Romney] has not returned my phone call. So that did not go well.

A367-68, 221-24 (describing that Whalen scheduled a meeting with Solamere but Plunkett "blew the meeting off ... late the night before").

G. LGV's Work with Moorgate Partners and Equity Deal with H.I.G. Capital

"[O]nly about two weeks" after engaging NTV, Plunkett began talking with Moorgate Partners, an

investment bank from California, A467, 498-502, but he did not tell Hendren or Whalen, A372-73, 501.

Moorgate introduced LGV to H.I.G., A868, and on October 2, 2015, H.I.G. sent a proposed term sheet for the Salary.com deal. A467, A869-74. Again, Plunkett hid these critical developments from NTV, which was actively pursuing other investors. A498-501.

LGV kept NTV in the dark, despite the terms of the Agreement, which obligated LGV to "inform and consult with NTV regarding the details" of the deal and gave NTV "the opportunity ... to match [any] terms" offered by "third parties not introduced by NTV." A863-67.

On November 2, 2015, LGV entered an agreement with H.I.G., as the equity investor in the deal. A891-97. At that point, Plunkett informed Whalen, "[w]e are signed under exclusivity with an equity partner to pursue the acquisition." A898.

H. Plunkett's Request that Whalen Continue to Pursue Potential Debt Investors

After H.I.G. committed to provide equity, Plunkett instructed Whalen to keep pursuing debt. A522-25.

> Q: [W]hat discussions did you have with Mr. Plunkett about what role NTV could have in raising debt funding after you were told that he had already gone exclusive with an equity provider?
>
> A: [Plunkett] said they still needed a debt provider and to keep working on it.

A368, 916. Strung along by Plunkett, Whalen continued to work on the deal. A383 (Q: "Why are you still working on the deal [in December 2015]?" A: "Kent had instructed me to try to continue to get debt providers.").

Whalen told Plunkett that NTV had "kept Ares, BDC New England, and SVB warm for debt," as Plunkett had requested, and that "Ares is especially excited to jump in." A369-71, 512, 525, 916. But LGV never intended to pursue financing from these NTV-introduced investors. The only reason to make NTV work with lenders was to get a better deal for LGV and Plunkett.

I. LGV's Withholding of Critical Information from NTV and Plunkett's Unscrupulous Conduct

Throughout the consulting engagement, LGV withheld critical information from NTV, or otherwise misled NTV, about the deal structure (whether LGV planned to purchase all assets of Salary.com or only certain ones), A352-53, the deal size, A379-80, and the closing date, A375-76, 699-700.

At trial, Plunkett admitted he did not "keep[] NTV informed of all the details and nuances of the deal." A491-92. As Hendren explained, that made it impossible for NTV to succeed.

> Kent had an obligation to inform us, to keep us current on things like these terms [with H.I.G.], and relative to doing things like following through on our right to match terms, that's rendered impossible when none of that information is shared. None of the terms that you have a right to match are provided. And in

> fact, Kent had Chris Whalen contacting people up until the very end of this process, where Kent was not providing Chris with accurate information on what the deal was.

A290.

Emblematic of Plunkett's games were his December 15 communications with NTV. At 10:50 am, Plunkett asked Whalen for updates on "proposals," and Whalen responded that he was "pushing Ares" and had "just talked to SVB," who wanted to "dive in fast." A377-78, 922, 945. After Plunkett forwarded the updates to his contact at H.I.G., A917 ("Ares and SVB want to join the lender race through the NTV guys."), he neither replied to Whalen, A377-78, nor followed up on these leads. Instead, at 4:53 pm, Plunkett sent a letter to Hendren, abruptly terminating the Agreement on 14 days' notice. A382, 920-21. The timing of these conflicting messages demonstrates that LGV intentionally used NTV as a stalking horse but never planned to compensate NTV.

J. LGV's Refusal to Compensate NTV and Plunkett's Low-Ball "Settlement" Tactics

Around the closing, a dispute arose about compensation. Plunkett claimed NTV was not entitled to the "success fee," because it had not introduced H.I.G. or Prudential. A529, 563, 665. He further insisted NTV was not entitled to its "break-up fee," because it had not introduced 10 qualified investors. Id. Instead, Plunkett made a low-ball offer of $25,000 - which he

deemed the "settlement value" of the dispute between LGV and NTV – in an unscrupulous attempt to avoid paying the fee of $330,000. A687-88, 884-90.

Whalen vividly described one particularly abusive call with Plunkett:

> Q: ... Did you have a discussion with Mr. Plunkett [on December 4, 2015] about what NTV should be paid?
>
> A: It's hard to forget.
>
> Q: What do you remember about that call?
>
> A: I had a call in my office, and Kent asked me, what you think we should do to ... settle this, so to speak. I said, you have a contract for $330,000. It seems pretty straightforward to me.... [H]e exploded at that point.... "f--- you, I don't give an f--- about the contract, I only pay people, you know, when I feel they should be paid. If I want to be a nice guy, I might be able to get you $75,000 or you get nothing."

A386-87 (emphasis added); A388.

Privately, Plunkett told H.I.G. that, although NTV was owed $330,000 as a "finder's fee," A517, 924-28 (listing $330k for "Plunkett Finder's Fee & Expenses"), 927 (stating "[t]he $330k is the right budget number for the finder relationship (NTV contract)"), LGV expected to pay "far less," A517. Plunkett also disparaged Hendren and Whalen as "failed banker[s]," A387, 917, and "scum," A699-700, 919, who had not earned any compensation.

On December 29, 2015, the Agreement between NTV and LGV terminated. A232, 383, 545. Only two days later, on December 31, 2015, LGV closed the transaction with H.I.G., the equity investor, and Prudential, the debt investor, to purchase the assets of Salary.com from IBM. A503, 543, 736.

K. The Trial Judge's Decision to Set Aside the Jury's Verdict for NTV and to Enter Judgment for LGV and Plunkett

Left with no alternative, NTV filed suit against LGV and Plunkett, asserting contract and c.93A claims. A1, 7. After trial, at which Hendren, Whalen and Plunkett testified, the jury held LGV liable for breach of contract. A946-48. The jury also held both LGV and Plunkett liable for willful violations of c.93A, and it awarded trebled damages - $990,000 – to NTV. Id.

LGV and Plunkett then moved to invalidate the verdict, arguing § 410(f) of the MUSA and § 29(b) of the SEA barred NTV from bringing its claims. Without distinguishing between the contract and c.93A claims, or between the claims against LGV and those against Plunkett personally, the trial judge allowed the motion, set aside the verdict, and dismissed all of NTV's claims. A984-1001.

SUMMARY OF THE ARGUMENT

I. NTV was not required to register as a securities broker under Massachusetts Uniform Securities Act ("MUSA") or the Securities and Exchange Act ("SEA"). The Agreement only called on NTV to advise LGV concerning the purchase of assets from IBM, not any transactions in "securities." Thus, it did not trigger any registration requirement. (pp.18-24)

II. Assuming that NTV was required to register as a securities broker and that, as a result, the Agreement violated Massachusetts and Federal law, neither G.L. c.110A, § 410(f), nor 15 U.S.C. § 78cc(b) barred NTV's G.L. c.93A claims, because those statutory claims were not "based on" the Agreement and did not depend on the enforceability of that contract. (pp.24-28)

III. Regardless, even if § 410(f) or § 29(b) applied to NTV's c.93A claims, LGV and Plunkett still failed to establish any affirmative defense, because they waived any argument under the MUSA in their answer and presented no evidence at trial to warrant rescission of the Agreement under the SEA. (pp.29-46)

IV. The jury found Plunkett personally liable for his violations of c.93A, and neither § 410(f) nor § 29(b) barred NTV's c.93A claims against Plunkett in his individual capacity, because Plunkett was not a party to the Agreement between NTV and LGV, but he willfully engaged in unfair and deceptive conduct. (pp.46-48)

ARGUMENT

I. The trial judge erred in ruling that, under Massachusetts and Federal securities law, NTV was required to register as a securities broker, because the Agreement only called for NTV to advise LGV concerning an asset purchase from IBM, not any securities transaction.

The trial judge ruled, without explanation, that "the anticipated capital sources [in the Agreement] would be 'securities' under the law" and, thus, that NTV was obligated to register as a "broker" under Massachusetts and Federal securities law. A992-94, citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 (1985). By its terms, however, the Agreement only called for NTV to consult with LGV about an asset purchase from IBM. A863-67. Because NTV did not contract with LGV to broker any "securities" transaction, the registration requirements of G.L. c.110A, § 201(a), and 15 U.S.C. § 78o(a)(1) did not apply.

A. Under Massachusetts and Federal law, only a person who effects transactions in securities must register as a securities broker.

Under Massachusetts securities law, a person may not "transact business ... as a broker" unless he or she is "registered" with the Secretary of State. G.L. c.110A, §§ 201(a), 202(a). A "broker" is "any person engaged in the business of effecting transactions in securities for the account of another[.]" Id. § 401(c). In the context of broker registration, "security" is defined to include:

> 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; ... or, in general, any interest or instrument commonly known as a "security[.]"

Id. § 401(k)

Similarly, under Federal securities law, a "broker" is "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). "[T]o effect any transactions in ... any security," a broker must be "registered" with the Securities and Exchange Commission. Id. § 78o(a)(1). For these purposes, a "security" means:

> any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, ... or in general, any instrument commonly known as a "security[.]"

Id. § 78c(a)(10).

The definition of "security" is "quite broad," Landreth Timber Co., 471 U.S. at 686, but it is not limitless, see Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) (explaining that, despite "the broad statutory definition of 'security,'" "Congress, in enacting the securities law, did not intend to provide a broad federal remedy for all fraud"); see, e.g., Valley Stream

Teachers Fed. Credit Union v. Comm'r of Banks, 376 Mass. 845, 858-59 (1978) (loans are not securities); Mahaney v. John Hancock Mut. Life Ins., 6 Mass. App. Ct. 919, 921 (1978) (insurance policies are not securities).

Of particular relevance here, business assets (e.g., copyrights, contracts, and equipment) are not "securities," and asset purchases are not securities transactions. Neither § 401(c) nor § 78c(a)(10) lists "asset" as a type of "security," and an asset lacks the "obvious characteristics of a security such as pledgeability, appreciability in value and concomitant voting rights." Valley Stream Teachers Fed. Credit Union, 376 Mass. at 858.

B. NTV only agreed to assist LGV with the purchase of assets from IBM, not any transaction in securities.

In this case, the Agreement between LGV and NTV contemplated the purchase of assets, not securities, from IBM:

> NTV will serve as consultant and advisor to [LGV] in connection with [LGV]'s effort to acquire, and finance the acquisition of the business and assets of salary.com ("Salary"), whether directly or through one or more affiliates of the company or any of its principals.

A863-67 (emphasis added). The documents underlying the Agreement reinforce this point. IBM and LGV initially entered an agreement for "the possible acquisition of certain assets and liabilities (the 'Assets') of [IBM]."

A837-42. They subsequently executed a term sheet to "sell or otherwise transfer" specific assets of Salary.com, including copyrights, contracts, and equipment (referred to as "Transferred Assets") "via an Asset Purchase Agreement." A844-49.

From the outset, Plunkett told Hendren the Salary.com deal would be an asset purchase.

> Q: Did you understand that what was being done was a carve-out of Salary.com's business lines out of IBM and into a standalone corporation?
>
> A: Yes. I understood ... the business ... was operated within IBM, and the associated assets would be spun out of IBM into what I understood to be Lightship Global as the acquirer of those assets and business.

A238-39. In the end, that is what happened: LGV and its partners "carve[d]-out" the assets of Salary.com from IBM. A717. They did not purchase stock or other securities in either entity.

C. The trial judge erred in ruling that the Agreement required NTV to register as a securities broker.

Contrary to the trial judge's finding, the Agreement was not "nearly identical" to the contract in Indus Partners, LLC v. Intelligroup, Inc., 77 Mass. App. Ct. 793 (2010). Indeed, the contrast between the "scope of services" in the two cases is instructive.

As this Court summarized, Indus and Intelligroup "entered into a contractual agreement" that "call[ed]

for Indus to 'advise and consult' with Intelligroup" about a potential "Transaction," which was expressly defined as "the sale or transfer, directly or indirectly, of all or any portion of the assets or securities (whether outstanding or newly issued) of [Intelligroup]." Id. at 793 & n.1 (emphasis added). Intelligroup agreed to pay a Transaction Fee that was "directly linked to the potential sale of securities" at a certain share price. Id. at 798. Because "the Agreement called for Indus to be extensively involved in negotiating a potential sale of securities," id. at 799, Indus needed to register as broker under § 201(a), and its failure to register "rendered the agreement unenforceable" under § 410(f). Id. at 801-02.[2]

In contrast, the Agreement between LGV and NTV contemplated only the purchase of assets from IBM. It did not refer to any "securities," such as stock issued by IBM or Salary.com. Indeed, "securities" appears nowhere in the Agreement, and "transactions in securities" were never mentioned at trial. This Court

[2] The same was true of the contract in Novelos Therapeutics v. Kenmare Capital Partners, No. 00-cv-1086, 2001 Mass. Super. LEXIS 307 (2001), which was deemed unenforceable under § 410(f). In Novelos, the transaction was "[a] private offering of ... shares of Common Stock ...('the Securities')." Id. at *4. "[T]here [wa]s no question that the contract called for Kenmare to solicit investors to purchase Novelos stock," and "[t]he contract thus provided for Kenmare to act as a broker-dealer, although unregistered, in violation of § 201(a)." Id. at *25-26.

recognized the distinction between "assets or securities" in Indus Partners, 77 Mass. App. Ct. at 793 n.1 (emphasis added), and the Agreement in this case involved only the former.

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1961), which the trial judge cited for the basic principle that securities law broadly defines "security," further supports the conclusion that NTV was not subject to registration requirements. The narrow question in Landreth was whether the "the sale of all of the stock of a company is a securities transaction." Id. at 683. Not surprisingly, given § 78c(a)(10) defines "security" to include "stock," the Supreme Court held, "the stock at issue" was a "security," and it rejected the "sale of business doctrine," which certain commentators had endorsed. Id. at 694-97. Nevertheless, like Indus Partners, LLC, Landreth distinguished such an asset purchase from a securities transaction that triggers registration requirements.[3]

In this case, the trial judge was mistaken that, for NTV to collect any fee, "there had to be a successful offering of securities by [LGV] at a closing." A993. By its terms, the Agreement anticipated that LGV would buy

[3] Parties can structure a business purchase in "the form of a sale of stock or a sale of assets," and the decision about transaction form – stock or assets - "usually hinges on matters that are irrelevant to federal securities law, such as tax liabilities[.]" Landreth Timber Co., 471 U.S. at 699 (Stevens, J., dissenting).

certain assets of Salary.com pursuant to an asset purchase agreement, not any stock in IBM pursuant to a stock purchase agreement. Nothing in the Agreement necessitated that NTV participate in any securities transaction with LGV.

II. The trial judge also erred in ruling that, notwithstanding the jury's verdict that LGV and Plunkett willfully engaged in unfair and deceptive conduct, § 410(f) and § 29(b) required the dismissal of NTV's c.93A claims, because those statutory claims were not "based on" the Agreement and did not depend on its validity.

After trial, the jury found LGV and Plunkett had willfully violated c.93A and awarded trebled damages of $990,000 to NTV. A946-48. In vacating that verdict, A1001, the trial judge misinterpreted § 410(f) and § 29(b), and he also failed to distinguish the jury's verdict that LGV breached the Agreement from its separate verdict that LGV and Plunkett engaged in unfair and deceptive conduct.

A. Section 410(f) only prohibits suits "based on" contracts that violate the MUSA.

The trial judge dismissed all NTV's claims against LGV based on § 410(f) of the MUSA, which provides:

> No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder ... may base any suit on the contract.

G.L. c.110A, § 410(f) (emphasis added); see Indus Partners, LLC, 77 Mass. App. Ct. at 795 (holding "[t]he

act of making [a] contract" that violates the MUSA, "irrespective of performance," "suffice[s] to preclude suit brought on that instrument"). Here, however, NTV's c.93A claims were not "base[d] ... on" its Agreement with LGV and, thus, not barred by § 410(f).

"[T]he starting point" for statutory interpretation "is the statutory text." Com. v. Vega, 449 Mass. 227, 230 (2007). Because § 410(f) does not define "base any suit on the contract," the analysis "begin[s] with the ordinary meaning of the words." Ajemian v. Yahoo!, Inc., 478 Mass. 169, 180 (2017); cf. Fincke v. Access Cardiosys., Inc., 776 F.3d 30, 36 (1st Cir. 2015) (interpreting "by means of" in § 410(a) in a manner "consistent with the plain language of the [MUSA]").

"Base" ordinarily means "to put on a base or basis; to found; to establish, as an argument or conclusion." Webster's New Int'l Dict. 225 (2d ed. 1960); cf. Black's Law Dict. 137 (5th ed. 1979) (defining "base" to mean "bottom, foundation, groundwork, that on which a thing rests"). According to its common usage, "based on" has a narrower meaning than "concerning" or "related to," which have the broader connotation of connection rather than foundation.

The legislative history confirms "base[d] ... on the contract" means "to enforce the contract." Section 410(f) of the MUSA is modeled on section 509(k) of the Uniform Securities Act (2002) ("USA"), and the two

provisions have nearly identical language. The USA drafters explained the bar on any suit "base[d] ... on" an improper contract was "intended to apply to actions to enforce illegal contracts." USA Commentary, § 509(k), cmt. 15 (2002 rev.).

Interpreting parallel Blue Sky provisions, other state courts have unanimously concluded that a suit "based on a contract" is an action to establish the legality of the contract or to enforce its terms.

> [T]he basis of any lawsuit, or that on which the suit ultimately rests, is the source of law that creates the plaintiff's cause of action by establishing legal rights that might be vindicated in court if abridged.

Girdwood Mining Co. v. Comsult LLC, 329 P.2d 194, 198 (Alaska 2014); see Securities Am., Inc. v. Rogers, 850 So.2d 1252, 1257-59 (Ala. 2003) (holding SAI, an unregistered broker, could not enforce the arbitration provision in its customer agreements, because those contracts violated Alabama securities law); Hayden v. McDonald, 742 F.2d 423, 432 (8th Cir. 1984) (holding the base-no-suit provision "only bar[s] the enforcement of contracts illegal because of violations of the Minnesota Blue Sky Act," but not actions based on common-law remedies, such as rescission and restitution), citing McCauley v. Michael, 256 N.W.2d 491, 500-01 (Minn. 1977); cf. Insight Assets, Inc. v. Farias, 321 P.2d 1021, 1026 (Utah 2013) (holding "an action is 'based upon a

contract' ... if a 'party to the litigation assert[s] the writing's enforceability as basis for recovery"), quoting Hooban v. Unicity Int'l, Inc., 285 P.3d 766, 772 (Utah 2012).

In Girdwood Mining Co. v. Comsult LLC, the Alaska Supreme Court interpreted the base-no-suit provision of A.S. 45.55.930(g) to prohibit only "lawsuits that seek to enforce the terms of a contract that is illegal under Alaska's securities law," because "[a]s a matter of textual interpretation, to 'base' a suit on a contract is to seek to vindicate legal rights established by the contract." 329 P.3d at 197. Although the trial court dismissed the case, the Alaska Supreme Court reversed; Girdwood did not seek to enforce its illegal fundraising agreement with Comsult, so A.S. 45.55.930(g) did not preclude the suit. See id. at 197-98. In subsequent litigation, the court explained that, when a plaintiff sues to vindicate rights that "are protected by sources of law outside of contract law," the base-no-suit provision does not apply. Comsult LLC v. Girdwood Mining Co., 397 P.2d 318, 320-21 (2017).

The consensus among state courts is significant, because the Legislature has directed Massachusetts courts to "construe [the MUSA] as to effectuate its general purpose to make uniform the laws of those states which enact it." G.L. c.110A, § 415; cf. Fincke, 776 F.3d at 32 (recognizing the MUSA is "to be 'construed as

to ... make uniform' state securities laws"). Absent some compelling reason (and there is none), this Court should interpret the base-no-suit provision of the MUSA to reach a "uniform" result.

Finally, this Court should not "adopt a statutory construction" that would "lead[] to an absurd and unreasonable conclusion." Com. v. O'Keefe, 48 Mass. App. Ct. 566, 568 (2000). Reading § 410(f) to reach any suit concerning an illegal contract "would sweep too far," because "[i]t would make virtually any cross-reference in a claim the "basis" of the action, Girdwood Mining Co., 329 P.2d at 198, and as a result, preclude statutory, tort, and equitable causes of action. The limited base-no-suit provision should not be interpreted to immunize unscrupulous parties, such as LGV and Plunkett, who engage in unfair and deceptive conduct.

B. Section 29(b) does not prohibit any suits, rather it only provides the option to seek the rescission of contracts that violate the SEA.

Unlike § 410(f), § 29(b) does not prohibit a defined category of civil actions, i.e., suits "based on" contracts that violate securities laws. Instead, it provides, "[e]very contract made in violation of any provision of this title ... shall be void." 15 U.S.C. § 78cc(b) (emphasis added).

"Although the word 'void' is contained in the statute, the Supreme Court has read Section 29(b) to be

'merely voidable at the option of the innocent party.'" Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195, 205 (3d Cir. 2006), quoting Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 378-88 (1970) (holding § 29(b) prevents "a guilty party ... from enforcing [an illegal] contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity").

Rather than prohibit actions to enforce illegal contracts, § 29(b) provides "an affirmative defense to an enforcement claim." Prassas Capital, LLC v. Blue Sphere Corp., No. 3:17-cv-131-RJC, 2018 U.S. Dist. LEXIS 54659, *8 (W.D.N.C. Mar. 30, 2018); see Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, No. 8:04CV586, 2006 U.S. Dist. LEXIS 68959, *23 (D. Neb. Sept. 12, 2006), citing GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 207 (3d Cir. 2001) (establishing the elements of an affirmative defense under § 29(b)).

If a defendant establishes an affirmative defense under § 29(b), the court may exercise its discretion to void a contract. In that case, rescission would preclude a suit for breach, it would not bar all statutory or tort claims that may relate to that contract. Section 29(b) is silent about such non-contract claims.

C. NTV's c.93A claims were neither "based on" its Agreement with LGV nor dependent on the enforceability of that contract.

NTV's claims that LGV and Plunkett engaged in unfair and deceptive conduct were not "based on" the Agreement, because c.93A and the common-law of contract are "wholly different areas of law." Comsult LLC, 397 P.2d at 321. To prevail on its c.93A claims against LGV and Plunkett, NTV was not required to prove that LGV breached a valid contract.

Chapter 93A creates "broad new rights, forbidding conduct not previously unlawful under the common law of contract[.]." Linkage Corp. v. Trs. of Boston Univ., 425 Mass. 1, 25 (1997). "Conduct may violate § 11 if it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness ... [or] is immoral, unethical, oppressive, or unscrupulous." Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc., 403 Mass. 722, 729-30 (1989). Moreover, "[t]he relief available under c.93A" is "neither wholly tortious nor wholly contractual in nature," and it is "not subject to the traditional limitations of preexisting causes of action." Kattar v. Demoulas, 433 Mass. 1, 12 (2000).

There is no dispute that "a mere breach of contract, without more, does not amount to a violation of c.93A." Beverly v. Bass River Golf Mgmt., Inc., 92 Mass. App. Ct. 595, 606 (2018), citing Whitinsville Plaza, Inc. v.

Kotseas, 378 Mass. 85, 100-01 (1979). "[I]n order to show a violation of c.93A, the plaintiff must show 'unfair or deceptive acts or practices,' other than the breach." Madan v. Royal Indem. Co., 26 Mass. App. Ct. 756, 763 (1989). As the trial judge instructed the jury in this case, "a breach of contract standing alone does not constitute proof of an unfair or deceptive act. There must be something more." A817.

It is equally true, however, that "[a] party is not exonerated from c.93A liability because there has been no breach of contract." NASCO, Inc. v. Public Storage, Inc., 127 F.3d 148, 152 (1st Cir. 1997), citing Jet Line Servs., Inc. v. Am. Employers Ins. Co., 404 Mass. 706 (1989). "A c.93A claim can survive even after a plaintiff's breach of contract ... claim[] ha[s] been dismissed." Hanningan v. Bank of Am., N.A., 48 F. Supp. 3d 135, 142 (D. Mass. 2014), because "a claim under c.93A rises or falls on its own merit," Patricia Kennedy & Co. v. Zam-Cul Enters., 830 F. Supp. 53, 59 (D. Mass. 1993).

In this case, the trial judge erred in ruling NTV's c.93A claims could "not be sustained absent a valid claim for breach of contract." A995, citing Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376 (2004). In that case, after trial, a jury found Kenmore breached the implied covenant in its lease with Uno, and the judge ruled Kenmore did not violate c.93A. On appeal, this Court held the judge should have directed a verdict

for Kenmore on the contact claim. Id. at 388-89.[4] On the c.93A claim, however, this Court accepted the factual finding that "the parties engaged in a 'traditional, business-like, arm's-length transaction'" and, based on those findings, affirmed that Kenmore "did not engage in unfair or deceptive practices." Id. at 389. In short, the c.93A claim failed because there was no violation by Kenmore, not because there was no breach of a valid contract with Uno.

This case arose in an entirely different procedure posture: unlike in Uno Restaurants, Inc., the trial judge sent NTV's c.93A claims to the jury, and based on the evidence, the jury found LGV and Plunkett willfully violated c.93A by engaging in unfair and deceptive conduct before, during, and after the consulting engagement with NTV. A946. That verdict did not depend, legally or factually, on a successful contract claim.

As described below, NTV claimed – and the jury found - that LGV violated c.93A in myriad ways, not only by willfully breaching the Agreement. Indeed, before NTV and LGV executed their contract on August 5, 2015, LGV engaged in unfair and deceptive conduct. And through the closing on December 31, 2015, LGV used NTV as a stalking horse for the Salary.com deal, even though Plunkett had

[4] The lease dispute largely turned on whether the implied covenant granted a right of first refusal to Uno, and this Court concluded that it did not.

already decided that NTV "failed" and never intended to compensate NTV. In the end, Plunkett insisted NTV had earned no compensation, telling Hendren and Whalen, "F--- the contract," offering a low-ball "settlement," and forcing NTV to sue.[5]

1. Before LGV and NTV entered the Agreement, LGV and Plunkett violated c.93A.

"A misrepresentation that induces a party to enter into an agreement may serve as the basis for a G.L. c.93A claim." Linear Retail Danvers #1, LLC v. Casatova, No. 2007-3147, 2008 Mass. Super. LEXIS 171, *7 (June 11, 2008), citing McEvoy Travel Bureau, Inc. v. Norton, Co., 408 Mass. 704, 714 (1990) ("Common law fraud can be the basis for a claim of unfair and deceptive practices under [c.93A]."); see Welch v. Barach, No. 09-1811-BLS, 2010

[5] The trial judge also cited Lawrence v. Richman Group Capital Corp., 358 F. Supp. 2d 29 (D. Conn. 2005) (applying Conn. law), but in that case, the court did not dismiss the Connecticut Unfair Trade Practices Act ("CUTPA") claim on the grounds that the plaintiff was an unregistered securities broker who sought to enforce a "void" contract. To the contrary, it ruled, "Lawrence's CUPTA claim is deficient ... even if the contract alleged were otherwise enforceable." Id. at 41. As the court noted, the plaintiff did not allege any fraud but only a "simple breach of contract," which was "insufficient to establish a claim under CUPTA." Id. at 42. The court explained, if the plaintiff had alleged "defendants made misrepresentations" with the "intent to deceive at the time [they] entered into the agreement," the complaint would have been adequate. That, of course, is this case. NTV pleaded in its complaint - and proved at trial - that LGV and Plunkett made numerous, material misrepresentations before, during, and after the consulting engagement. Those lies, along with other unfair and deceptive conduct, violated c.93A.

Mass. Super. LEXIS 304, *4 (Oct. 5, 2010) (ruling claims "based substantially on defendants' alleged pre-contract misrepresentations" were brought "for violation of c.93A," "not for breach of contract").

In this case, "misleading conduct" by Plunkett "induced the agreement" between LGV and NTV. Jacobson v. Mailboxes, Etc. U.S.A., 419 Mass. 572, 578-79 (1995) (distinguishing c.93A claims based on "precontract conduct that is ... unfair or deceptive" from "contract enforcement claims"). Plunkett falsely represented to Hendren that LGV had an exclusive opportunity to acquire Salary.com from IBM. A181-82, 251, 301. In fact, before LGV engaged NTV, that exclusive opportunity with IBM had expired. A301, A927. Before NTV entered the Agreement, Plunkett also falsely stated that LGV had terminated its exclusive engagement with Stifel. A181, 192, 214, 251, 301. But the truth was that, without telling NTV, LGV continued to work with Stifel. A332, 470.

Further, in proposing an agreement between LGV and NTV, Plunkett misled Hendren and Whalen to believe that LGV was an operating company with capital and that LGV intended to acquire the assets of Salary.com. A202, 208. As NTV later learned, however, LGV was just a shell company with no money to compensate NTV for its services. A454-55, 477.

2. Throughout the consulting engagement, LGV and Plunkett strung along NTV, but they did not intend to compensate NTV.

"Stringing someone along with false promises of payment to induce further performance ... is a classic c.93A violation." WorldCare Clinical, Inc. v. Bracco Diagnostic, Inc., No. 99095, 2007 Mass. Super. LEXIS 305, *13 (July 23, 2007), aff'd, No. 08-P-597, 2009 Mass. App. Unpub. LEXIS 95 (Feb. 26, 2009) (affirming c.93A verdict for plaintiff where "defendant engaged in a scheme to string the plaintiff along, using false promises of future benefits to induce the plaintiff to continue to perform services without a contract"); see Community Builders, Inc. v. Indian Motorcycle Assocs., Inc., 44 Mass. App. Ct. 537, 557-58 (1998) (holding defendants "withheld payment unconscionably, stringing [plaintiff] along ... with a purpose of coercing [plaintiff] to settle for substantially less compensation than the parties had agreed to before the services were performed").

In Exhibit Source, Inc. v. Wells Avenue Business Center, LLC, 94 Mass. App. Ct. 497 (2018), this Court affirmed the c.93A verdict and trebled damages award against a defendant-landlord who refused to return a security deposit. The trial judge found the landlord (i) "deliberately strung ... along" the plaintiff-tenant and had "no intention" of returning the deposit; (ii) gave "pretext[ual]," "manufactured" reasons for

withholding the money; and (iii) hoped the tenant would "accept less in settlement." Id. at 501. The judge ruled, and this Court affirmed, that the landlord's "strategy" was "intentional" and "went well beyond recognized concept[s] of unfairness." Id. This Court had "no difficulty concluding" that the tenant's c.93A claim "sounds predominantly in tort," because the landlord's "actions violate[d] well-established legal norms that are independent of the parties' contract." Id. at 502.

LGV and Plunkett engaged in similar wrongful conduct. By August 2015, Plunkett decided that NTV had "failed" and would not "succeed." A531-32. Nevertheless, through December 2015, LGV "deliberately strung along" NTV. Exhibit Source, Inc., 94 Mass. App. Ct. at 501. LGV used NTV as a "stalking horse" to generate competition over Salary.com. A192, 255, 396. During that period, when Whalen spent almost all his professional time on the deal, Plunkett engaged in unscrupulous, unethical, and deceptive conduct.

Plunkett gave "pretextual," "manufactured" reasons for refusing to meet with NTV-introduced investors. Exhibit Source, Inc., 94 Mass. App. Ct. at 501. For example, he declined to meet with reputable private equity firms that had not signed NDAs, A592 ("[I]f you are at all looking at a deal, you sign an NDA. You have to."), or provided term sheets, A344 ("[Plunkett] was very insistent that terms sheets should happen from the

very first meeting[.]"). But the NDA requirement was a farce, because Plunkett met with investors without written confidentiality agreements, A594-95 (North Bridge), and his term-sheet condition was unrealistic, A300 ("[A] term sheet typically is not something that is one of the opening steps. That's usually well farther down the road.").

In addition, Plunkett missed scheduled meetings with interested investors, and he gave false excuses to NTV. For example, after arriving hours late to North Bridge, A359-61, Plunkett lied to Whalen, claiming he had "hit traffic," A510-11. Unbeknownst to NTV, however, Plunkett had double-booked a meeting with H.I.G. to pitch the same deal. Id. Plunkett also cancelled, at the last minute, a meeting with Solamere, a "major player" in private equity that was a "great fit" and "could have done the entire deal." A224, 367-68. Without any explanation to Hendren or Whalen, Plunkett "blew ... off" the Solamere meeting, leaving NTV "in a very bad position at the very last minute." A221, 224.

Even after LGV accepted a binding term sheet from H.I.G. in November 2015, A522, Plunkett strung along NTV, directing Whalen to "keep warm" several debt investors, A369-71, 916. Yet as the deal framework developed, Plunkett withheld critical information from NTV (e.g., deal size, closing date, and financial information). A290, 352-53, 375-80, 492. Until the

bitter-end, LGV used NTV as a stalking horse: a few hours before Plunkett sent a termination notice to Hendren, A945, he pressed Whalen for updates on debt proposals, A920-21.

LGV never intended to compensate NTV for its work. That is why, on the eve of the closing, LGV terminated its Agreement with NTV. Id., 503, 543-46. At trial, Plunkett admitted "one of the considerations" in the timing of his December 14th notice to NTV was to ensure "the agreement would terminate before the December 31st closing date" with IBM. A613-14.

3. Around the closing, LGV and Plunkett engaged in unfair and deceptive conduct.

When a dispute arose about the compensation that NTV had earned, Plunkett made a low-ball offer of $75,000 in an effort to extort a cheap settlement. A529-30, 563. Despite listing $330,000 on closing documents as the "finder's fee" for NTV, A924-28, Plunkett told H.I.G. that he planned to pay "far less," A517.

Plunkett also disparaged NTV as "failed banker[s]," A387, 917, and "scum" who did not deserve their "bust-up fee," A388-89, 919. And on a call with Hendren and Whalen, Plunkett yelled, "F--- you, I don't get a F--- about the contract. I only pay people ... when I feel they should be paid." A386-87.

III. Regardless, the trial judge erred in concluding that LGV and Plunkett established any affirmative defense, because they waived any argument under the MUSA by not pleading it in their answer and failed to prove any claim under the SEA by not presenting evidence at trial to justify rescission of the Agreement.

The trial judge erred in ruling that LGV and Plunkett established affirmative defenses, which required setting aside the jury's verdict and dismissing NTV's claims. LGV and Plunkett waived any argument under the MUSA by failing to raise § 410(f) in their answer. They also failed to carry their burden of proof under the SEA by failing to present any evidence to justify rescission of the Agreement under § 29(b).

A. LGV and Plunkett waived a defense under the MUSA, because in their answer, they failed to plead that § 410(f) barred NTV's c.93A claims.

As a procedural matter, the trial judge ruled LGV and Plunkett had not waived their MUSA arguments. A989-90. In so ruling, the judge misapplied the waiver standard for an affirmative defense and improperly shifted the burden on the issue to NTV.

When a plaintiff sues to enforce an agreement that violates the MUSA, § 410(f) provides the defendant with an affirmative defense. See Landmark Financial Corp. v. Fresenius Medical Care Holdings, Inc., No. 10-cv-10372-NMG-MBB, 2012 U.S. Dist. LEXIS 46006 (D. Mass. Mar. 16, 2012) (following Indus Partners, LLC and noting that Fresenius "bears the underlying burden of proof to establish [its] affirmative defense" under § 410(f)).

"Ordinarily, 'a failure to plead an affirmative defense results in a waiver and exclusion of the defense from the case.'" Alicea v. Com., 466 Mass. 228, 236 n.12 (2013), quoting Demoulas v. Demoulas, 428 Mass. 555, 575 n.16 (1998), and citing Mass. R. Civ. P. 8(c), 365 Mass. 749 (1979); see Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991).

Although no Massachusetts court has (yet) applied the waiver principle to § 410(f), other states courts have reached the foregone conclusion. In Webster v. Rushing, 316 So. 2d 111 (La. 1975), the Louisiana Supreme Court held for the plaintiff-broker who secured a commercial mortgage for the defendant-developer. Citing the Louisiana securities law, which mirrors the MUSA, the court held:

> the defense that plaintiff was not a registered loan broker and was, thus, precluded from recovering under the contract ... was clearly an affirmative defense which was required to be specially pleaded.

Id. at 114. By failing to assert that affirmative defense, the developer waived its argument that the contract was void, so the unregistered broker was entitled to recover his agreed-upon fee. Id. at 115.

In their answer, LGV and Plunkett similarly failed to plead an affirmative defense under § 410(f). Their third defense ("the Agreement is unenforceable and/or void due to violations of the securities laws and

regulations") did not mention the MUSA. See Lewis v. Russell, 304 Mass. 41, 44 (1939) ("It is not enough that a defence be suggested or hinted at, or even that the plaintiff be reasonably caused to expect that it will be asserted."). LGV and Plunkett did not assert, in the MUSA's parlance, that NTV could not "base any suit" on the Agreement. Instead, they claimed the contract was "unenforceable" and "void," implying a defense only under § 29(b).

To the extent the answer was ambiguous, LGV and Plunkett stated, following a Rule 9C conference, that their defense "implicated ... section 15(a) and 29(b) of the [SEA]." A55. They did not invoke § 410(f) of the MUSA. In their summary judgment motion, they argued that, under § 29(b), the Agreement between LGV and NTV was "void." A91. Again, LGV and Plunkett did not contend that, under § 410(f), NTV could not bring any suit "base[d] on" that contract, and they did not cite Massachusetts law. In the joint pre-trial memorandum, LGV and Plunkett summarized "[a]ll significant legal issues" but did not say a word about the MUSA. A108-29.

The first time when LGV and Plunkett asserted a defense under § 410(f) was, quite literally, on the eve of trial in a bench memorandum. A130-36. That was too late, however, to resurrect an affirmative defense that had been waived more than one-and-a-half years earlier, when LGV and Plunkett omitted it from their answer.

Put simply, the trial judge erred in finding that LGV and Plunkett had not "express[ly] waive[d]" their argument under § 410(f). A989. That decision turned the waiver rule on its head. By failing to expressly assert any affirmative defense under the MUSA in their answer, LGV and Plunkett waived the issue, and they could not later raise it to avoid the jury's verdict.

B. LGV and Plunkett failed to establish a defense under the SEA, because they did not prove that LGV was an innocent, unwilling party or that the equities required voiding the Agreement.

The burden of proof for an affirmative defense is on the party asserting it. See Demoulas v. Demoulas Super Mkts., 424 Mass. 501, 548 (1997). Specifically, "to void [an] Agreement under § 29(b)," an unwilling, innocent party must establish three elements:

> (1) the contract involved a "prohibited transaction," (2) he is in contractual privity with the defendant and (3) he is "in the case of persons the Act was designed to protect" before determining whether [the party seeking rescission] satisfied these elements."

Regional Props., Inc. v. Fin. and Real Estate Consulting Co., 678 F.2d 552, 559 (5th Cir. 1982).

In finding "no evidence that Lightship or Plunkett knowingly 'acquiesced' to the NTV violation" of the broker registration requirement, A998, the trial judge twice erred. First, the evidence established that LGV knew, or should have known, that NTV and Whalen were not registered. Second, the judge improperly shifted the

burden to NTV to prove that LGV knew about, or acquiesced in, a securities law violation – that is, that LGV was not an "unwilling, innocent party."

1. No evidence proved LGV was an "unwilling, innocent party" to the Agreement.

Because § 29(b), like § 410(f), provides an affirmative defense, LGV had the burden to prove that it was entitled to rescind the Agreement, thereby avoiding its contractual obligations. Yet for the reasons stated above, see Part I, supra, LGV failed to prove the Agreement involved a prohibited "securities" transaction. In addition, LGV failed to prove it was an "unwilling, innocent party" of the sort that the Federal securities law aims to protect. Mills, 396 U.S. at 387.

A party is "entitled to rescission" under 29(b) "only if it is an innocent party." Maiden Lane Partners, LLC v. Perseus Realty Partners, G.P. II, LLC, No. 09-2521-BLS1, 2011 Mass. Super. LEXIS 86, *11-13 (May 31, 2011). But LGV offered no evidence that it did not know, and could not have easily determined, that neither NTV nor Whalen were registered brokers. At best, "[t]he record is ... unclear on the nature and extent" of LGV and Plunkett's "actual or constructive knowledge of, or complicity in, any allegedly prohibited conduct." Cornhusker Energy Lexington, LLC, 2006 U.S. Dist. LEXIS 68959, *30. Absent evidence from which a jury could conclude that LGV was an unwilling, innocent party, LGV

failed to establish an affirmative defense, and the trial judge erred in ruling the Agreement was "void."

To the extent the record sheds light on the issue, the evidence tends to show LGV knew Whalen was not a registered broker. Whalen told Plunkett, in July 2015, before LGV and NTV executed the Agreement, that he was not registered. A70. Further, there is no doubt that, with reasonable diligence, LGV could have determined that neither NTV nor Whalen were registered. LGV could have asked NTV or searched public databases (e.g., BrokerCheck). NTV did not mispresent its or Whalen's status or prevent LGV or Plunkett from learning that information.

2. No evidence established the equities warranted rescinding the Agreement.

Determining the appropriate remedy, if any, under Section 29(b), "require[s] a careful balancing of the equities." Freeman v. Marine Midland-Bank N.Y., 419 F. Supp. 440, 453 (E.D.N.Y. 1976), citing Mills, 396 U.S. at 387-88. As an equitable matter, "'[t]here is a conspicuous lack of judicial enthusiasm [for rescission] where there has been performance by the violator." Occidental Life Ins. Co. v. Pat Ryan & Assoc., Inc., 496 F.2d 1255, 1266 (4th Cir. 1974), quoting Pearlstein v. Scudder & German, 429 F.2d 1136, 1149 (2d Cir. 1970) (Friendly, J., dissenting).

Here, this Court should be "reluctant to nullify" the Agreement, which LGV executed and NTV performed. Id. at 1267. "[I]t would not advance the purposes of the securities laws" to permit LGV and Plunkett "to obtain an unexpected windfall," due to the "fortuitous factor" that Whalen's registration had lapsed, especially where LGV and Plunkett had "an ample variety of remedies, both legal and equitable," id., for any alleged wrong by NTV in what they have argued is merely "a contract case," A153. Indeed, when answering NTV's complaint, LGV and Plunkett initially asserted counterclaims for breach of contract based on allegations that the Agreement was a valid, enforceable contract. A40-49.

Moreover, to assess the "equitable considerations" relevant to a rescission claim under 29(b), a court must "closely examine the extent of each party's culpability." Freeman v. Marine Midland Bank, No. 71-cv-42, 1979 U.S Dist. LEXIS 12177, *8 (E.D.N.Y. May 24, 1979); see Naftalin & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 469 F.2d 1166, 1182 (8th Cir. 1972) (refusing to void an illegal contract and "absolve" a party, who did not "qualify as an 'unwilling innocent party,'" of its "contractual obligations" because doing so "would be an inequitable and gratuitous result"). Because LGV and Plunkett presented no evidence about their knowledge (or lack thereof), the trial judge could not weigh the equities, and thus, he could not properly

decide that those considerations required the Agreement to be rescinded.

IV. The trial judge erred in dismissing NTV's c.93A claim against Plunkett in his individual capacity, because Plunkett was not a party to the Agreement between NTV and LGV, but as the jury found, he willfully engaged in unfair and deceptive conduct.

Although NTV sued LGV for breach of contract and breach of the implied covenant, NTV sued both LGV and Plunkett for violations of c.93A. A816, A830-32, 946-48. Because Plunkett was not a party to the Agreement, NTV's c.93A claim against Plunkett, in his individual capacity, was not – and could not have been – "based on" that contract with LGV, and it made no difference whether that contract was "void."

The evidence at trial left no doubt that the Agreement was only between NTV and LGV. A863-67. The document identifies the parties as NTV and LGV, the corporate entities. Id. In his opening, counsel for LGV and Plunkett stressed this point: "It's not an agreement between Mr. Hendren or Mr. Plunkett ... It's an agreement between the companies." A153.

Plunkett executed the Agreement as LGV's CEO, A863-67, not "in his individual capacity," A120, so he did not become a party to that contract, see Porshin v. Snider, 349 Mass. 653, 655 (1965); see, e.g., Marshall v. Stratus Pharm., Inc., 51 Mass. App. Ct. 667, 673 (2001) (holding "[t]he signature [of the president "for"

the company] makes clear that Pyle was contracting on behalf of Stratus").

To state the obvious, NTV's c.93A claim against Plunkett cannot be deemed an action "based on" NTV's contract with LGV, for the purpose of § 410(f), because Plunkett was, by his own admission, not a party to the Agreement. Plunkett could neither be held liable for breach, see Jurgens v. Abraham, 616 F. Supp. 1381, 1386-87 (D. Mass. 1985), nor sue to enforce it, see Harvard Law Sch. Coalition for Civil Rights v. Pres. & Fellows of Harvard Coll., 413 Mass. 66, 70-71 (1992).

Nevertheless, in his dealings with NTV, Plunkett violated c.93A by personally engaging in unfair and deceptive conduct. See Kattar, 433 Mass. at 14-15 ("Parties need not be in privity for their actions to come within the reach of c.93A."). Hendren testified that Plunkett treated NTV unfairly and lied repeatedly. A288, 293. Plunkett "blew off" NTV-introduced investors – showing up late or canceling altogether and, then, lying about his reasons. A221, 224, 360-61, 367-68, 510-11. Hendren and Whalen could not "trust anything [Plunkett] said or anything he did." A228. Based on Plunkett's unscrupulous, dishonest dealings, Hendren had the "strong feeling that [Plunkett] was deceiving and playing us." A229.

Throughout the engagement, it was "very difficult" to work with Plunkett, A228, who was "insulting" to

Hendren and Whalen, A194, and "unprofessional," A293, A291 (describing "profanity-laced conversations" with Plunkett); A344 (describing that, "[a]t a certain point," Plunkett "became much more difficult to deal with" in terms of his "attitude" toward NTV, "demeanor" with potential investors, and tendency to "yell" during "F-bomb related conversations").

At trial, Hendren summarized his difficult experience working with Plunkett:

> We had put a lot time into this [deal] and had operated in good faith. So naturally, we're very frustrated, and we are also trying to think about how not to get stiffed; not to have somebody play games on us and not pay us.

A232. Unfortunately, as Plunkett planned all along, he "purposefully deceiv[ed] and t[ook] advantage of NTV" as a stalking horse to enrich LGV and himself. A228.

Before sending the case to the jury, the trial judge cautioned defense counsel that, "the liability [for c.93A violations], if it would be found, would be on Mr. Plunkett." A646 (emphasis added). And in the end, based on the evidence at trial, the jury held Plunkett personally liable under c.93A for trebled damages. Plunkett cannot escape personal liability for his own conduct by belatedly challenging the validity of the Agreement between LGV and NTV.

V. NTV requests an order for LGV and Plunkett to pay its appellate attorneys' fees and costs.

As noted above, the trial judge ruled that, if he had entered judgment for NTV, he would have awarded attorneys' fees and costs in the amount of $275,674. A999-1001. Because NTV has been forced to defend on appeal the jury's well-supported verdict that LGV and Plunkett willfully violated c.93A, NTV respectfully requests this Court order that LGV and Plunkett also pay NTV its reasonable attorneys' fees and costs for this appeal. See G.L. c.93A, § 11; Fabre v. Walton, 441 Mass. 9, 10 (2004), citing Yorke Mgt. v. Castro, 406 Mass. 17, 19-20 (1989).

CONCLUSION

For the foregoing reasons, NTV respectfully requests that this Court vacate the trial judge's decision to set aside the jury's verdict and the judgment for LGV and Plunkett, and remand this case with instructions for the trial judge (i) to reinstate the jury's verdict, (ii) to enter judgment for NTV, (iii) to award damages to NTV in the amount of $990,000, (iv) to award attorneys' fees and costs for trial to NTV in the amount of $275,674.23, (v) to award attorneys' fees and costs for this appeal to NTV in amounts to be determined; and (vi) to award pre-judgment interest to NTV in an amount to be determined.

Respectfully submitted,

NTV MANAGEMENT, INC.

By its attorneys,

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CERTIFICATE OF COMPLIANCE

I, Daniel N. Marx, as counsel for Plaintiff-Appellant NTV Management, Inc., certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure.

/s/ Daniel N. Marx
Daniel N. Marx

Dated: February 8, 2019

CERTIFICATE OF SERVICE

I, Daniel N. Marx, as counsel for Plaintiff-Appellant NTV Management, Inc., certify that on February 8, 2019, I caused the foregoing brief to be served electronically through this Court's e-filing system on the following counsel of record:

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Daniel N. Marx

Dated: February 8, 2019

ADDENDUM

Mass. R. Civ. P. 8(c)

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

G.L. c.93A, § 2(a)

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

G.L. c.93A, § 11

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty–five C, whether by way of original complaint, counterclaim, cross–claim or third–party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Such person, if he has not suffered any loss of money or property, may obtain such an injunction if it can be shown that the aforementioned unfair method of competition, act or practice may have the effect of causing such loss of money or property.

Any persons entitled to bring such action may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as hereinafter provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment

on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

In any action brought under this section, in addition to the provisions of paragraph (b) of section two, the court shall also be guided in its interpretation of unfair methods of competition by those provisions of chapter ninety–three, known as the Massachusetts Antitrust Act.

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.

G.L. c.110A, § 201(a)

It is unlawful for any person to transact business in this commonwealth as a broker-dealer or agent unless he is registered under this chapter.

G.L. c.110A, § 202(a)

A broker-dealer, agent, investment adviser or investment adviser representative may obtain an initial or renewal registration by filing with the secretary or his designee an application together with a consent to service of process pursuant to paragraph (g) of section 414, and paying any reasonable costs charged for processing such filings. The application shall contain whatever information the secretary by rule requires concerning such matters as:

(1) the applicant's form and place of organization;

(2) the applicant's proposed method of doing business;

(3) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or the investment adviser;

(4) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;

(5) the applicant's financial condition and history; and

(6) any information to be furnished or disseminated to any client or prospective client, if the applicant is an investment adviser.

The secretary may by rule or order require an applicant for initial registration to publish an announcement of the application in 1 or more specified newspapers published in the commonwealth. If no denial order is in effect and no proceeding is pending under section 204, registration shall become effective at noon of the thirtieth day after an application is filed. The secretary may by rule or order specify an earlier effective date, and may by order defer the effective date until noon of the thirtieth day after the filing of any

amendment. Registration of a broker-dealer or an investment adviser automatically constitutes registration of any agent or investment adviser representative, whichever is applicable, who is a partner, officer, or director, or a person occupying a similar status or performing similar functions. No person shall be designated as a partner, officer or director or a person occupying a similar status or performing similar functions, for the purpose of the automatic registration if the designation is solely for the purpose of avoiding registration as an agent or investment adviser representative.

G.L. c.110A, § 401(c)

"Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account.

G.L. c.110A, § 401(k)

"Security" means 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 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, § 410(f)

> No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

G.L. c.110A, § 415

> This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

15 U.S.C. § 78c(a)(4)(A)

> In general. The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.

15 U.S.C. § 78c(a)(10)

> The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time

of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78o(a)(1)

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

15 U.S.C. § 78cc(b)

Contract provisions in violation of title. Every contract made in violation of any provisions of this title [15 USCS §§ 78a et seq.] or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title [15 USCS §§ 78a et seq.] or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: *Provided,* (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title [15 USCS § 78o], and (B) that no

> contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or from whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 15 of this title [15 USCS § 78o], unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation. The Commission may, in a rule or regulation prescribed pursuant to such paragraph (2) of such section 15(c) [15 USCS § 78o(c)], designate such rule or regulation, or portion thereof, as a rule or regulation, or portion thereof, a contract in violation of which shall not be void by reason of this subsection.

Uniform Securities Act, § 509(k)

> [No enforcement of violative contract.] A person that has made, or has engaged in the performance of, a contract in violation of this [Act] or a rule adopted or order issued under this [Act], or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this [Act], may not base an action on the contract.

A.S. 45.55.930(g)

> A person who makes or engages in the performance of a contract in violation of a provision of this chapter or regulation or order under this chapter, or who acquires a purported right under the contract with knowledge of the facts by reason of which its making or performance is in violation, may not base a suit on the contract.

Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016 - 327 BLS 1

NTV MANAGEMENT, INC.

vs.

LIGHTSHIP GLOBAL VENTURES, LLC and G. KENT PLUNKETT

MEMORANDUM AND ORDER ON POST-TRIAL MOTIONS

A jury returned a verdict in favor of plaintiff, NTV Management, Inc., on November 17, 2017. The jury found that defendant, Lightship Global Ventures, LLC, breached its contract with NTV, and breached the implied covenant of good faith and fair dealing with respect to actions taken by Lightship after the contract was executed. In addition, the jury found that Lightship and its principal, G. Kent Plunkett, committed unfair or deceptive acts in violation of G.L. c. 93A. Damages of $330,000 were awarded and, upon an express finding that the c. 93A violations were committed willfully and knowingly, the jury found that the damages should be trebled.

Judgment on the jury's verdict awaits a determination of an award of attorney fees to NTV based on the successful prosecution of its c. 93A claim. NTV now petitions for such an award (Paper No. 41). Meanwhile, Lightship and Plunkett move to enter judgment in their favor, notwithstanding the verdict, because NTV was an unregistered broker-dealer. That motion is

entitled Motion to Invalidate the Consulting and Advisory Services Agreement Based on NTV Management's Role as an Unregistered Broker-Dealer" (Paper No. 47)("Motion to Invalidate"). Lightship and Plunkett also submit a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial (Paper No. 40)("JNOV Motion") raising additional arguments against the jury's verdict. This memorandum and order will address all three motions.

DISCUSSION

The crux of this dispute concerns the parties' conduct arising out of a Consulting and Advisory Services Agreement (the "Agreement") dated August 4, 2015. Stated generally, the claim is that, pursuant to the Agreement, NTV was to perform certain services for Lightship in connection with Lightship's "effort to acquire, and finance the acquisition of the business and assets of" a company called Salary.com.[1] Ultimately, Lightship was successful in purchasing the Salary.com business.[2] NTV contends that it performed the services under the Agreement to earn a fee upon the successful acquisition by Lightship of Salary.com. Lightship refused to pay a fee to NTV and, according to NTV, took steps to interfere with NTV's ability to earn the fee.

I. Motion to Invalidate the Agreement

This motion is, in essence, a motion for judgment notwithstanding the verdict. Defendants contend that NTV's claims and, therefore the verdict, depend entirely upon the enforceability of the Agreement. Because NTV (or a principal of NTV) was not a registered broker-dealer, defendants say the Agreement is unenforceable. Thus, NTV's claims based on the Agreement, must fail.

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[1] Agreement, ¶ 2 of Scope of Work ("SOW").

[2] The purchase was effected by a corporation set up for the purpose of the acquisition.

A. Procedural Background

Before considering the merits of defendants' argument, a description of the procedural history of this issue is in order. In their answer to NTV's complaint, defendants asserted an affirmative defense, contending that NTV's claims "fail because the Agreement is unenforceable and/or void due to violations of the securities regulations." Subsequently, defendants moved for summary judgment. Defendants' principal argument for summary judgment was that NTV failed to perform the services necessary to earn a fee under the Agreement. Defendants also argued, however, that because NTV was not registered as a broker-dealer under the Federal Securities and Exchange Act, 15 U.S.C. § 78o(a), the Agreement was void. Specifically, defendants contended that "Section 29(b) of the Exchange Act provides that '[e]very contract' made in violation of the SEA or the performance of which involves such violation 'shall be void', 15 U.S.C. § 78cc(b)." Defendants' Memorandum in Support of Their Motion for Summary Judgment, p. 17.

On May 31, 2017, the court (Kaplan, J.) issued its order on defendants' motion for summary judgment, with a fourteen page memorandum. The motion was allowed, in part, and denied, in part. In short, NTV's claim for a 3% "commission" was dismissed because the undisputed facts established that NTV did not produce the investors who, ultimately, financed the acquisition of the Salary.com business. The court also dismissed NTV's claims for promissory estoppel, unjust enrichment, fraudulent transfer and to reach and apply. NTV's claim for an "advisory fee" under the Agreement was allowed to continue. The court did not address, or mention, defendants' contention that all claims should be dismissed because NTV was not

registered as a broker-dealer.[3]

On October 27, 2017, the parties submitted their Joint Pre-Trial Memorandum. In that Memorandum at pages 19-20, defendants again raised their argument that the Federal securities laws made the Agreement "void." A Final Trial Conference was held on October 30, 2017, in anticipation of the commencement of trial on November 8, 2017. At the Final Trial Conference, the "broker-dealer issue" was discussed. NTV and defendants agreed that the broker-dealer issue should be decided by the court, not the jury. Defendants represented that the issue could be determined "basically" on what is in the Agreement. Transcript, October 30, 2017, p. 6. The parties were instructed to notify the court if they wished to offer evidence relevant only to the broker-dealer issue. If so, such evidence would be taken outside of the hearing before the jury. The broker-dealer issue would then be decided as a directed verdict motion.

Two days later, on November 1, 2017, NTV filed its Motion in Limine No. 1 seeking to preclude argument or testimony before the jury regarding the status of NTV's registration as a broker-dealer. In that motion, NTV also provided its position on the merits of the broker-dealer issue. NTV contended that the Agreement contains a "severability" clause so that even if the Agreement's provision for a 3% commission fee might make the Agreement in violation of the Federal securities laws, the 3% commission fee was no longer in the case as a result of the summary judgment decision. At trial, NTV was seeking to recover an "advisory" fee that would not implicate the securities laws. In response, on November 8, 2017, defendants submitted their "Memorandum Concerning NTV's Role as an Unregistered Broker Dealer." In this

[3] In the Statement of Undisputed Facts submitted with the summary judgment motion, NTV admitted that its principal, Christopher Whalen, was not affiliated with a licensed broker-dealer during the relevant time period.

memorandum, defendants argued, for the first time, that the Massachusetts Uniform Securities Act ("the Act"), G.L. c. 110A, §§ 101 et seq., also required registration as a broker-dealer for the conduct contemplated by the Agreement. The effect of failure to register when required under the Act is that "[n]o person who has made or engaged in the performance of any contract in violation of any provision of this chapter . . . may base any suit on the contract." *Id.* at § 401(f).

Trial commenced on November 8, 2017. The parties' consent to submit the broker-dealer issue to the court, rather than to the jury, was confirmed on the record. Defendants indicated that the only evidence specific to the broker-dealer issue that they would need is the Agreement, itself, and a stipulation that at the relevant dates NTV and its principals were not registered as a broker-dealer. The record reflects my response: "What I think we do with this is at the time, if there is - - if there is a time for a motion JNOV, that I would require you to work out a stipulation as to whatever his licensing status exactly is . . . but for this trial, before this jury, we'll leave it out." Transcript, November 9, 2017, p. 4.[4]

NTV now opposes consideration of defendants' Motion to Invalidate on two procedural grounds. First, NTV opposes the motion because defendants submitted a volume of allegedly "Stipulated Facts" in support of the motion. The volume includes affidavits and deposition testimony of both NTV principals and Plunkett that were not introduced at trial. The volume also includes a number of exhibits that were entered into evidence at trial. NTV argues that it is unfair for defendants to offer more evidence on the broker-dealer issue than what was stipulated on the first day of trial; namely, that the only evidence for the court to consider on the broker-dealer

[4] NTV confirmed at oral argument on these motions a stipulation that neither NTV nor its principals were registered as broker-dealers.

issue would be the Agreement and a stipulation as to whether NTV or its principals were registered as a broker-dealer. I agree. It is too late for defendants, or for NTV, to attempt to supplement the record on the broker-dealer issue. Either side could have done so at the time of trial, outside of the hearing of the jury, but they chose not to. Accordingly, I will not consider the Stipulated Facts submitted by defendants, except for a stipulation as to whether NTV was registered as a broker-dealer.

The second procedural ground for NTV's opposition to the Motion to Invalidate is defendants' reliance on the Massachusetts Uniform Securities Act. NTV says that the Act was never advanced as a ground for defendants' broker-dealer argument until defendants' memorandum filed on the first day of trial. NTV claims that defendants, therefore, "waived" arguments based on the Act. NTV's Opposition to Motion to Invalidate, p. 2. I find that such a waiver has not occurred. First, there is no express waiver. Second, the mere fact that defendants did not argue at summary judgment for dismissal based on the Act does not constitute a waiver because the court did not decide the broker-dealer issue. The issue remains alive for consideration after the trial[5] and both sides are free to advance legal arguments based on statutes and case law that may have relevance. Lastly, there has been no unfairness or undue prejudice to NTV. Both sides are presumed to know the law, including the possibility that its opponent might advance an argument about the law that had not previously been raised.[6] Accordingly, I reject

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[5] Defendants included the broker-dealer issue as a ground for their motions for directed verdict at the close of NTV's evidence and at the close of all the evidence.

[6] NTV says that defendants failed properly to supplement a discovery answer regarding the law defendants were relying upon for their broker-dealer argument. In response to an interrogatory, defendants stated that NTV was in violation of the securities laws because NTV was not acting in association with a registered broker-dealer. The specific "securities laws" were

NTV's procedural arguments to deny the motion to invalidate.

B. The Merits of the Broker-Dealer Issue

Under both the Securities and Exchange Act of 1934 ("Exchange Act") and the Massachusetts Act, a "broker" is any person who engages in the business of effecting transactions in securities for the account of others. See 15 U.S.C. §78c (a)(4)(A) and G.L. c. 110A, § 401(c). A "broker", as defined, is required to register as a broker-dealer with the Securities and Exchange Commission. 15 U.S.C. §78o(a)(1). Likewise, Massachusetts requires that a "broker" transacting business in the Commonwealth register under G.L. c. 110A, § 201(a). Failure to register when a person should has consequences. Among other things, Section 29(b) of the Exchange Act (15 U.S.C. § 78cc(b)) provides that a contract made in violation of the Exchange Act (such as one to provide services as a broker when the provider is not registered as a broker) "shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract . . . ." The Massachusetts Act states the consequences in a slightly different manner. "No person who has made or engaged in the performance of any contract in violation of any provision of this chapter . . . may base any suit on the contract." Act, § 410(f).

The parties have stipulated that NTV and its principals were not registered as a broker-dealer during the relevant time period. Thus, the question presented is whether the Agreement

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not provided. NTV followed up with an email request, in 2016, for defendants to identify what securities laws were violated. In response, defendants sent an email identifying only Federal laws that "we believe could potentially be implicated." NTV provides no authority for why defendants should be obligated to have supplemented their response regarding their potential legal arguments based upon the Massachusetts Act. Mass. R. Civ. P. 26(e) suggests that no supplementation was required..

between NTV and Lightship was made in violation of the aforementioned statutes, or required performance in violation of the statutes.

The Appeals Court in *Indus Partners, LLC* v. *Intelligroup, Inc.*, 77 Mass. App. Ct. 793 (2010) provides analysis under the Massachusetts Act on facts closely aligned with the facts in this case. Moreover, as the Court in *Indus Partners* noted, the Act's definition of broker-dealer essentially repeats the definition in the Exchange Act. Thus, "[w]e accordingly turn to the Federal statutes and discussions for guidance in determining whether Indus was a broker-dealer under the Act, 'engaged in the business of effecting transactions in securities.'" *Id.* at 797. In recognition of *Indus Partners* as binding precedent, I will first examine whether the Massachusetts Act prohibits NTV from recovering on its claims based on the Agreement.

The Appeals Court held that the "[t]he act of making the contract itself, irrespective of performance, can thus suffice to preclude suit brought on that instrument." *Id.* at 795. As a result, the court looks to the terms within the four corners of the Agreement to judge whether the services for which NTV was engaged constitute brokerage services. "[I]f the duties described in the Agreement constitute broker-dealer services, the Agreement is unenforceable." *Id.* at 796.[7]

The Agreement incorporates a document entitled Scope of Work (SOW). The SOW describes the services that NTV was going to provide Lightship in three categories: (1) "Consulting and Advisory", (2) "Acquisition and related transactions", and (3) "Financing." The first category of service required NTV to serve as an advisor to Lightship "in connection with the

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[7] NTV appears to concede that the broker-dealer issue is determined by the terms of the contract, not by the performance under the contract. At p. 2 of its Opposition to the Motion to Invalidate, NTV states "that Lightship's lengthy discussion of whether or not NTV, in fact, acted as broker-dealer is irrelevant to this Motion."

company's effort to acquire, and finance the acquisition of" Salary.com. In this first category, the SOW also provides that NTV shall be included in the acquisition process as necessary to facilitate the financing of the transaction. The third[8] category of services under the SOW is described as follows:

> NTV will endeavor *to source capital and structure financing transactions from agreed-upon target investors and/or lenders. NTV will facilitate and participate in meetings and due diligence with capital sources, structuring and negotiating terms, and closing financing for the Acquisition* as [Lightship's] advisor.

Emphasis added.

There is no question but that the anticipated capital sources would be "securities" under the law. See *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 686 (1985)(securities defined broadly to encompass virtually any instrument that might be sold as an investment).

The SOW goes on to describe the "Fees and Compensation" anticipated by the Agreement and the work required to earn the fees:

> [Lightship] will pay to NTV *as transaction fees (collectively, "Fees") at closing* in cash the a [sic] success fee (the "Success Fee") equal to the greater of 3% of the value of the capital that NTV introduces to the project that is invested or $330,000. In the event a deal is consummated by management with investment or financial sponsorship other than parties introduced by NTV, but not including sources contacted and/or introduced by NTV, . . . and no success fee is earned, then NTV shall be entitled to a $330,000 advisory fee in consideration of its team's effort, advisory services, time, and opportunity costs associated with *working with management, preparing materials, communication with potential sources of capital, and other services*, provided NTV shall have *introduced at least 10 qualified sources of capital and remained engaged with [Lightship] and available to provide advice and support*. It is understood and agreed by the parties that: . . . (ii) *NTV expects to introduce and facilitate investment from third party sources collectively able to finance all levels of the transactions (i.e., both equity and debt)* and [Lightship] has agreed as to each level of the capital structure for which NTV has one or more sources of capital willing and able to provide financing that [Lightship] has agreed

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[8] The second category under "Services" entitled "Acquisition and related transactions" described who might be responsible for paying a previous advisor.

> that [Lightship] will close with such investor(s) introduced and facilitated by NTV and not with other investors who might offer such financing on substantially the same terms; provided that if [Lightship] determines reasonably and in good faith that accepting financing from one or more of such investors would not be in the best interests of the Company and its management and shareholders (but specifically excluding as an interest of the Company avoidance of fees otherwise payable), [Lightship] shall not be required to close with such investor(s). If third parties not introduced by NTV shall offer better terms than parties introduced by NTV, then NTV will have the opportunity, within five days after notification, to match such terms.

Emphasis added.

> The Agreement also contains the following severability clause in Paragraph 8.3:
>
> In case one or more of the provisions of this Agreement will be held invalid, illegal or unenforceable in any respect for any reason, the same will not affect any other provision in this Agreement, which will be construed as if such invalid or illegal or unenforceable provision had not been contained in this Agreement.

Finally, the Agreement mandates that it "is made under, and in all respects will be construed, and governed by and in accordance with the laws of" Massachusetts.

The Court in *Indus Partners* recognized Federal law holding that a person "effects transactions in securities" if he participates in such transaction at key points in the chain of distribution. *Id.* at 797. As referenced above, whether a person participates at key points is determined by the anticipated scope of services defined in the Agreement, not by what services were actually performed. This makes sense given that the presumed purpose of the Act is to regulate in advance persons who have a stake in the sale of securities. *Id.* at 796 n. 5.

There is no doubt that NTV had a stake in the sale by Lightship of securities to finance the acquisition of Salary.com. To collect either the potential Success Fee or the Advisory Fee there had to be a successful offering of securities by Lightship at a closing. This describes a transaction-based fee arrangement that, as noted in *Indus Partners*, the Securities and Exchange

Commission has found to be a key factor in determining whether broker-dealer registration is required. *Id.* at 798-799 (such an arrangement is one of the "hallmarks of being a broker-dealer"). The Appeals Court based its holding that Indus Partners was an unregistered broker on this key factor as well as other indicia of participating in the transaction at key points: "The Agreement's transaction-based compensation arrangement, coupled with its requirement that Indus be extensively involved in negotiations, would confer broker-dealer status even though the ultimate 'exchange of funds or securities [would be] arranged by the principals, and not [Indus].'" *Id.* at 801.

The Agreement between NTV and Lightship describes anticipated extensive involvement by NTV in a transaction effecting the sale of securities. Specifically, NTV is to "participate in meetings and due diligence with capital sources, structuring and negotiating terms, and closing financing for the Acquisition." Even with respect to earning an Advisory Fee in the event NTV's prospective investors do not actually finance the acquisition, the Agreement contemplates compensation upon a closing of the offering to NTV for "preparing materials, communication with potential sources of capital" and remaining "engaged with [Lightship] and available to provide advice and support." I find that the scope of services called for in the Agreement is comparable, if not nearly identical, to the scope of services found by the Appeals Court in *Indus Partners* to require broker-dealer registration. Consequently, *Indus Partners* is direct authority for concluding that the Agreement is unenforceable. See also, *Novelos Therapeutics, Inc.* v *Kenmare Capital Partners, LTD*, 13 Mass. L. Rptr. 389, 2001 WL 893449 (Super. Ct. 2011)(dismissing claims for compensation by unregistered broker-dealer based on description of anticipated services in the contract).

NTV may not, under the Massachusetts Act, assert *any* claims based on the Agreement. *Indus Partners,* 77 Mass. App. Ct. at 801-802. Because NTV's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of c. 93A all rest entirely on the enforceability of the Agreement, those claims are barred by the Massachusetts Act. *Id.* at 793 (claims for quantum meruit, promissory estoppel and c. 93A dismissed with dismissal of contract clam). See also, *Lawrence* v. *Richman Group Capital Corp.*, 358 F. Supp. 2d 29, 40 (D. Conn. 2005)(void contract with unregistered broker precludes claims for breach of implied covenant and Connecticut Unfair Trade Practices Act based on the contract); *Uno Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 441 Mass. 376, 385, 389 (2004)(claims for breach of covenant of good faith and fair dealing, and c .93A, cannot be sustained absent valid claim for breach of contract).

The Appeals Court in *Indus Partners* relied heavily upon Federal law under the Exchange Act to reach its conclusion that the agreement between the parties described broker-dealer services. *Indus Partners*, 77 Mass. App. Ct. at 796. Indeed, the Appeals Court quoted and applied the six part test for determining whether an individual acted as a broker that is routinely utilized by Federal courts. *Id.* at 798; see *SEC* v. *Helms*, 2015 U.S. Dist. LEXIS 110758, *50 (W.D. Tex. 2015). Following the logic and analysis of *Indus Partners*, I conclude that the contract between NTV and Lightship made NTV a "broker" under Federal law, as well as Massachusetts law. As described above, the Federal statute uses language different from the Massachusetts Act to describe the consequence of entering into a broker-dealer contract when not registered as a broker-dealer. Under Federal law, the contract is "void." Exchange Act, § 29(b).

NTV advances two arguments against a finding that the Agreement is unenforceable. First, NTV points to the severability provision in the Agreement. NTV argues that even if the contract viewed as a whole is deemed to be an agreement for services as a broker-dealer, the contemplated services for NTV to receive the "advisory fee", severed from the "success fee", do not amount to brokerage services. NTV's second argument is that under Federal law a contract for the provision of brokerage services by an unregistered broker should be deemed "voidable by an innocent party" rather than "void." As a matter of equity, therefore, the Agreement between NTV and Lightship should not be deemed void because Lightship's principal, Plunkett, is, NTV says, not an innocent party. Both arguments fail under the authority of *Indus Partners*.

As described above, the Agreement contains a paragraph, ¶ 8.3, purporting to allow enforcement of provisions not declared illegal, even if other provisions are illegal. NTV contends that, with respect to the advisory fee, it was acting as a "finder" not a broker. Thus, the Agreement should be held to be enforceable to collect the advisory fee. The problem, however, with NTV's argument is that even if the Agreement were to be analyzed separately for what is required for the advisory fee, the contemplated services for that fee constitute broker-dealer services. The description in the Agreement of the "Services" NTV was to provide, including to source capital and structure financing transactions and to facilitate and participate in meetings and due diligence with capital sources, structuring and negotiating terms, and closing financing, applies to the entire engagement, whether or not the services trigger a success fee or an advisory fee. The services are inextricably intertwined. Moreover, with respect to the advisory fee, the Agreement explicitly calls for NTV to work with management, prepare materials, communicate with potential sources of capital, and provide "other services", all the while remaining engaged

with Lightship and available to provide advice and support. Those services, combined with a transaction-based fee, fall squarely into what *Indus Partners* found to be a contract for broker-dealer services. Lastly, NTV suggests that the advisory fee should not be regarded as "transaction-based." NTV says that because the advisory fee is a "flat fee" it is distinguishable from, and therefore severable from, the "success fee" that is determined as a percentage of the overall financing. This argument ignores the fact that the advisory fee, under the Agreement, is paid only upon a closing of the transaction; i.e., the fee is based on the transaction. Further, it should be noted that the broker in *Indus Partners* also was to be paid a flat fee upon a consummated transaction (with the possibility of a percentage fee if the deal was in excess of a certain amount). *Indus Partners*, 77 Mass. App. Ct. at 793 n.1, 798. The Court viewed such a fee as a transaction based fee that is the hallmark of a broker-dealer contract. *Id.* at 799. In short, the possible severability of the provisions in the Agreement does not dictate a different result merely because NTV is seeking, at this time, only the advisory fee.[9] *Novelos Therapeutics*, 2011 WL 893449 *9 (rejecting severability argument by unregistered broker-dealer).

In *Maiden Lane Partners, LLC* v. *Perseus Realty Partners, G.P. II, LLC*, 28 Mass. L. Rep. 380, 2011 WL 2342734, a Massachusetts Superior Court judge denied summary judgment for a party, Perseus, seeking to rescind a contract with Maiden Lane, a party allegedly performing broker-dealer services as an unregistered broker-dealer. The issue was decided on Federal law, only, with no reference to the Massachusetts Act or *Indus Partners*. The court, citing Federal authority, noted some authority for the proposition that under § 29(b) of the Exchange Act, a

[9] In this lawsuit, NTV sought, and presumably still seeks when it appeals the grant of summary judgment against it for the success fee, to recover the 3 % success fee.

contract made in violation of the registration requirement "is not automatically void but only voidable at the option of the innocent party." *Id.* at *4, citing *Cornhusker Energy Lexington, LLC* v. *Prospect St. Ventures*, 2006 WL 2620985 at *24 (U.S.D.C. D. Neb. 2006). Because Perseus was seeking to rescind the contract in an equitable action, the court concluded that equitable defenses were available such that even if Maiden Lane was in violation of the Exchange Act, a jury could "find that Perseus, by its conduct, knew of and acquiesced to that violation and was not therefore an innocent party. In that event, rescission [by Perseus] would be prohibited and Maiden Lane's contractual claim would stand." *Id.* at *6. NTV cites this case as a ground for allowing it to recover under the Agreement notwithstanding that it was an unregistered broker-dealer. There are two reasons why NTV's argument must be rejected.

First, under the Massachusetts Act the language is different. There is no authority for recognizing an equitable defense to the statutory prohibition of an action based on a contract with an unregistered broker-dealer.

Second, there is no evidence that Lightship or Plunkett knowingly "acquiesced" to the NTV violation, or even knew that NTV was not registered. NTV could have put such evidence into evidence under the court's order that a party should request to offer any relevant evidence on the broker-dealer issue, for hearing outside of the jury, during the trial.

In sum, NTV's claims, all based on the Agreement, must be dismissed. Judgment shall enter dismissing the claims but, in the exercise of discretion, costs shall not be awarded to defendants because of their wrongdoing, as found by the jury. In anticipation of the possible appeal of this judgment, I go on to express my views on the remaining motions.

II. **Motion for Judgment Notwithstanding the Verdict**

Upon review of defendants' motion (Paper No. 40), I conclude that there is no reason to disturb the jury's verdict. Applying the standard articulated in *Esler* v. *Sylvia-Reardon*, 473 Mass. 775, 780 (2016)(motion must be denied if anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the nonmoving party), I deny the motion. I stand by my decision to submit to the jury the question of the parties' intent with respect to the use of ambiguous words in the Agreement. With respect to the jury's finding of c. 93A violations, the evidence was sufficient to support the findings based on jury instructions (as to which defendants asserted no objection) that made it clear that the standard for a violation of c. 93A is significantly more than mere breach of contract. Likewise, the jury was warranted in finding on the evidence presented that defendants' unfair and deceptive acts were done willfully and intentionally.

III. **NTV's Petition for Award of Attorneys' Fees**

Because NTV's complaint, including its claim for violation of c. 93A, must be dismissed, as described above, NTV is not entitled to an award of attorneys' fees. Thus, this motion is denied. Nevertheless, I express the following conclusions regarding the petition.

The petition seeks an award of attorneys' fees in the amount of $405,724, plus reimbursement of costs in the amount of $13,576.10. The petition is supported by affidavits and contemporaneous time records kept by the lawyers. Defendants to not object to the hourly rates used to calculate the fees sought. Moreover, as the trial judge, I find that the hourly rates are fully justified by the skill, preparation and professionalism of NTV's lawyers.

Defendants assert three objections to the amount of the attorneys' fees. First, defendants contend that there should be no recovery for time spent by the lawyers to defend counterclaims asserted by defendants. I agree. Because NTV's lawyers accounted separately for their time spent to defend the counterclaims (so as to bill NTV's insurer), the amount is easily determined. Thus, NTV's petition for attorneys' fees must be reduced by $88,159.50, and the expenses reduced by $3,058.87.

Second, defendants argue that the fees should be reduced to reflect NTV's unsuccessful claim for a 3% success fee. In response, NTV argues that the claims for the success fee and the advisory fee are " inextricably intertwined" because they arose from the same Agreement and the same operative facts. NTV Petition for Award of Attorneys' Fees, p.17. My findings on the broker-dealer issue and the issue of severability, described above, arrives at the same conclusion. As a result, I reject defendants' argument for a reduction in an award of fees on this ground.

Third, defendants challenge the hours expended on the case by Thomas Gallitano, a senior partner in the firm, providing advice and counsel to the principal trial lawyer, Mr. Dennington. Mr. Gallitano billed 146.9 hours to the case, as part of the total hours logged by the firm on the case amounting to 1,351.2. I agree that a potion of Mr. Gallitano's time on the case must be viewed as time spent for client relations, and training and supervising his junior partner. Such hours are overhead of the firm and are not recoverable as reasonable fees to obtain a c. 93A judgment. Accordingly, I reduce the fees that could be allowed by 75% of the amount sought for Mr. Gallitano's time. That reduction comes to $52,407.37. Otherwise, based upon my review of the billing records, the time logged by the law firm for NTV appears reasonable.

If attorneys' fees were to be awarded to NTV at this point of the litigation, I would approve an award of $265,157. I also would award reimbursement of expenses in the amount of $10,517.23. As indicated, however, the petition for an award of attorneys' fees and expenses must be denied.

ORDER

For the reasons stated, NTV's claims must be dismissed. Judgment is to enter for defendants, no award of costs allowed.[10]

By the Court,

Edward P. Leibensperger
Justice of the Superior Court

Date: March 2, 2018

[10] In light of this Order, NTV's Motion for Post-Trial Real Estate Attachment and Injunctive Relief is DENIED.