IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

IRPC, INCORPORATED, Plaintiff	: FEBRUARY TERM, 2001 : No. 0474
v.	: Commerce Case Program
HUDSON UNITED BANCORP, and STUART BRIEFER, Defendants	: : Control No. 103001

O R D E R

AND NOW, this 18th day of January 2002, upon consideration of the Preliminary Objections of defendant, Hudson United Bancorp to the Amended Complaint and the plaintiff's response in opposition, the respective memoranda, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** and **DECREED** that:

1. The Preliminary Objections to Count IV - Negligent Supervision and Count VI - Securities Fraud are **Sustained** and Counts IV and VI are **Dismissed**.

2. All remaining Preliminary Objections are **Overruled**.

3. The Defendant is directed to file an answer to the Amended Complaint within twenty-two (22) days of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... January 18, 2002

Defendant, Hudson United Bancorp ("Hudson"), has filed Preliminary Objections ("Objections") to the Amended Complaint ("Complaint")[1] of plaintiff, IRPC, Incorporated ("IRPC"). For the reasons discussed, the court is issuing a contemporaneous Order sustaining the Objections, in part, and overruling the Objections, in part.

[1] The Complaint is inexplicably titled as an "Amended Joinder Complaint."

BACKGROUND

IRPC is a Pennsylvania corporation that acts as a common paymaster for a number of limited partnerships ("Partnerships") operated by Israel Roizman ("Roizman"). During the times referenced in the Complaint, IRPC had two accounts with Hudson: an"Operating Account" and a "Repurchase Account." The Operating Account was a checking account and had as authorized signatories Roizman and Stuart Briefer ("Briefer"). Briefer served as IRPC's accountant and controller and directed IRPC's accounting and fiscal operations. The Repurchase Account existed solely to enable overnight investment at a higher rate of return than that provided for in the Operating Account.[2] Both Accounts were personally managed

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[2] This is typical of a repurchase account, whose underlying transactions have been described as follows:

> Commercial repurchase agreements are highly specialized negotiated contracts, entered into almost exclusively by United States government securities dealers in order to finance their highly leveraged operations. The dealer typically will borrow cash from a corporation or other investor who is searching for a short-term investment with low risk and a high return. In exchange for the investor's cash, the dealer agrees to sell and the investor agrees to buy a specified portion of the dealer's securities at an agreed-upon price as security for the agreement. Simultaneously, the dealer agrees to repurchase and the investor agrees to resell the same securities at a later date at a specified higher price. In the contract, the parties usually will stipulate that any interest accruing on the securities after the initial purchase, but before the repurchase, will remain the property of the dealer. Because of the economic characteristics of the transaction, repos generally are perceived by the participants as short-term collateralized loans. In fact, a repurchase agreement is not a transaction in which securities are being 'sold'; rather, the principal economic result is the formation of secured loans and borrowings. The underlying securities exchanged in the transaction are treated simply as collateral in the financial markets; the risk of fluctuations in the value of the securities remains with the dealer even though theoretically the investor has title until the subsequent repurchase.

Howard R. Schatz, The Characterization of Repurchase Agreements in the Context of the Federal Securities Laws, 61 St. John's L. Rev. 290, 294-96 (1987) (footnotes omitted). See also United States v. Erickson, 601 F.2d 296, 300 n.4 (7th Cir. 1979) (stating that a repurchase transaction is "in

and overseen by Hudson employee, Lewis Rothstein ("Rothstein"). Every two weeks, IRPC would calculate the amount due from each Partnership for salary and payroll tax obligations, whereupon each Partnership would deposit the appropriate amount into IRPC's account at Hudson ("Hudson Account"). IRPC would then disburse checks from the Operating Account as required. Briefer supervised this process for IRPC, and in this capacity, had limited authority to conduct certain specific financial transactions on IRPC's behalf.

In May 2000, IRPC allegedly discovered that Briefer had embezzled an undetermined sum of money from IRPC. Briefer supposedly began embezzling by advising the Partnerships to deposit more funds into the Operating Account than were required and by moving the excess funds to third parties and to his own personal Hudson accounts, either through direct transfers or through checks written to himself. According to the Complaint, Briefer embezzled at least $2,985,759.35 from the Operating Account between 1994 and 1998 and an additional $2,209,731.76 from the Repurchase Account between 1998 and 2000. During this time, Hudson honored all of the checks written by Briefer and never notified anyone at IRPC of Briefer's treatment of the Accounts, even though Briefer's removal of funds resulted in a series of overdrafts on the Accounts in 1998.[3]

Footnote 2 (continued)
substance a secured loan" that "involves little more than a 'sale' of securities and an obligation to repay the 'sale price plus interest on the sale price at some later date"); S.E.C. v. Miller, 495 F. Supp. 465, 467 (S.D.N.Y. 1980)(characterizing repurchase transactions as short-term loans collateralized by securities in which "the element of the transaction over which the most bargaining usually occurs is the interest rate").

[3] IRPC alleges that it could not have discovered Briefer's misconduct on its own because of Briefer's use of his status as accountant and controller to conceal his wrongdoing.

IRPC's claims against Hudson stem from Hudson's supposed failure to comply with sound banking practices and to inform IRPC of Briefer's conduct. Based on the allegations in the Complaint, IRPC asserts Counts against Hudson for failure to notify IRPC of the breach of fiduciary duty by Briefer, negligent supervision, breach of contract, securities fraud and common law fraud.[4] Each of the Preliminary Objections attacks the legal sufficiency of each of the Counts arrayed against Hudson.

DISCUSSION

When a court is presented with preliminary objections based on legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999). It is with this in mind that the Court must examine the Objections.

I. IRPC's Claims Are Not Barred by Pennsylvania's Uniform Commercial Code

Hudson's initial argument is that three[5] of the Counts brought against it are displaced by Pennsylvania's Uniform Commercial Code ("UCC"). To the extent that Hudson's argument is correct, it does not preclude IRPC from proceeding with any of the claims set forth in the Complaint.

In general, principles of law and equity supplement the UCC unless they are displaced by particular UCC provisions. 13 Pa. C.S. § 1103. See also Peled v. Meridian Bank, 710 A.2d 620, 625 n.16 (Pa. Super. Ct. 1998) ("To the extent the UCC is silent as to the parties' rights, the UCC may be supplemented

[4] The Complaint also asserts claims against Briefer for conversion and breach of fiduciary duty.

[5] Hudson asserts that IRPC's securities fraud and common law fraud claims also are displaced by the UCC, but presents no argument in its memorandum as to why this is so.

by general principles of law and equity. . . ."). As highlighted by Hudson, division three of the UCC applies to negotiable instruments, while division four applies to commercial paper and investment securities. 13 Pa. C.S. §§ 3102, 4102.

Acknowledging that no Pennsylvania case addresses the issue of displacement as applicable to this case, Hudson directs the Court's attention to Sebastian v. D&S Express, Inc., 61 F. Supp. 2d 386 (D.N.J. 1999), in which the court examined Pennsylvania law:

> In deciding whether UCC § 3404 precludes a common law negligence action, the Court acknowledges that principles of law and equity can generally be used to supplement provisions of the UCC. The Third Circuit has advised that the displacement analysis begins with two basic propositions. First, the UCC is to be liberally construed and applied to promote its underlying purposes and policies, which include simplifying and clarifying the law governing commercial transactions, fostering the expansion of commercial practices, and standardizing the laws of the various jurisdictions. Second, the New Jersey Bank court reminds the reader that the UCC does not purport to preempt the entire body of law affecting the rights and obligations of parties to a commercial transaction. Courts have interpreted these two basic principles to mean that the UCC does not displace the common law of tort unless reliance on the common law would thwart the purposes of the Code. Yet, where the Code provides a comprehensive remedy for the parties to a transaction, a common law action will be barred.

61 F. Supp. 2d at 391 (citations and quotation marks omitted) (emphasis added). Cf. Gress v. PNC Bank Nat'l Ass'n, 100 F. Supp. 2d 289, 291-92 (E.D. Pa. 2000) (predicting that Pennsylvania courts would hold that 13 Pa. C.S. § 3420, which relates to conversion of instruments, would displace common law conversion and negligence concerning the payment of forged checks because of the similar remedies and legal standards); Philadelphia Bond & Mortg. Co. v. Highland Crest Homes, Inc., 235 Pa. Super. 252, 261, 340 A.2d 476, 481 (1975) (holding that a pre-UCC doctrine was inapplicable where the protection provided by the doctrine was available under the UCC).

Hudson appears to concede that the allegations set forth in the Counts arrayed against it provide the basis for relief under various sections of the UCC. Count III - Notice of Breach of Fiduciary Duty alleges a legitimate claim under 13 Pa. C.S. § 3307, which sets forth rules that apply when certain persons are aware of a breach of fiduciary duty, while Count IV - Negligent Supervision and Count V - Breach of Contract implicate UCC divisions three and four. Instead of asserting that these Counts are legally insufficient, the Objections focus on the fact that IRPC has failed to identify the relevant statute in the Complaint. This alone, however, is not grounds to dismiss the claim. While a complaint must include the facts upon which a plaintiff's claims are based, "a plaintiff is not obliged to identify the legal theory underlying his complaint," and there is no requirement that a plaintiff title a count with the specific cause of action alleged thereunder. Weiss v. Equibank, 313 Pa. Super. 446, 453, 460 A.2d 271, 275 (1983). See also Gavula v. ARA Servs., Inc., 756 A.2d 17, 22 (Pa. Super. Ct. 2000) (even though the relevant counts were not specifically identified as "negligence" counts in plaintiff's complaint, those counts "clearly intended to be a claim for negligence" were to be treated as such); McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1992) ("[t]he obligation to discover the cause or causes of actions is on the court: the plaintiff need not identify them").[6] Indeed, Pennsylvania courts faced with a conflict between the allegations of a count and the count's title look at the allegations and not the title. See, e.g., Zernhelt v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled "negligent infliction of emotional distress" as a claim for intentional infliction

[6] It is required that a plaintiff plead "each cause of action against each defendant in a separate count under a separate heading." Goodrich Amram § 1020(a):5. Such heading, however, must state only the number of the count and nothing more. See id. § 1020(a):2 ("[e]ach count should open with a heading First count, Second count, etc.").

of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) ("since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus"). This renders the captions of each of the Counts against Hudson and IRPC's failure to name particular UCC provisions irrelevant.[7]

If IRPC were asserting parallel claims for UCC and common law violations, Hudson's argument might have merit. In their current forms, however, Counts III, IV and V present legally sufficient claims, whether under the UCC or otherwise, and the pertinent Objections are overruled.[8]

II. IRPC's Negligent Supervision Claim Is Legally Insufficient

Hudson makes two primary arguments against Count IV - Negligent Supervision, specifically: that IRPC does not allege that Rothstein acted outside the scope of his employment, and that the claim is barred by the economic loss doctrine. While the first argument is without merit, the second argument is persuasive and requires the dismissal of Count IV.

Pennsylvania law allows a claim against an employer for negligent supervision of an employee "where the employer fails to exercise ordinary care to prevent an intentional harm to a third-party which 1) is committed on the employer's premises by an employee acting outside the scope of his employment and 2) is reasonably foreseeable." Mullen v. Topper's Salon & Health Spa, Inc., 99 F. Supp. 2d 553, 556 (E.D. Pa. 2000) (citing, inter alia, Dempsey v. Walso Bureau, 431 Pa. 562, 246 A.2d 418, 419-22

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[7] Even if this were not the case, the court is not convinced that allowing IRPC to proceed on these actions would thwart the purposes of or duplicate the remedies provided in the UCC.

[8] IRPC counters that pre-UCC cases may be used in interpreting 13 Pa. C.S. § 3307 and any other UCC sections that apply to its claims. Because the Counts are legally sufficient, however, there is no need to resolve the issue of interpretation now.

(1968); Restatement (Second) of Torts § 317 (1965)). Although Hudson contends that there is no allegation that Rothstein acted outside the scope of his employment, at the very least, the court can make such an inference: surely, it was outside the scope of Rothstein's employment for him to disregard Briefer's suspicious conduct. Cf. Heller v. Patwil Homes, Inc., 713 A.2d 105, 109 (Pa. Super. Ct. 1998) (finding that "the total absence of supervision" provided by employer to employee allowed claim for negligent supervision to proceed). As such, the Complaint alleges this element of a negligent supervision claim.

However, IRPC's claim founders on the economic loss doctrine. The purpose of the economic loss doctrine, as adopted in Pennsylvania, is "maintaining the separate spheres of the law of contract and tort." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). Under the Commonwealth's version of the doctrine, "negligence and strict liability theories do not apply in an action between commercial enterprises involving a product that malfunctions where the only resulting damage is to the product itself." REM Coal Co. v. Clark Equip. Co., 386 Pa. Super. 401, 412-13, 563 A.2d 128, 134 (1989) (adopting approach of East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)). See also East River S.S. Corp., 476 U.S. at 870 (Where "no person or other property is damaged, the resulting loss is purely economic."); Spivack v. Berks Ridge Corp., 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1991) ("Economic losses may not be recovered in tort (negligence) absent physical injury or property damage."); Waterware Corp. v. Ametek/US Gauge Div., PMT Prods., 51 Pa. D. & C.4th 201, 211-12 (C.P. Phila. 2001) ("The Commonwealth's version of the doctrine precludes recovery for economic losses in a negligence action if the only damage sustained by the plaintiff/purchaser is damage to the product itself but no other property damage or personal injury resulted.").

Here, where IRPC suffered only economic damages, the doctrine bars plaintiff's claim. While there is an ongoing dispute as to whether Pennsylvania law requires the application of the economic loss doctrine to certain intentional torts,[9] IRPC points to nothing to support its argument that negligent supervision is an intentional tort, even if one of its underlying elements is an intentional wrong of the employee. As such, IRPC's negligent supervision claim is barred by the economic loss doctrine, and the Objections to Count IV are sustained.

III. IRPC's Securities Fraud Claim Is Legally Insufficient

Count VI of the Complaint alleges a claim for securities fraud under the Pennsylvania Securities Act of 1972 ("PSA").[10] Under 70 Pa. C.S. § 1-401(a) ("Section 1-401(a)"), it is unlawful "[t]o employ any device, scheme or artifice to defraud" in connection with the offer, sale or purchase of a security, with 70 Pa. C.S. § 1-501(a) imposing civil liability on anyone who violates Section 1-401(a). The crux of the

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[9] In First Republic Bank v. Brand, 50 Pa. D. & C.4th 329 (C.P. Phila. 2000), for example, the court noted the absence of Pennsylvania case law on the subject and the conflicting decisions in Pennsylvania federal courts. 50 Pa. D. & C.4th at 340-44. For public policy and other reasons set forth in detail in the opinion, the Court ultimately concluded that the economic loss doctrine did not bar fraudulent misrepresentation claims "if the representation at issue is intentionally false." 50 Pa. D. & C.4th at 343 (quoting North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, No. Civ. A. 99-2050, 2000 WL 230214, at *7 (E.D. Pa. Feb. 29, 2000)). In reaching its conclusion, the Court relied on All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862 (7th Cir. 1999); KNK Medical-Dental Specialties, Ltd. v. Tamex Corp., No. Civ. A. 99-3409, 2000 WL 1470665 (E.D. Pa. Sept. 28, 2000); Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F. Supp. 2d 644 (W.D. Pa. 1999); Budgetel Inns, Inc. v. Micros Sys., Inc., 34 F. Supp. 2d 720 (E.D. Wis. 1999); Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 1227 (W.D. Wis. 1997); Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269 (M.D. Pa. 1990); Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 735 So. 2d 1219 (Fla. 2000); R. Joseph Barton, Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims, 41 Wm. & Mary L. Rev. 1789 (2000); Tourek, Boyd & Schoenwetter, 84 Iowa L. Rev. 875.

[10] 70 Pa. C.S. §§ 1-101 to 1-704.

debate over the legal sufficiency of IRPC's securities fraud claim is whether alleged misrepresentations related to the Repurchase Account were made in connection with the offer, sale or purchase of a security.

The PSA defines "security" as follows:

> [A]ny note; stock; treasury stock; bond; debenture; evidence of indebtedness; share of beneficial interest in a business trust; 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; limited partnership interest; 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; membership interest in a limited liability company of any class or series, including any fractional or other interest in such interest unless excluded by clause (v); or, in general, any interest or instrument commonly known as or having the incidents of 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.

70 Pa. C.S. § 1-102 (t).

A repurchase account is not expressly included in the definition, and no Pennsylvania court has held that a repurchase account is a security. However, several federal cases[11] have examined this question and have found that fraud involving a repurchase account may qualify as securities fraud. In Manufacturers Hanover Trust Co. v. Drysdale Securities Corp., 801 F.2d 13 (2d Cir. 1986), for example, the court sidestepped the question of whether repurchase accounts were securities, but held that the trial court's jury

[11] Pennsylvania looks to federal law for guidance on securities issues, including the definition of "security." See, e.g., 70 Pa. C.S. § 1-703(a) (stating that the PSA is to be construed "to coordinate the interpretation and administration of this act with related Federal regulation"); Martin v. ITM/Int'l Trading & Marketing, Ltd., 343 Pa. Super. 250, 254, 494 A.2d 451, 453 (1985) (looking to federal law to determine whether the instrument in question was a security); Brennan v. Reed, Smith, Shaw & McClay, 304 Pa. Super. 399, 410, 450 A.2d 740, 746 (1972) (seeking guidance from federal securities law cases).

instruction that such accounts were securities was, at worst, harmless error:

> Even assuming that repos are not securities, they are subject to section 10(b) and Rule 10b-5. Viewing repos, as we must, from the perspective of their economic significance, we think that the repos at issue herein fit squarely within the statutory language in the 1934 Act describing "contract[s] to buy, purchase or otherwise acquire securities." As such, and consistent with our holding in [S.E.C. v.] Drysdale [Securities Corp., 785 F.2d 38 (S.D.N.Y. 1986)], repos are subject to the antifraud provisions of the 1934 Act.
>
> Since repos involve the purchase and sale of securities, it follows that the jury's finding of fraud "in connection with" repos was a finding of fraud "in connection with" the purchase and sale of securities. Indeed, even if one focuses exclusively on the "loan," as opposed to the "purchase and sale," characteristics of repos, for purposes of the antifraud provisions of the 1934 Act, "[t]he terms 'sale' or 'sell' each include any contract to sell or otherwise dispose of a security." The repos herein certainly satisfy that broad definition.
>
> In our view, the preferred instruction would have been that repos may or may not themselves constitute securities, but that, in either event, fraud "in connection with" repos satisfies the language in section 10(b) and Rule 10b-5 relating to "fraud in connection with the purchase or sale of securities." Nonetheless, the district judge's additional comment that repos themselves are securities, if inaccurate, amounts to mere harmless error in this case.

801 F.2d at 19-20. See also In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 67 B.R. 557, 594 (D.N.J. 1986) (noting the "clear trend in cases brought under Section 10(b) of the Securities and Exchange Act of 1934 . . . to treat repo and reverse repo transactions as 'purchases and sales' of securities for purposes of applying the anti-fraud provisions of the Act"); City of Harrisburg v. Bradford Trust Co., 621 F. Supp. 463 (M.D. Pa. 1985) (applying securities fraud standards to misrepresentation involving repurchase transactions); Howard R. Schatz, The Characterization of Repurchase Agreements in the Context of the Federal Securities Laws, 61 St. John's L. Rev. 290 (1987) (arguing that the anti-fraud provisions of federal securities laws should apply to certain repurchase transactions).

While fraud related to a repurchase account may qualify as securities fraud, courts have paid close attention to the mandate that the fraud be made in connection with the offer, sale or purchase of a security. In repurchase and similar situations, this has been interpreted to require a connection between the misrepresentation and the security and does not permit an action based on any misrepresentation related to the repurchase account. See, e.g., S.E.C. v. Drysdale Secs. Corp., 785 F.2d 38, 41 (2d Cir. 1986) (allowing repurchase-related securities fraud claim where the "misrepresentations directly involve the consideration for a securities transaction and are thus closely linked to transfers of securities"); Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943-44 (2d Cir. 1984) ("[I]t is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part."). Cf. Angelastro v. Prudential-Bache Secs., Inc., 764 F.2d 939, 943-47 (3d Cir. 1985) (discussing the term "in connection with" generally). Even in City of Harrisburg, which interpreted repurchase-related securities fraud in a particularly liberal manner, the alleged misrepresentations centered on where the securities were being deposited. 621 F. Supp. at 466.

Here, the alleged misrepresentations have little to no connection to securities underlying the Repurchase Account. All of Hudson's supposed misstatements related to whether Hudson had appropriate controls and policies in place to protect IRPC from fraudulent activity, and there is no mention of securities or any securities transactions related to the Repurchase Account.

Accordingly, the Complaint does not present a valid claim for securities fraud, and the Objections to Count VI are sustained.

IV. The Complaint Alleges a Complete Count for Fraud

Finally, Hudson contends that the Complaint does not present a legally sufficient claim for fraud. This court disagrees.

The elements of a cause of action for fraud are:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1004, 1014 (Pa. Super. Ct. 1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)). Although IRPC may have difficulty in prevailing on its fraud claim, the Complaint nevertheless alleges a complete claim for fraud.

First, the Complaint alleges a material misrepresentation, in that Hudson failed to disclose its allegedly inadequate fraud prevention measures. While Hudson cites In re Estate of Evasew, 526 Pa. 98, 584 A.2d 910 (1990), for the proposition that "an omission is actionable as fraud only where there is an independent duty to disclose the omitted information," it fails to include the balance of the sentence, which states that "such an independent duty exists where the party who is alleged to be under an obligation to disclose stands in a fiduciary relationship to the party seeking disclosure. . . ." 526 Pa. at 105, 584 A.2d at 913. See also Sewak v. Lockhart, 699 A.2d 755, 759 (Pa. Super. Ct. 1997) ("Concealment of a material fact can amount to actionable fraud if the seller intentionally concealed a material fact to deceive the purchaser. '[A]ctive concealment of defects known to be material to the purchaser is legally equivalent to an affirmative misrepresentation.'"); Sevin v. Kelshaw, 417 Pa. Super. 1, 9, 611 A.2d 1232, 1236 (1992) ("One party to a transaction who by concealment or other action intentionally prevents the other

from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering."). Here, Hudson's fiduciary duty to IRPC would create such a relationship that would impose a duty of disclosure, and it is readily understandable that such a non-disclosure could be material. To the extent that IRPC's claims are based, in part, on a provision in the Repurchase Account agreement, the success of alleging fraud does not rise or fall based on this provision, as the alleged omissions are sufficient to sustain the misrepresentation prong of the claim.

Second, the Complaint alleges that Hudson had actual knowledge of its omissions, acted recklessly and intentionally concealed the facts in question. Complaint ¶¶ 162-166. Cf. Office of Disciplinary Counsel v. Anonymous, 552 Pa. 223, 231, 714 A.2d 402, 406 (1998) (agreeing with the Colorado Supreme Court, which "rejected the notion that actual knowledge or intent to deceive must necessarily be established, stating that the element of scienter is made out when the attorney's conduct is reckless, to the extent that he can be deemed to have knowingly made the misrepresentation"). In addition, the Complaint supports a finding of justifiable reliance and sets forth the damages IRPC allegedly incurred as a result of Hudson's inaction and misconduct.

Accordingly, IRPC has alleged a complete count for fraud. These Objections are overruled.

CONCLUSION

In sum, for the reasons discussed, IRPC's claims for negligent supervision and securities fraud are deemed legally insufficient and are dismissed. The remaining Preliminary Objections are overruled. This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.