IN THE SUPREME COURT OF FLORIDA

ANDREW KRAUSE and
DAVID BAUTSCH,

Petitioners,

v.

TEXTRON FINANCIAL CORP.,

Respondent.
________________________________/

Case No. **SC09881**
Lower Ct. Case No.: 2D07-4060

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the Second District
Court of Appeal, State of Florida

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INTRODUCTION

The Second District Court of Appeal ("Second District") correctly held that the claims asserted in the *Amended Complaint* (App. at Tab 6[1]) filed by Petitioners Andrew Krause ("Krause") and David Bautsch ("Bautsch," with Krause, "Petitioners"), were time-barred where the tolling provisions of 28 U.S.C. § 1367(d) were inapplicable. To the extent necessary, the Court can affirm on the alternative ground that Petitioners are not entitled to imposition of a constructive trust or unjust enrichment as a matter of law pursuant to the "tipsy coachman rule." *See Dade Cty. School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999).

STATEMENT OF THE CASE AND FACTS

In May 1997 Krause and Bautsch purchased golf memberships at the Twin Eagles Golf & Country Club, Inc. ("TGCC"). (App. at Tab 6, ¶ 8)

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[1] Respondent Textron Financial Corp. ("Textron") will use the same form of citations contained in *Petitioners' Amended Brief of the Merits* to the extent citing to the documents contained in the *Appendix to Petitioners' Brief on the Merits* ("Petitioners' Appendix"). To the extent reference is made to documents not contained in the Petitioners' Appendix Textron will use the same citations as set forth in its *Appellee's Answer Brief* filed with the Second District, that is, "R. at __" or "R. at __, ¶ __" , which documents are part of the record before this Court, and which form of citation is used in *Petitioners Amended Brief on the Merits* (p. 40). *See* Nov. 18, 2009 letter from James Birkhold, Clerk of the Second District, to Thomas D. Hall, Clerk of this Court concerning transmittal of the record on appeal, and the *Master Index to Record on Appeal* submitted to the Second District.

Their memberships were evidenced by certificates issued by TGCC and governed by the terms of the Twin Eagles Golf & Country Club Plan ("Plan"). (*Id.*) Textron was not a party to the Plan which governed the relationships between TGCC and the Petitioners. (*Id.*)

On July 6, 1998, Textron entered into a Loan Agreement with TwinEagles Land Group I, LLC and TGCC ("collectively, "TwinEagles") (App. at Tab 6, ¶ 10), pursuant to which Textron, *inter alia,* financed the construction of the TwinEagles golf course and country club. (App. at Tab 2, ¶ 6; App. at Tab 3, P. 4) Neither Krause nor Bautsch was a party to the Loan Agreement (or related documents) entered into by and between Textron and TwinEagles. (R. at 80, ¶ 5)

On April 29, 1999 and May 18, 1999, Bautsch and Krause, respectively, resigned as members of TGCC. (App. at Tab 1, ¶¶ 11 and 12)

On May 5, 1999 and June 4, 1999, TGCC sold the memberships of Bautsch and Krause, respectively, to new members of TGCC. (App. at Tab 6, ¶ 14) Bautsch and Krause alleged that TGCC was obligated to remit to them the proceeds of the sale of their membership as of May 5, 1999 and June 4, 1999, respectively. (*Id.*)

Prior to the Petition Date (as defined below), TGCC delivered the proceeds of the sale of Petitioners' golf memberships to Textron. (App. at Tab 9, P. 210 and n.1; App. at Tab 5, P. 5) As noted by the District Court, Petitioners "concede[d]…that discovery in the bankruptcy court established that [TGCC]

transferred the golf membership sale proceeds to Textron pre-petition, and that once the proceeds were no longer held by [TGCC] they ceased to be property of the [bankruptcy] estate." (App. at Tab 5, P. 5)

On September 9, 1999 ("Petition Date"), TGCC and six affiliates (collectively, "Debtors") filed voluntary petitions for relief under chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of Florida, Case Nos. 99-14697-9P1, 99-14699-9P1, 99-14702-9P1, 99-14703-9P1, 99-14705-9P1, 99-14709-9P1 and 99-17249-9P1. (App. at Tab 2, ¶ 4; App. at Tab 5, P. 2) As of the Petition Date, TGCC was indebted to Textron in the approximate amount of $9 million. (App. at Tab 6, ¶ 11)

On June 15, 2000, Petitioners filed a *Complaint* against TGCC and Textron initiating an Adversary Proceeding, Adv. Pro. No. 00-378, in the U.S. Bankruptcy Court, Middle District of Florida ("Adversary Proceeding"). (App. at Tab 1) Count I of the *Complaint* pertained ***solely*** to TGCC and sought a declaration as to Petitioners' rights in the Debtors' bankruptcy estates; Petitioners asserted no state law claims against Textron along with their request for declaratory relief. (App. at Tab 1) In Count II of their *Complaint*, the ***only*** count pertaining to Textron, Petitioners sought ***one*** form of relief—the "imposition of a constructive trust against any remaining golf membership sale proceeds or, alternatively, in Textron's secured claim to the extent of the membership sale proceeds used by

[TGCC] or encumbered with [TGCC's] permission by Textron's secured claim." (App. at Tab 1, P. 5, Wherefore clause) Other than the imposition of a constructive trust, Petitioners ***did not identify unjust enrichment (or any other form of relief, including relief provided for in the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.)*** in the Wherefore clause of Count II in the *Complaint* as against Textron. *See* (*Id.*)

On April 23, 2002, Textron moved for summary judgment in the Adversary Proceeding; in support of that motion it submitted an Affidavit of Franklin D. Lea, a former underwriting manager of Textron who supervised and administered credit facilities made by Textron to TGCC. (App. at Tab 2) Mr. Lea testified, *inter alia*, that (i) Textron had no actual or implied knowledge that any funds received from TGCC represented the proceeds of the sale of Petitioners' golf memberships, (*Id.*, ¶ 13), (ii) pursuant to the Order confirming the Debtors' chapter 11 plan of reorganization Textron was adjudicated to have an allowed secured claim in the amount of $17,512,000 secured by first priority liens upon all of TGCC's assets, (*id.*, ¶ 14), (iii) as provided in the Debtors' chapter 11 plan and disclosure statement, Textron's allowed secured claim was ***satisfied in full*** by the purchaser of the Debtors' assets, and Textron ***released all of its liens and no longer held any claim against the Debtors***, (*id.*, ¶ 15), and (iv) the funds it received in satisfaction of its allowed secured claim against the Debtors "have been ***commingled with***

other, unrelated funds and are no longer subject to tracing." (*Id.*, ¶ 17) (emphasis added).

By Order dated July 18, 2002, the Bankruptcy Court entered summary judgment in favor of Textron and against the Petitioners. (App. at Tab 3)

On May 5, 2005, Petitioners dismissed the Adversary Proceeding as to TGCC with prejudice, (App. at Tab 4), which formally concluded the Adversary Proceeding as the July 18, 2002 summary judgment order pertained only to Textron. (App. at Tab 3)

On January 12, 2006, the District Court, Middle District of Florida, entered an *Opinion and Order* through which it dismissed Petitioners' appeal of the July 18, 2002 summary judgment order based on lack of subject matter jurisdiction. Relying upon and quoting from the Eleventh Circuit's opinion in *In re Galluci,* 931 F.2d 738, 742 (11th Cir. 1991) the District Court held that because the funds sought to be recovered by Petitioners had been transferred by TGCC to a third party—Textron—prior to the Petition Date, the Adversary Proceeding did not "'involve property of the [bankruptcy] estate [and, therefore,] not only is it a noncore proceeding, it is an unrelated matter ***completely beyond the bankruptcy court's subject matter jurisdiction***.'" (App. at Tab 5, P. 10)

The trial court understood that the District Court found that the Bankruptcy Court "never had jurisdiction." (App. at Tab 8, P. 4) (" … the District Court found

the Bankruptcy court never had jurisdiction."). Having concluded that the Bankruptcy Court lacked subject matter jurisdiction, the District Court directed the Bankruptcy Court to vacate its prior summary judgment order in Textron's favor, (App. at Tab 5, P. 11), which it did. (App. at Tab 8, P.3)

On February 10, 2006, Petitioners filed their *Complaint* initiating the state court lawsuit that is the subject of this appeal. (R. at 26-30; App. at Tab 8, P. 3).

On June 5, 2006, Petitioners filed their *Amended Complaint*; Count I sought the remedy of a constructive trust, Count II sought the remedy of unjust enrichment. (App. at Tab 6) However, as explained above, the ***only*** remedy requested in the (previously dismissed) Adversary Proceeding as against Textron was imposition of a constructive trust. (App. at Tab 1, P. 5) (Wherefore clause).

On June 23, 2006, Textron filed its *Motion to Dismiss Amended Complaint*, (App. at Tab 7) ("Motion to Dismiss"), through which it argued that (i) the claims asserted in the *Amended Complaint* were time-barred, (*id.,* ¶3), (ii) Petitioners were not entitled to imposition of a constructive trust, (*id.,* ¶¶12-13), and (iii) Petitioners failed to join an indispensable party—TGCC. (*id.,* ¶14).

On May 9, 2007, the trial court entered its *Order Granting Motion to Dismiss* ("May 9 Order"). (App. at Tab 8) The trial court granted the Motion to Dismiss, holding that the claims asserted in the *Amended Complaint* were time-barred and, therefore, the court declined to address Textron's argument that

Petitioners were not entitled to imposition of a constructive trust. *See* (*id.*) The trial court noted that at the hearing on the Motion to Dismiss, Petitioners argued for the first time that their claims were not time-barred via operation of 28 U.S.C. § 1367(d), but that it had allowed the parties to brief the issue. (*Id.* at 1)

The trial court explained that after dismissal of the Adversary Proceeding, the lawsuit filed in the state court on February 10, 2006, was filed outside the five year limitation period set forth in Fla. Stat. § 95.11(2)(b). (*Id.* at 3) The trial court further explained that the District Court ordered the Bankruptcy Court to vacate the summary judgment order in Textron's favor based on the Bankruptcy Court's lack of subject matter jurisdiction and, therefore, the trial court could not find that the federal court ever made a finding that it would or would not exercise supplemental jurisdiction over Petitioners' state law constructive trust claim. (*Id.* at 4) Lastly, the trial court held that it could not "rely on the doctrine of equitable estoppel to preclude a dismissal in this action." (*Id.* at 4-5)

Petitioners appealed to the Second District which, after briefing and oral argument, affirmed the trial court's May 9 Order. (App. at Tab 9[2]) The Second District noted the District Court's prior holding that the state law constructive trust claim asserted by Petitioners against Textron was outside the Bankruptcy Court's "related to" jurisdictional grant (set forth in 28 U.S.C. § 1334(b)), that that holding

[2] The Second District's opinion is reported at 10 So. 3d 208 (Fla. 2d DCA 2009).

was not appealed by the Petitioners and was therefore determinative of the issue. (App. at Tab 9, P. 212) The Second District then held that "[b]ecause this [constructive trust] claim against Textron was not 'related to' the claim against Twin Eagles, it is not entitled to the federal court's supplemental jurisdiction and the tolling provision found in 28 U.S.C. § 1367(d) does not apply." (*Id.*) The Second District further held that, "[a]s to [Petitioners'] state claim against Textron for unjust enrichment, we agree that because this claim was not part of the bankruptcy complaint, the provisions of 28 U.S.C. § 1367(d) do not apply and that this claim is also barred by the statute of limitations." (*Id.*)

On October 15, 2009, this Court accepted jurisdiction of Petitioners' appeal from the Second District's affirmance of the trial court's May 9 Order.

SUMMARY OF ARGUMENT

The Second District correctly affirmed the trial court's holding that 28 U.S.C. § 1367(d) did not apply to the state law claims being asserted by Petitioners against Textron in the *Amended Complaint*, that is, the Bankruptcy Court lacked "related to" subject matter jurisdiction such that there was no "original" jurisdiction as required by 28 U.S.C. § 1367(a).

Petitioners waived the right to challenge the trial court's ruling that it could not apply equitable estoppel to bar Textron's assertion that Petitioners' claims were time-barred by not challenging that ruling in the initial brief they filed with the

Second District. *See McKinzie v. State,* 845 So. 2d 316, 318 (Fla. 1st DCA 2003); Fla. R. App. P. 9.210(b)(5).

To the extent necessary, the Court can affirm on alternative grounds pursuant to the "tipsy coachman rule." *See Dade Cty. School Bd. v. Radio Station WQBA,* 731 So. 2d at 644-45. Specifically, the Court can affirm on the alternative ground that Petitioners are not entitled to the imposition of a constructive trust over any of Textron's property because such a trust is an (extraordinary) equitable remedy and not a cause of action that can only brought pursuant to a recognized cause of action. *Collinson v. Miller*, 903 So. 2d 221, 228 (Fla. 2d DCA 2005). Such a cause of action is absent here where the only other relief sought by Petitioners against Textron was unjust enrichment, which is also a remedy.

Further in the alternative, Petitioners are in any event not entitled to imposition of a constructive trust as a matter of law because they cannot trace the monies transferred to Textron by TGCC ***almost eight years (8) ago*** or specific, identifiable property that was purchased with those monies. *Gersh v. Cofman,* 769 So. 2d 407, 409 (Fla. 4th DCA 2000) ("A constructive trust may be imposed ***only*** where the trust res is specific and identifiable property, or can be clearly traced in assets of the defendant.") (emphasis added), *rev. denied*, 791 So. 2d 1097 (Fla. 2001).

The uncontradicted evidence before the trial court (as well as the Bankruptcy Court before it) in the form of Franklin D. Lea's Affidavit submitted on behalf of Textron (App. at Tab 2) was that the proceeds of the sale of Petitioners' golf memberships could not be traced. Moreover, Petitioners cannot establish a "confidential relationship" with Textron that had been abused. *Hutson v. Brooks,* 646 So. 2d 276, 277 (Fla. 2d DCA 1994). Petitioners alleged that there existed a confidential relationship between them and Textron, as well as TGCC. (App. at Tab 1, ¶ 19) ("The plaintiffs, [TGCC] and Textron share a confidential relationship relative to the proceeds of the sale of the golf memberships pursuant to the terms of the [Plan]."). However, no such three-way relationship existed. There were two sets of relationships in this case, neither confidential in nature—one between Textron and the Debtors (*i.e.*, lender and borrower) and another between TGCC and the Petitioners (*i.e.*, country club and members).

Because Petitioners ***never*** requested the remedy of unjust enrichment in the complaint they filed with the Bankruptcy Court § 1367(a), which contemplates state law claims being prosecuted by a plaintiff simultaneously ***with*** federal law claims ***before a federal court***, does not and cannot apply toll the applicable limitations period under Florida law, Fla. Stat. § 95.11(2)(b), which as correctly noted by the trial court indisputably ran prior to the filing of Petitioners' state court lawsuit. Petitioners cite to case law from this Court for the proposition that any

relief contemplated by the allegations in a complaint is properly asserted even though not specifically requested, *Chasin v. Richey,* 91 So. 2d 811 (Fla. 1957). However, Petitioners do not and cannot cite to case law applying that concept ***to the tolling provisions contained in § 1367(d)***.

Even if such case law existed, Textron respectfully submits that it would inappropriately expand (and distort beyond recognition) the tolling provisions of § 1367(d) far beyond anything Congress ever intended. Taking Petitioners' argument to its logical conclusion, any number of additional legal theories allegedly alluded to in their *Amended Complaint*, regardless that ***none*** was identified as relief being sought, would be entitled to the benefit of the tolling provisions of § 1367(d). The Second District correctly and summarily rejected the proposition urged on this Court by Petitioners: "As to [Petitioners'] state claim against Textron for unjust enrichment, we agree [with Textron] that because this claim was not part of the bankruptcy complaint, the provisions of 28 U.S.C. § 1367(d) do not apply and that this claim is also barred by the statute of limitations." (App. at Tab 9, P. 212)

Even if unjust enrichment had been sought by Petitioners as against Textron before the Bankruptcy Court (it was not), and such relief was not time-barred (it was), it would fail as matter of law because Petitioners gave nothing to Textron. *See Rollins, Inc. v. Butland,* 951 So. 2d 860, 876 (Fla. 2d DCA 2007) (plaintiff

must confer benefit on defendant). And in return for any monies it received from the Debtors, Textron in fact gave ***substantial*** value in the form of millions of dollars of loans to them. *See Cole Taylor Bank v. Shannon,* 772 So. 2d 546, 551 (Fla. 1st DCA 2000); *Rollins,* 951 So. 2d at 876.

ARGUMENT

A. Standard of Review

This Court reviews the legal conclusion that the claims asserted in the *Amended Complaint* were time-barred *de novo*. *See Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343, 344 (Fla. 4th DCA 2005). This Court can affirm the May 9 Order on any ground that finds support in the record, regardless of whether that ground was raised below or even if this Court were to disagree with the trial court's reasoning, or that of the Second District. *See Dade Cty. School Bd.*, 731 So. 2d at 644-45.

B. Analysis

(i) The trial court, as affirmed by the Second District, correctly held that Petitioners' claims were time-barred.

The trial court correctly concluded that the statute did not apply, noting that notwithstanding Petitioners' argument to the contrary there was nothing that evidenced that the Bankruptcy Court determined that it would not exercise supplemental jurisdiction pursuant to § 1367. (App. at Tab 8, P. 4) There is a good reason for this conclusion—no such determination was ever made.

The trial court accepted Textron's argument that § 1367(d) did not apply because the Adversary Proceeding was dismissed on subject matter jurisdiction grounds, and there was no decision to not exercise supplemental jurisdiction that would implicate the tolling provisions of that statute. (*Id.* at 4). 13B Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3567.1, supp. 27 (West Supp. 1994) ("the tolling provision of (d) should be read as coming into play ***only*** if the court exercises its discretion, under § 1367(c), to dismiss a supplemental claim of which it has jurisdiction under subsection (a)") (emphasis added). Case law is in accord. *See, e.g., White v. Polk Cty.,* 2006 WL 1063336, *8 (M.D. Fla. April 21, 2006) ("Where a federal court declines to exercise supplemental jurisdiction over remaining state law claims, the claims should be dismissed without prejudice so they can be refiled in the appropriate state court."); *Carris v. Storage Express I, LLC*, 2008 WL 3851433, n.1 (S.D. Fla. Aug. 14, 2008) (court declined to exercise supplemental jurisdiction over state law claims because they predominated over the federal claims and then directed plaintiff's attention to § 1367(d)[3]). In other words, the tolling provision in § 1367(d) applies to supplemental claims that are asserted under subsection (a) and dismissed under subsection (c), which indisputably did ***not*** happen here as there was never a decision by either the

[3] This decision is annexed as part of Petitioners' Appendix (Tab 10), and referred to in note 2 of *Petitioners' Amended Brief on the Merits*.

Bankruptcy Court or District Court to not exercise supplemental jurisdiction over the state law claim brought against Textron.

The Bankruptcy Court did not have supplemental jurisdiction over Textron to adjudicate the claims asserted by Petitioners in the *Complaint*. Putting aside the open question of whether section 1367 applies to bankruptcy courts at all,[4] the appropriate rule should be that where, like here, there is a lack of "related to" subject matter jurisdiction, there is no basis for such courts to exercise supplemental jurisdiction under section 1367 since doing so would render superfluous the grant of "related to" jurisdiction to bankruptcy courts. *In re Harlan*, 402 B.R. 703, 713 n.8 (Bankr. W.D. Va. 2009) ("…if bankruptcy courts are permitted to exercise supplemental jurisdiction over claims that are not 'related to' the debtor's bankruptcy cases, the grant of 'related to' jurisdiction in 28 U.S.C. § 1334(b) would be rendered superfluous.").

This fact scenario renders Petitioners' reliance upon *Scarfo v. Ginsberg,* 817 So. 2d 919 (Fla. 4th DCA 2002) misplaced since there, unlike in the facts before this Court, state law claims were dismissed without prejudice to refiling in state court after a decision by a federal District Court to not exercise supplemental

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[4] *Compare In re Sasson,* 424 F.3d 864, 869 (9th Cir. 2005) (bankruptcy court's "related to" jurisdiction includes supplemental jurisdiction under section 1367) *with In re Walker*, 51 F.3d 562, 570-73 (5th Cir. 1995) (bankruptcy courts cannot exercise supplemental jurisdiction under section 1367).

jurisdiction after having granting summary judgment to the defendants on the federal (Title VII) claim.[5] While there are several cases to that effect, they are also inapposite for the same reason: The Adversary Proceeding in the instant case was dismissed for lack of "related to" subject matter jurisdiction such that "original" jurisdiction was lacking, and there was no decision to not exercise supplemental jurisdiction by the Bankruptcy Court that would have implicated the tolling provisions of § 1367(d).

In fact, there was never "original" jurisdiction in the Bankruptcy Court over Textron against which Petitioners only sought the imposition of a constructive trust pursuant to state (Florida) law, and the dispute between Petitioners and Textron over funds paid to Textron by prior to the Petition Date was between non-debtor parties and beyond the scope of the Bankruptcy Court's "related to" subject matter jurisdictional grant. Notwithstanding Petitioners' argument to the contrary, because Textron's secured claim had been paid in full, and Textron released liens it held against the Debtors' property, the outcome of the dispute between Petitioners and Textron, as correctly held by the District Court, could have no effect on the Debtors' bankruptcy estates thus confirming the absence of "related to" subject matter jurisdiction over the dispute.

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[5] *Scarfo* is further discussed *infra*.

As correctly anticipated by Petitioners, Textron relies primarily upon *Ovadia v. Bloom,* 756 So. 2d 137 (Fla. 3d DCA 2000), where the Third District Court of Appeal ("Third District") affirmed the trial court's grant of summary judgment for the defendants on the ground that the plaintiff's suit was time-barred. This ruling was premised on the holding that, like here, the federal court never had subject matter jurisdiction in the prior suit in federal court such that the tolling provisions of § 1367(d) were inapplicable. In *Ovadia,* subject matter jurisdiction was lacking based on lack of diversity.

Here, subject matter jurisdiction was lacking since the funds over which Petitioners sought a constructive trust were transferred to Textron, a non-debtor, prior to the Petition Date ***leaving a dispute between non-debtors (Petitioners and Textron) over property that was not part of TGCC's bankruptcy estate***. *See Galluci, supra; In re Lemco Gypsum, Inc.,* 910 F.2d 784 (11th Cir. 1990) (dispute between purchaser of debtor's assets and debtor's landlord, that is, two non-debtors, was beyond the scope of the bankruptcy court's "related to" subject matter jurisdictional grant contemplated by 28 U.S.C. § 1334(b) since the dispute would have no effect on the bankruptcy estate). Because subject matter jurisdiction was

lacking in the Bankruptcy Court,[6] § 1367(a), which contemplates the existence of "original" jurisdiction, was unavailable to Petitioners.[7]

The Third District explained, apropos here, that "[a]s a threshold matter, we cannot grant Dr. Ovadia relief under 28 United States Code section 1367. Under the ***plain language of that section***, the limitations period is not tolled because the federal court never had original jurisdiction over Dr. Ovadia's action." *Ovadia,* 756 So. 2d at 139. Quoting from *Heckman v. City of Oakland Park,* 644 So. 2d

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[6] Petitioners note that the District Court stated that the effect of this lack of subject matter jurisdiction did not mean that the Bankruptcy Court lacked jurisdiction from the outset, only that it should have dismissed the Adversary Proceeding instead of granting Textron summary judgment. However, this statement, properly characterized as *dicta*, is suspect in light of the District Court's holding based on *Galluci, supra,* which was premised on the fact that the funds at issue were transferred to Textron, a non-debtor, prior to the Petition Date, leaving a dispute over property that was ***not*** property of the estate between non-debtors Textron and Petitioners. *Galluci* holds that bankruptcy courts lack subject matter jurisdiction to hear non-core matters beyond the scope of their "related to" jurisdiction, that is, where the proceeding, ***like the one before this Court***, does not involve property of a bankruptcy estate. *Galluci*, 931 F.2d at 742. *Accord Lemco Gypsum, supra.* Petitioners' discussion of "related to" jurisdiction, including case law, at pp. 36-40 of their *Petitioners' Amended Brief on the Merits*, is wide of the mark where it presumes that Petitioners could have prevailed in a claim against Textron (pp. 39-40); however, there was no ability to establish a constructive trust claim where Petitioners could not trace commingled funds or property purchased therewith and Textron's claim against the Debtors had been satisfied and its liens released.

[7] Through the Adversary Proceeding Petitioners sought imposition of a constructive trust as to Textron or a priority claim against its bankruptcy estate. However, (i) because the funds were transferred to Textron and could not be traced a constructive trust could not be imposed as against Textron's property, generally, and (ii) neither could one be imposed on Textron's secured claim since that claim had been satisfied and Textron's liens on the Debtors' property released such that there was no basis for the imposition of a constructive trust over that claim.

525, 527 (Fla. 4th DCA 1994), the Third District further explained that "a voluntary but improvident foray into the federal arena will not toll the statute of limitations." *Ovadia,* 756 So. 2d at 139.

This statement is apropos here where the underlying litigation started in state court, the Petitioners, upon the filing of the Debtors' bankruptcy cases, elected to proceed in federal court—the Bankruptcy Court, although there was no requirement that they do so since they were entitled to seek relief from the automatic stay (11 U.S.C. § 362(a)) to continue liquidating their claim in state court[8]—and when that forum didn't produce the results sought Petitioners returned to state court. In short, and as alluded to in *Heckman, supra,* the strategic litigation decisions made by the Petitioners, after failing to achieve the relief they sought in the federal arena, should preclude a finding that they are entitled to the benefit of the tolling provisions of § 1367(d). Of note, the Second District below, like the Third District in *Ovadia, supra,* also quoted the above-referenced language from *Heckman*. (App. at Tab 9, P. 212)

Petitioners rely primarily on *Scarfo, supra,* which also served as their lead case in seeking certiorari based on an alleged conflict with *Ovadia, supra*. Other distinguishing facts are that in *Scarfo* there was a trial in the federal District Court

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[8] Petitioners explain that "[g]enerally, in the context of bankruptcy creditors don't choose to venture" voluntarily into the federal forum, but that is precisely what happened here, and the "venture" turned into an "improvident foray" as repeatedly acknowledged by Petitioners in their *Petitioners' Amended Brief on the Merits*.

concerning the parties' ***factual*** dispute as to whether the defendants qualified as "employers" under Title VII. *Scarfo,* 817 So. 2d at 920. Because the Court, ***after*** the trial, found that the defendants were not "employers" it concluded that they could not be liable under the statute and, as a result, granted defendants summary judgment. *Id.* In the case before this Court, there was no factual dispute that was tried in federal court, and claims against Textron were dismissed based upon lack of subject matter jurisdiction as opposed to on the merits via summary judgment.

In *Scarfo,* the Fourth District Court of Appeal stated that dismissal by a federal court on grounds of subject matter jurisdiction, like what transpired in the case at bar, does not preclude application of the tolling provisions in § 1367(d). The problem with this reasoning is that it fails to take into account the requirement in § 1367(a) that "original jurisdiction" exists in the federal court for section 1367 to apply in the first instance. In other words, without federal subject matter jurisdiction there can be no supplemental jurisdiction. Thus, the holding reached in *Ovaida* provides the better rule of law as it is more consistent with the scheme set up by Congress through § 1367.

Petitioners purport to see a difference between dismissal for lack of diversity, a threshold jurisdictional issue, and dismissal of a claim for being outside the Bankruptcy Court's "related to" subject matter jurisdiction. This is a distinction without a difference—both matters are premised upon a lack of subject matter

jurisdiction in the federal court such that the dismissal in this case and in *Ovaida* are, in fact, consistent with one another and the language of § 1367(d). Like *Scarfo*, *Blinn v. Florida Dept. of Transp.*, 781 So. 2d 1103 (Fla. 1st DCA 2000), discussed by Petitioners, is also distinguishable from the facts at bar and those in *Ovaida*.

In *Blinn*, the plaintiff dismissed the federal proceeding voluntarily, which was not the case in the instant matter nor in *Ovaida*. Petitioners discuss a handful of cases from other states[9] all of which, based on Petitioners' description of them, are easily distinguishable from the facts before this Court (as well as in *Scarfo*), and in any event, beyond not being controlling, Petitioners candidly acknowledge that "[t]o be sure, other jurisdictions have reached different results."

(a) Petitioners waived any arguments based upon the doctrine of equitable estoppel

The trial court rejected Petitioners' argument that Textron should be equitably estopped to argue that Petitioners' claims were time-barred. (App. at Tab 8, P. 4-5) Petitioners neglected to address that ruling in the initial brief they filed with the Second District and, therefore, they waived any challenge to that ruling. *McKinzie,* 845 So. 2d at 318 (claims waived by not being included in appellant's

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[9] *Bonifeld v. County of Nevada*, 94 Cal. App. 4th 298 (Cal 3d Dist. 2002); *Oleski v. Dept. of Public Welfare*, 822 A.2d 120 (Pa. Comm. Ct. 2003); *Goodman v. Best Buy, Inc.,* 755 N.W.2d 354 (Minn. App. 2d 2008); and *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008).

initial brief on appeal); Fla. R. App. P. 9.210(b)(5) (initial brief "shall" contain "[a]rgument with regard to each issue…."). As such, this Court should not consider any argument by Petitioners that Textron should have been equitably estopped to assert that Petitioners' claims were time-barred.

Regardless, Petitioners elected to litigate in the federal forum after the filing of the Debtors' bankruptcy cases (even though they had the right to ask the Bankruptcy Court to modify the automatic stay provisions of 11 U.S.C. § 362(a) to continue to liquidate their claim in the state court proceeding). Then, after litigating in the federal forum for several years, and after things did not go well for them in that forum, that is, they suffered an adverse summary judgment ruling by the Bankruptcy Court and fared no better before the District Court on appeal, although that Court ultimately directed the summary judgment order to be vacated, Petitioners elected to return to state court. Textron respectfully submits that these facts militate strongly against a finding that Textron should be equitably estopped to argue a limitations defense. Instead, these facts make the above-quoted language from *Heckman, supra,* apropos here, especially where it cannot be disputed that the issue of subject matter jurisdiction (the lack of which served as the basis for dismissal of Petitioners' claims against Textron) can be raised at any time in a judicial proceeding. *Cochran v. U.S. Health Care Fin. Admin.,* 291 F.3d 775, 778 n.3 (11th Cir. 2002) (citations omitted). In that regard, Petitioners' equitable

estoppel and tolling arguments are to that effect that it was Textron's fault that the limitations period ran during the course of the proceedings in federal court; however, the onus should be on the Petitioners for their strategic litigation decisions concerning the forum in which they chose to litigate their claims.

And application of the doctrine of equitable tolling according to Petitioners' quote from this Court's decision in *Machules v. Dept. of Administration,* 523 So. 2d 1132 (Fla. 1988) reflects that an appropriate consideration is whether the ***defendant*** will be prejudiced. Allowing Petitioners to continue their long-standing litigation against Textron (for actions taken by TGCC) will indisputably cause Textron to incur even more time and expense in responding thereto. At some point the litigation must end, and Textron respectfully submits that this is the appropriate stopping point. Instead of attempting to place blame for their predicament on Textron, it is more appropriate for the Petitioners to look in the mirror, consider their strategic litigation decisions, including the nearly three (3) year delay in dismissing TGCC from the Adversary Proceeding with prejudice after the grant of summary judgment in Textron's favor, and be held responsible therefor.

Based on the foregoing, the Court should affirm the Second District's affirmance of the trial court's ruling that § 1367(d) did not apply and, therefore, the state law claims asserted in the *Amended Complaint* were time-barred.

(ii) Even if § 1367(d) applies, Petitioners cannot establish essential elements of their constructive trust claim.

Even if the Court were to find that § 1367(d) applies, the Court can affirm the Second District's affirmance of the May 9 Order as to Petitioners' request for imposition of a constructive trust because Petitioners aren't entitled to that equitable remedy as a matter of law. *See Dade Cty. School Bd.,* 731 So. 2d at 644-45 (explaining "tipsy coachman rule").

As an initial matter, in *Collinson*, 903 So. 2d at 228, the Second District explained that the remedy of a constructive trust "remains an extraordinary one" which, because it is a remedy and not an established cause of action, "must be imposed upon an established cause of action." *Id*. Here, because the only other requested relief as to Textron, unjust enrichment, is also a remedy, *Port-A-Weld, Inc. v. Padula & Wadsworth Const., Inc.,* 984 So. 2d 564, 566-67 (Fla. 4th DCA 2008) (referring to unjust enrichment as a remedy), *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1996) (same), Petitioners' request for the imposition of a constructive trust must fail. Alternatively, if the Court finds that unjust enrichment is "an established cause of action," and a traditional analysis is applied, Petitioners are not entitled to the imposition of a constructive trust.

Courts in this State consistently hold that in order to impose a constructive trust under Florida law, litigants, like Petitioners here, must establish, among other

things, that there is specific identifiable property as against which a trust can be imposed, or such property can be clearly traced by the party seeking to impose the trust. *Cole Taylor Bank*, 772 So. 2d at 553 (citing *Trend Setter Villas of Deer Creek v. Villas on the Green, Inc.,* 569 So. 2d 766, 768 (Fla. 4th DCA 1990)); *Gersh,* 769 So. 2d at 409 (same). As explained by the Fourth District Court of Appeal in *Arduin v. McGeorge*, 595 So. 2d 203, 204 (Fla. 4th DCA 1992):

> Money is fungible. Where money is the asset upon which it is proposed that a constructive trust be imposed, it is ***<u>necessary</u>*** that a specific amount be identified and located, either by tracing it through a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of some item of property, by tracing and identifying the transaction in which the conversion occurred and thus tracing the money into the item of property.

Id. (emphasis added). Similarly, in *Glidden v. Gutelius*, 96 Fla. 834, 842-43, 119 So. 140, 143 (1928), this Court explained, in part, in the context of a discussion of the rights of a *cestui que* trust, as follows:

> Whenever property in its original state and form has once been impressed with the character of a trust, no subsequent change of such state and form can divest it of its trust character, ***<u>so long as it is capable of clear identification</u>***, and the beneficiary of the trust may pursue and reclaim it in whatever form he may find it, unless it has passed into the possession of a bona fide purchaser without notice. Whether a disposition of trust funds be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, ***<u>if he can identify them</u>***. If they cannot be identified, because they are mingled with the moneys of the trustee, then the beneficiary is entitled to a charge upon the new investment ***<u>to the extent of the trust money traceable in it</u>***.

Id.

The burden to trace the commingled asset is on the party claiming a right to imposition of a constructive trust. *In re S.N.A. Nut Co.,* 204 B.R. 537, 542 (Bankr. N.D. Ill. 1997). Petitioners cannot bear their burden of proof, however. There is not a specific or identifiable property as against which a constructive trust can be imposed; and the proceeds at issue were commingled no later than April 18, 2002, the date of Mr. Lea's Affidavit, ***almost eight (8) years ago***! In short, at this point in time, there is simply no set of facts upon which Petitioners could trace the proceeds of the sales of their golf memberships or property purchased therewith. Moreover, there can be no imposition of a constructive trust over Textron's general assets. *Finkelstein v. Southeast Bank, N.A.,* 490 So. 2d 976, 983 (Fla. 4th DCA 1986) (courts will not impose a constructive trust over a defendant's general assets).

Likewise, there can be no imposition of a constructive trust as to Textron's secured claim against the Debtors since (i) that claim has been satisfied in full, (ii) Textron has released all of its liens against the Debtors' property, ***and*** (iii) the Debtors' bankruptcy cases, administered under the lead case of Section 20 Land Group, Ltd., have been formally and finally concluded as of June 27, 2006, the date of the entry of the *Final Decree* by the Bankruptcy Court.

Moreover, Petitioners cannot establish a confidential relationship with Textron that had been abused. *Hutson,* 646 So. 2d at 277. Petitioners alleged that

there existed a confidential relationship between them and Textron (and the Debtors). However, no such relationship existed. There were two relationships in this case—between Textron and the Debtors (*i.e.*, lender and borrower), and TGCC and the Petitioners (*i.e.*, country club and members). Petitioners were not a party to the loan documents entered into by and between Textron and the Debtors, and Textron was not a party to the Plan entered into by and between Petitioners and TGCC.

Based on the foregoing, to the extent necessary, the Court can affirm the Second District's affirmance of the May 9 Order on the basis that Petitioners are not entitled to the imposition of a constructive trust as a matter of law on any funds or property of Textron, or in its previously satisfied secured claim against the Debtors' bankruptcy estates.

(iii) Petitioners' failure to assert a claim for unjust enrichment in the federal proceedings precludes application of § 1367(d).

The Court can affirm as to Petitioners' request for unjust enrichment because of their ***failure to assert it in the federal proceedings*** which necessarily precludes application of § 1367(d) in the first instance. *See Dade Cty. School Bd.,* 731 So. 2d at 644-45.

The trial court correctly recounted Textron's argument that § 1367(d) did not apply to Petitioners' request for unjust enrichment because that remedy was ***never*** before the District Court, or the Bankruptcy Court for that matter. (App. at Tab 8,

P. 4) The ***first*** time that Petitioners sought unjust enrichment as to Textron was in the state court litigation which Petitioners commenced ***after*** dismissal of the Adversary Proceeding.[10] Because there was no request for unjust enrichment made in the proceedings before the Bankruptcy Court, it cannot be questioned that § 1367, which contemplates state law claims being prosecuted simultaneously ***with*** federal law claims ***before a federal court***, does not and cannot apply toll the applicable limitations period under Florida law, Fla. Stat. § 95.11(2)(b).[11]

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[10] Textron is mindful that in the *Complaint* initiating the Adversary Proceeding, Petitioners stated that TGCC, the Debtors in the related bankruptcy cases and Textron were all "unjustly enriched" by retaining or encumbering the proceeds of Petitioners' golf memberships. (App. at Tab 1, ¶ 21) However, the Wherefore clause of the *Complaint*—on the same page as the referenced language and a mere four lines below it—sought ***only*** imposition of a constructive trust; the prayer for relief does ***not*** reference unjust enrichment (***or any other remedy***). (*Id.,* Wherefore clause).

[11] Based on the allegations in their *Amended Complaint*, Petitioners' claims accrued as of May 5, 1999 (Bautsch) and June 4, 1999 (Krause), when they were due to be paid the proceeds from the sale of their golf memberships. *State Farm Mut. Auto Ins. Co. v. Lee,* 678 So. 2d 818, 821 (Fla. 1996) (cause of action accrues and statute of limitations period begins to run from breach of the contract, *i.e.*, when a claim can be brought). The date by which legal or equitable claims based on the Plan, a "written instrument," had to be filed was therefore May 5, 2004 for Bautsch and June 4, 2004 for Krause. Fla. Stat. § 95.11(2)(b) (five year limitations period for legal or equitable action on a contract, obligation or liability based on a written instrument). Arguably, because the parties were not in privity of contract with respect to the Plan, *supra*, the applicable limitations is four years. *See* Fla. Stat. § 95.11(3)(k). Regardless, even applying the five year limitation period, absent application of § 1367(d), which does not apply here for the reasons stated above, the request for unjust enrichment asserted in the state court litigation on February 10, 2006 is time-barred.

Petitioners cite to case law from this Court for the proposition that any relief contemplated by the allegations in a complaint is properly asserted even though not specifically requested, *Chasin v. Richey,* 91 So. 2d 811 (Fla. 1957). Petitioners, however, do not and cannot cite to case law ***applying that concept to the tolling provision contained in § 1367(d)***.[12] Even if such case law existed, Textron respectfully submits that it would inappropriately expand (and distort beyond recognition) the tolling provisions of § 1367(d) far beyond anything Congress ever intended.

Taking Petitioners' argument to its (il)logical conclusion, any number of additional legal claims or remedies alluded to in the *Complaint* filed with the Bankruptcy Court, regardless of the fact that ***none*** was identified as relief being sought, would be entitled to the benefit of the tolling provisions of § 1367(d). In that regard, Petitioners identify several such claims and/or remedies that "come to mind," that is, money had and received unjust enrichment, resulting trust, quasi-

[12] Section 1367(d) has nothing whatsoever to do with *Chasin* which concerned an appeal from a judgment entered in favor of a real estate broker claiming a commission. The specific issue raised on appeal was that the amount awarded to the broker exceeded the amount prayed for in the complaint; however, the Court concluded that the amount prayed for was the result of a mathematical error. *Chasin*, 91 So. 2d at 812. Thus, *Chasin* does not support the proposition that, ***in the context of § 1367(d)***, which explicitly contemplates state law claims being asserted in federal court, claims not specifically asserted in federal court should nevertheless get the benefit of the tolling provisions of that statute. The foregoing analysis also applies to the other decision cited by Petitioners, *Davidson v. Lely Estate, Inc.,* 330 So. 2d 528 (Fla. 2d DCA 1976), which, like *Chasin*, has absolutely nothing to do with § 1367(d).

contract and contract implied in law. The Second District correctly and summarily rejected the proposition urged on this Court by Petitioners: "As to [Petitioners'] state claim against Textron for unjust enrichment, we agree [with Textron] that because this claim was not part of the bankruptcy complaint, the provisions of 28 U.S.C. § 1367(d) do not apply and that this claim is also barred by the statute of limitations." (App. at Tab 9, P. 212)

Alternatively, even if unjust enrichment had been sought by Petitioners as against Textron before the Bankruptcy Court (it was not), and such relief was not time-barred (it is), it would fail as matter of law because Petitioners gave nothing to Textron—the monies Textron received came from TGCC. *See Rollins,* 951 So. 2d at 876 (one of the elements of a constructive trust claim is that the plaintiff confer a benefit on the defendant). And in return for any monies it received from the Debtors, Textron gave substantial value in the form of millions of dollars of loans to the Debtors. *See Cole Taylor Bank,* 772 So. 2d at 551 (the last requirement for recovery for unjust enrichment is that under the circumstances it would be inequitable to allow the recipient to retain the benefit without giving value therefor); *Rollins,* 951 So. 2d at 876 (same).

Based on the foregoing, to the extent necessary, the Court can affirm the Second District's affirmance of the May 9 Order on the basis that Petitioners are not entitled to the remedy of unjust enrichment.

CONCLUSION

Based on the foregoing, the Court should affirm the Second District's affirmance of the May 9 Order in its entirety, including the Second District's holding that (i) § 1367(d) was inapplicable to the request for unjust enrichment since Petitioners ***never*** requested that relief in the *Complaint* filed with the Bankruptcy Court, and (ii) equitable estoppel could not be used to bar Textron from asserting a statute of limitations defense since Petitioners failed to challenge that holding in the initial brief they filed with the Second District.

Alternatively, the Court should find that even if the tolling provisions of § 1367(d) apply, Petitioners cannot as a matter of law demonstrate the right to (i) the imposition of a constructive trust as tracing of funds commingled almost eight (8) years ago or property purchased therewith is factually impossible, and Textron's secured claim was satisfied and Textron released liens it held against the Debtors' property, or (ii) unjust enrichment because there is no underlying cause of action, and Petitioners gave no property to Textron and in return for any monies Textron received from the Debtors Textron gave substantial value in the form of millions of dollars in loans.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Regular U.S. Mail, postage prepaid, and Electronic Mail upon William A. Donovan, Esq., William A. Donovan, P.A., 2671 Airport Road, South, Suite 304, Naples, FL 34112 on this 29th day of December, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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