IN THE SUPREME COURT OF FLORIDA

ANDREW KRAUSE and
DAVID BAUTSCH,

Petitioners,

v.

Supreme Ct. Case No.: SC09-881
Lower Ct. Case No.: 2D07-4060

TEXTRON FINANCIAL
CORPORATION,

Respondent.
_____________________________/

RESPONDENT'S (JURISDICTIONAL) ANSWER BRIEF

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

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STATEMENT OF THE CASE AND FACTS

In May 1997 Andrew Krause and David Bautsch ("Petitioners") purchased golf memberships at the Twin Eagles Golf & Country Club, Inc. ("TGCC"). Textron Financial Corp. ("Textron" or "Respondent") was not a party to the agreement which governed the contractual relationships between TGCC and Petitioners, and neither Petitioner was a party to the Loan Agreement (or related documents) dated July 6, 1998 entered into by and between Textron, as lender, and TGCC and TwinEagles Land Group I, LLC ("Land Group"), as borrowers.

On April 29, 1999 and May 18, 1999, prior to the Petition Date (as defined below) Bautsch and Krause, respectively, resigned as members of TGCC. On May 5, 1999 and June 4, 1999, TGCC sold the memberships of Bautsch and Krause, respectively, to new members of TGCC. Petitioners alleged that TGCC was obligated to remit to them the proceeds of the sale of their memberships as of May 5, 1999 and June 4, 1999, respectively. TGCC deposited the proceeds of the sales into its account and, prior to the Petition Date, delivered the proceeds to Textron.

On September 9, 1999 ("Petition Date"), TGCC and six affiliates ("Debtors") filed chapter 11 bankruptcy cases in the Bankruptcy Court, Middle District of Florida, at which time Textron was owed approximately $9 million.

On June 15, 2000, Petitioners filed a *Complaint* against TGCC and Textron initiating an Adversary Proceeding in the Bankruptcy Court. Petitioners sought

only <u>one</u> form of relief against Textron: 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." *Complaint*, Wherefore Clause.[1]

On April 23, 2002, Textron moved for summary judgment in the Adversary Proceeding and in support thereof submitted the April 18, 2002 Affidavit of Franklin D. Lea who testified (¶¶ 14, 15 and 17), *inter alia*, that (i) 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, (ii) as provided in the Debtors' chapter 11 plan and disclosure statement, Textron's allowed secured claim was <u>satisfied in full</u> from the proceeds of the sale of the Debtors' assets and, as a result, Textron released <u>all of its liens and no longer held any claim against the Debtors</u>, and (iii) the funds Textron received in satisfaction of its allowed secured claim "have been <u>commingled with other, unrelated funds and are no longer</u>

[1] Prior to the Petition Date, Petitioners filed suit in state court but <u>elected</u> to dismiss that suit and seek relief in the Debtors' bankruptcy proceedings as opposed to seeking relief from the automatic stay, 11 U.S.C. § 362(a). Petitioners state that upon the filing of the Debtors' bankruptcy cases the state court "lost" jurisdiction. Petitioners' Brief, n.1. However, the automatic stay provisions of the Bankruptcy Code merely precluded the continued prosecution of that lawsuit absent modification of the stay by the Bankruptcy Court, relief that was <u>not</u> sought.

subject to tracing." (Emphasis Added). The testimony as to commingling was uncontradicted.

By Order dated July 18, 2002, the Bankruptcy Court entered summary judgment in favor of Textron and against Petitioners ("SJ Order"). On May 5, 2005, Petitioners elected to dismiss the Adversary Proceeding as to TGCC with prejudice which formally concluded the Adversary Proceeding as the SJ Order pertained only to Textron.

On January 12, 2006, the District Court, Middle District of Florida, sitting as an appellate court, entered an order dismissing Petitioners' appeal of the SJ Order based on lack of subject matter jurisdiction.[2] The District Court held that because the funds sought to be recovered by Petitioners had been transferred to a non-debtor 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." *Opinion and Order* at 10 (quoting *In re Galluci*, 931 F.2d 738, 742 (11th Cir. 1991)) (Emphasis Added). In *dicta*, the District Court stated that its holding did not mean that the Bankruptcy Court lacked

[2] According to Petitioners, there was an undue delay in the Respondent's assertion of a lack of subject matter jurisdiction before the Bankruptcy Court. Petitioners' Brief at 2-3. Even if true, that delay is a red-herring because it is black letter law that subject matter jurisdiction can be raised at any time. *See*, *e.g.*, *Burke v. Esposito*, 972 So. 2d 1026, 1029 (Fla. 2d DCA 2008).

jurisdiction from the "inception," *id.*; however, the trial court below understood the District Court to have found that the Bankruptcy Court "never had jurisdiction." *Order Granting Motion to Dismiss* at 4; Note 3, *infra*. Having concluded that the Bankruptcy Court lacked subject matter jurisdiction, the District Court directed the Bankruptcy Court to vacate its prior SJ Order in favor of Textron, which it did.

On February 10, 2006, Petitioners proceeded, for the second time, in state court and filed the *Complaint* initiating the lawsuit subject of this appeal. On June 5, 2006, Petitioners filed their *Amended Complaint*; Count I sought the remedy of a constructive trust over the funds received by Textron, and Count II sought the remedy of unjust enrichment. However, it is undisputed that the only remedy Petitioners requested in the previously dismissed Adversary Proceeding as against Textron was the imposition of a constructive trust.

On June 23, 2006, Textron filed its *Motion to Dismiss Amended Complaint* through which it argued, in part, that (i) the claims asserted by Petitioners were time-barred, and (ii) Petitioners were not entitled to imposition of a constructive trust as a matter of law, that is, they could not establish a relationship, let alone a "confidential relationship," with Textron, and tracing of the proceeds of the sale of Petitioners' memberships (commingled seven years earlier) would be impossible.

On May 9, 2007, the trial court held 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. The trial court agreed with Respondent that section 1367(d) did not apply.

Petitioners appealed to the Second District Court of Appeal which, after briefing and oral argument, affirmed the trial court in an order dated April 17, 2009. *Krause et al. v. Textron Fin. Corp.,* 2009 WL 1025406 (Fla. 2d DCA April 17, 2009). The Second District recounted the District Court's holding that the state law claims against Textron were beyond the Bankruptcy Court's "related to" subject matter jurisdiction and that that holding, which Petitioners elected not to challenge on appeal, was outcome "determinative." *Id.,* *3. Quoting from *Heckman v. City of Oakland Park*, 644 So. 2d 525, 527 (Fla. 4th DCA 1994), the Second District explained that Petitioners "were free to choose the forum in which they sought to litigate the[ir] claims. They cannot now argue a tolling of a state court statue of limitation[s] because of their <u>voluntary but improvident foray</u> into the federal arena." *Id.* (Emphasis added). The court's opinion did not address the primary case relied upon by Textron regarding section 1367(d), *Ovadia v. Bloom*, 756 So. 2d 137 (Fla. 3d DCA 2000), or Petitioners which is cited in support of the claimed conflict, *Scarfo v. Ginsberg*, 817 So. 2d 919 (Fla. 4th DCA 2002).

The Second District specifically addressed Petitioners' claim for unjust enrichment, agreeing with Textron that because the claim was <u>not</u> asserted in the Adversary Proceeding before the Bankruptcy Court the tolling provisions of

section 1367(d) did not apply to that claim either rendering it time-barred, too. *Krause*, 2009 WL 1025406, *3.

SUMMARY OF ARGUMENT

There is no express and direct conflict between Krause and *Scarfo* where, *inter alia*, there was an absence of "original" jurisdiction in *Krause* under section 1367(a), which incorporates the tolling provisions of section 1367(d), but such jurisdiction was present in *Scarfo*. Alternatively, to the extent the Court finds an express and direct conflict, this distinction, among others, militates against the exercise of the Court's discretion to hear the appeal, especially where in no event can Petitioners establish their state law claims as against Textron.

ARGUMENT

A. Jurisdictional Statement

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

B. Analysis

Petitioners assert that the *Krause* expressly and directly conflicts with *Scarfo*. Specifically, Petitioners argue that their claims were dismissed after the District Court made a factual finding that the constructive trust claim asserted

against Textron was beyond the Bankruptcy Court's "related to" jurisdiction whereas in *Scarfo* the state law claims were allowed to proceed in the absence of such jurisdiction. There are several flaws in this argument, many of which reflect the materially distinguishable facts between these cases which militate against a finding of an express and direct conflict or, alternatively, the exercise of this Court's discretion to hear the appeal.

First, the District Court, sitting as an appellate court in bankruptcy, did <u>not</u> make (and could not have made) any findings of fact as <u>repeatedly</u> urged by Petitioners. *In re Sublett,* 895 F.2d 1381, 1384 (11th Cir. 1990) (appellate courts in bankruptcy cannot make independent findings of fact; that is the function of the bankruptcy court sitting as the trial court). Second, unlike in *Scarfo,* there was no "trial" on the issue of jurisdiction. In fact, jurisdiction was <u>not</u> at issue in *Scarfo* where the court addressed only whether the defendant was an "employer" for purposes of determining the viability of a lawsuit brought under Title VII. Third, unlike in *Scarfo,* Petitioners <u>elected</u> to voluntarily dismiss with prejudice their claim against TGCC that allowed them to be in federal court in the first instance leaving only claims against Textron for which there was never jurisdiction since the funds at issue were transferred to Textron <u>prior</u> to the Petition Date and, thus,

were never part of the Debtors' bankruptcy estates.[3] Thus, as explained in *Ovaida*, relief under section 1367(d) was unavailable there (as in the instant case) because the federal district court never had subject matter jurisdiction based on the lack of complete diversity between the parties. Stated another way, the Bankruptcy Court lacked "original" jurisdiction over the claim against Textron that would provide for supplemental jurisdiction pursuant to section 1367(a) which existed in *Scarfo*.

Fourth, in *Scarfo,* unlike in the instant case, the federal district court dismissed the state law claims "without prejudice to refiling them in state court," *Scarfo*, 817 So. 2d at 920 (emphasis added), specifically setting up the subsequent filing by the plaintiff of a state court lawsuit. Fifth, *Scarfo, Ovaida,* and *Krause* are, in fact, consistent with each other in that all three decisions require that state law claims asserted in federal court be brought pursuant to section 1367(a)—which is the hook that makes applicable the tolling provisions contained in section 1367(d)—and requires "original jurisdiction" lacking in *Krause* (and *Ovaida*) but present in *Scarfo*. Based on the foregoing, there is no express and direct conflict between *Krause* and *Scarfo*.

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[3] The District Court's statement, in *dicta*, that even though there was a complete lack of subject matter jurisdiction that didn't mean that that jurisdiction was lacking at the outset was wrong because (i) the proceeds from the sale of the Petitioners' golf memberships were transferred to Textron prior to the filing of the bankruptcy cases such that these funds did not constitute property of the Debtors' estates, and (ii) Petitioners' claims against Textron involved non-debtors as to which any recovery would have no effect on the Debtors' bankruptcy estates.

To the extent the Court concludes otherwise, the Respondent respectfully submits it should not exercise the discretion vested in it to hear the appeal because, among other things, the facts before the Second District in *Krause* and the Fourth District in *Scarfo* are so distinguishable from one another so as to render this appeal not the right opportunity to consider the conflict.

Moreover, even if this Court were to accept the appeal, and even if it were to reverse, Petitioners would be unable, as a matter of law, to establish their unjust enrichment and constructive trust claims which further militates against an exercise of the Court's discretion to hear the appeal. As to the former, notwithstanding Petitioners' argument to the contrary, Petitioners' Brief at 9, the Second District correctly rejected Petitioners' claims for unjust enrichment on limitations grounds based on the undisputed fact that Petitioners never asserted that claim in the bankruptcy proceedings such that that claim could not possibly get the benefit of the tolling provisions of section 1367(d). The case cited to by Petitioners on this issue, *Holly v. Innovative*, 803 So. 2d 749 (Fla. 1st DCA 2002), has absolutely nothing to do with section 1367, generally, or the tolling provisions of section 1367(d), specifically. In fact, if this Court accepts the appeal it can and should reject Petitioners' argument regarding their unjust enrichment claim for the same reasons explained by the Second District. *See Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982) (this Court explained that once it accepts jurisdiction over a case to

resolve the legal issue in conflict it may, in its discretion, consider other issues properly raised and argued before it).

Also, as explained above, Petitioners cannot establish a relationship, let alone a "confidential relationship," with Textron since the Petitioners were not parties to the loans made by Textron to TGCC and Land Group, and Textron was not a party to the contracts pursuant to which TGCC sold golf memberships to the Petitioners. And Petitioners cannot, because of commingling ten (10) years ago, identify specific property, that is, the proceeds of the sale of Petitioners' golf memberships, or the proceeds therefrom. As such, the Petitioners cannot as a matter of law establish a claim for the imposition of a constructive trust. *See, e.g., Gersh v. Cofman,* 769 So. 2d 407, 409 (Fla. 4th DCA 2000) (stating elements required for the imposition of a constructive trust including the existence of a confidential relationship, and that there exists a trust *res* that is specific and identifiable property or that can be clearly traced in the assets of the defendant), *rev. denied*, 791 So. 2d 1097 (Fla. 2001).

CONCLUSION

Based on the foregoing, there is no express and direct conflict between *Krause* and *Scarfo* or, alternatively, the Court should elect to not exercise its discretion to hear the appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on William A. Donovan, Esq., William A. Donovan, P.A., Attorneys for the Petitioners, 2671 Airport Rd., Suite 304, Naples, FL 34112 and Richard Johnston, Jr., Esq., Fowler White Boggs, Former Attorney for the Petitioners, 2235 First Street, Ft. Myers, FL 33901 via Regular U.S. Mail, postage prepaid, on this 30th day of June 2009.

CERTIFICATE OF COMPLIANCE

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

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