IN THE SUPREME COURT OF FLORIDA

ANDREW KRAUSE and
DAVID BAUTSCH,

Petitioners

v.

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

RESPONDENT TEXTRON FINANCIAL
CORPORATION,

Respondent.
_____/

# PETITIONERS' REPLY BRIEF ON THE MERITS

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

William A. Donovan
Florida Bar # 228958
WILLIAM A. DONOVAN, P.A.
2671 Airport Road, South, Suite 304
Naples, FL 34112
239-793-0013 Telephone
239-885-8581 Facsimile
Attorney for Petitioners,
ANDREW KRAUSE and DAVID
BAUTSCH

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## SUMMARY OF ARGUMENT IN REPLY

Petitioners' claims asserted against Respondent in their Amended Complaint in Circuit Court are not time barred by the statute of limitations because § 1367(d) does not limit tolling only to claims asserted under subsection (a) and dismissed under subsection (c). Tolling applies to "any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)…"

Petitioners' claims, filed in the Adversary Proceeding on June, 15 2000, were entitled to tolling because they were "related to" the Bankruptcy proceedings of the bankrupt debtor, and jurisdiction continued until May 16, 2005, the date the bankrupt debtor was dismissed with prejudice. "Related to" subject matter jurisdiction may have been lost on May 16, 2005, but it was not lacking from the beginning.

The Circuit Court resolved this matter on a motion to dismiss and not a summary judgment. There was no determination that Petitioners pleadings were insufficient, or that they could not establish the elements necessary to impose a constructive trust, or recover based on unjust enrichment. Such a determination would be fact based, and the facts were not fully before the Circuit Court. This matter should be remanded back to the Circuit Court to provide it the opportunity

to make the requisite determinations.

Petitioners can establish the elements for imposition of constructive trust, and, in the federal proceeding Petitioners sufficiently asserted unjust enrichment, which entitled that claim to be asserted in Circuit Court pursuant to the tolling of § 1367(d).

Constructive trust and unjust enrichment do not require that the relationship, out of which abuse of confidence or mistake originates, be between the one seeking relief and the party against who relief is sought. It is not required that that the money have been delivered directly from the Petitioners to Respondent. The relationship between TwinEagles and Petitioners was one of confidence and trust founded upon contract and the Plan. That confidence and trust was breached when TwinEagles delivered Petitioners' funds from the resale of their memberships to Respondent. Although TwinEagles owed money to Respondent, the security agreement for the loan did not extend to Petitioners' funds.

The applicability of the equitable doctrines of equitable estoppel/tolling were identified, but not developed, in Petitioners' initial brief in the Second DCA, but they were addressed in the reply brief. Respondent's behavior and those doctrines, which at least bear upon Respondent's lack of clean hands, should be considered.

## ARGUMENT IN REPLY

### 1. The trial court and the Second District Court of Appeals erred in holding that Petitioners' claims were not entitled to the tolling provisions of § 1367(d).

Respondent's primary argument, and the issue upon which this Court based conflict jurisdiction, concerns the applicability of § 1367(d), under the circumstances of this case, to toll the running of the statute of limitations. Respondent argued that the tolling provisions of § 1367(d) [1] should be limited only to those state law claims that the federal court specifically acknowledged as being "related to" the underlying federal claim, but nevertheless declined to exercise supplemental jurisdiction only for those reasons set forth in subsection § 1367(c). [2]

Petitioners disagree because the language of the tolling provision itself is not so self-limiting. The tolling of § 1367(d) does not refer to, and is not ied to, § 1367 (c). Congress could have limited the tolling provisions by using Respondent's

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[1] (d): The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

[2] (c): (1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

words "…the tolling provision in § 1367(d) applies to supplemental claims that are asserted under sub-section (a) and dismissed under subsection (c)" *Respondent's Answer Brief on the Merits* p. 13. However, Congress crafted the language of § 1367(d) to toll the period of limitations for "**any claim asserted under subsection (a), and for any other claim in the same action**…"

*Barcel v. Lele*, No. 8:05-CV-1519-T-23, 2005 WL 3468282 (M.D. Fla. Dec. 19, 2005) was a federal case where jurisdiction over state law claims was asserted pursuant to the "related to" provisions of §1367 (a). The Middle District specifically determined that the state law claims **were not "related to"** the federal claim, that **it lacked subject matter jurisdiction**, and dismissed the state law claims **without prejudice to filing them in state court pursuant to the 30-day tolling afforded by §1367 (d)**. *Barcel* is absolutely contrary to Respondent's position.

The United States Supreme Court, in *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002), read § 1367(d) less narrowly than Respondent:

> On its face, subsection (d) purports to apply to dismissals of "*any* claim asserted under subsection (a)." *Ibid.* (emphasis added). Thus, it could be broadly read **to apply to any claim technically "asserted" under subsection (a)** as long as it was later dismissed, **regardless of the reason for dismissal**.

*Id.* at 538. (Emphasis added)

In *Blinn v. Florida Department of Transportation*, 781 So. 2d 1103 (Fla. 1st

DCA 2000), the First DCA decided that voluntary dismissals were entitled to the tolling provisions of § 1367(d), but it explicitly confronted and rejected Respondent's argument. It refused to "add words to the statutory text in the belief that some textually unspoken 'legislative intent' so required." *Id*. at 1105. The First DCA hit the nail on the head when it expressed its view:

> In our view, the tolling provision of section 1367 ought not be interpreted as applicable only to dismissals predicated on a federal court's decision to decline supplemental jurisdiction, pursuant to the criteria set forth in section 1367(c)(1)-(4). A policy of this nature would force a Plaintiff to litigate the supplemental jurisdiction question in order to gain the savings protection of section 1367(d).

*Id*. at 1109. (Emphasis added)

In *Scarfo v Ginsberg*, 817 So. 2d 919 (Fla. 4th DCA 2002), the Fourth DCA confronted a factual scenario legally on all fours with this case. The claimant's federal law claims (employment discrimination prohibited by the Civil Rights Act of 1964) and state law claims (battery, intentional infliction of emotional distress, and invasion of privacy) were asserted in federal court. The federal claims were dismissed after **a factual finding** of lack of subject matter jurisdiction (employer had less than 15 employees where 15 was the minimum jurisdictional requirement). The state law claims were dismissed without prejudice, and filed in state court within 30 days. Granting a summary judgment, the state court dismissed the claims as barred by the statute of limitations. On appeal, the Fourth DCA reversed

and, contrary to Respondent's argument, observed:

> Section 1367(d) provides for a tolling of state law limitations on ***any*** state law claim ***asserted*** in federal court under section 1367(a). **The only requirements are that the claim be *asserted* under section 1367(a)**.

*Id*. at 921.

When the Fourth DCA analyzed the applicability and effect of § 1367(d), it did not mention *Ovadia v. Bloom*, 756 So. 2d 137 (Fla. 3d DCA 2000), but it likely had *Ovadia* in its sights. *Scarfo* appreciated a **distinction with a difference** when it contrasted diversity jurisdiction with federal question jurisdiction:

> In this case plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity of citizenship. We note that in this instance the issue as to subject matter jurisdiction raised by defendants did not contend that plaintiff's claim was of a class that on its face could not be brought in federal court. Instead defendants' attack was based on a factual dispute as to whether any of the defendants qualified as employers under Title VII. After a "trial" on that issue, the court determined that none of the defendants met the Title VII requirements for liability. It was only on the basis of the resolution of that factual dispute that the court dismissed plaintiff's federal claim.

*Id*. at 920.

*Scarfo* and this case based jurisdiction on federal question grounds. [3] Both involved lack of subject matter jurisdiction **factual** findings by the federal court. Both involved dismissals of the state law claims without prejudice; with a specific

[3] *Scarfo* based federal subject matter jurisdiction on the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). This case based federal jurisdiction on the United States Bankruptcy Code (11 U.S.C. § 101 et seq.) and 28 U.S.C § 1334.

statement in *Scarfo* and, in this case as a matter of law. [4] Neither involved any decisions on the merits, [5] and in both cases the claimants filed their state law claims in state court within 30 days of the federal dismissals.

*Ovadia*, upon which Respondent relies, invoked only diversity jurisdiction, pursuant to 28 U.S.C. § 1332. All claims were state law based, filed in federal court, dismissed due to incomplete diversity, refilled in state court within 30 days, and dismissed because the 2-year statute of limitations had run. *Ovadia* held that § 1367(d) afforded no relief because "the limitations period is not tolled because the federal court never had original jurisdiction." *Id*. at 139. In this case, Respondent claimed (erroneously, as Petitioners argued) [6] that, similarly, the Bankruptcy Court never had subject matter jurisdiction, so that under *Ovadia*, Petitioners' state law claims were not entitled to the tolling of §1367(d). Respondents have relied on, and extrapolated from, language in a factually distinguishable case, and did not see a distinction with a difference between diversity jurisdiction and federal question

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[4] *See Crotwell v. Hockman-Lewis Ltd.*, 734 F. 2d 767 (11th Cir. 1984).

[5] In this case, 2006 Dismissal Order vacated summary judgment on the merits. Also, *See Stalley ex rel. U.S. v. Orlando Regional Healthcare System, Inc.*, 524 F. 3d 1229 (11th Cir. 2008), *Arison Shipping Co. v. Hatfield*, 352 So. 2d 539 (Fla. 3d DCA 1977), *Southern Coatings, Inc. v. City of Tamarac*, 916 So. 2d 19 (Fla. 4th DCA 2005) and *Crotwell*.

[6] Petitioners argued that from June 15, 2000 until May 16, 2005, the Bankruptcy Court had subject matter jurisdiction. Voluntary dismissal of bankrupt debtor triggered loss of jurisdiction. *See Petitioners' Brief on the Merits* p. 39-44.

jurisdiction. *Ovadia* should be overruled. Its holding was not in accord with the language of § 1367(d), the salutary purpose behind its tolling provision, the holdings of *Blinn, Scarfo, Raygor* or the Middle District's own application of § 1367(d)'s tolling, as demonstrated in *Barcel.*

Finding the tolling provisions of § 1367(d) applicable to Petitioners' claims would obviate responses to the remaining issues asserted by Respondent under the "Tipsy coachman" rule. Petitioners believe that it is improper to use that rule in lieu of asking for and receiving a summary judgment. Nevertheless, Petitioners will briefly address the issues raised.

**2. Petitioners can establish essential elements of their constructive trust claim, or should at least be afforded the opportunity to try.**

The 2007 Circuit Court Order of dismissal was based on Respondent's Rule 1.140(b)(6) [7] motion to dismiss and not a summary judgment. No answer or affirmative defenses were filed. The dismissal order's sole foundation was that the limitations period had run, and Petitioners claims were not entitled to the tolling provisions of § 1367(d) or the doctrine of equitable estoppel to preclude dismissal.

On a motion to dismiss, the trial court is bound by the four corners of the complaint, including its attachments, and must consider the well pleaded allega-

[7] Fla. R. Civ. P. 1.140(b) Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading,… but the following defenses may be made by motion at the option of the pleader:…(6) failure to state a cause of action…

tions, including the inferences drawn from them, as true. It tests the sufficiency of the complaint, and not whether the Plaintiff can prove what it alleged. [8] In this case, the trial court did not analyze the sufficiency of Petitioners' pleadings. That is its function, and it should be given that opportunity. The Second DCA held only that § 1367(d) did not toll the running of the statute of limitations as to the claims for constructive trust and unjust enrichment. [9] Petitioners request that this Court restrict the scope of its inquiry to that holding, which, upon reversal, would allow the Circuit Court an opportunity to make the necessary factual and legal determinations within its authority.

Petitioners and TwinEagles enjoyed a fiduciary relationship based on the membership agreement and the Plan documents. Upon sale of Petitioners' resigned golf memberships to new purchasers, 90% of the proceeds were the property of Petitioners. Respondent was aware of the membership agreement, and secured its loan to most of TwinEagles' property, **but not to memberships resold by Golf**

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[8] *See Wilson v. News-Press Pub. Co.*, 738 So. 2d 1000 (Fla. 2d DCA 1999) and *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 899 So. 2d 1222 (Fla. 1st DCA 2005).

[9] Constructive trusts and unjust enrichment have been described as causes of action, *See Golden v. Woodward*, 15 So. 3d 664 (Fla. 1st DCA 2009), or remedies, *See Collinson v. Miller*, 903 So. 2d 221 (Fla. 2d DCA 2005). These issues had no bearing on the lower courts' decisions, and are not germane to the matters before this Court. Restitution and conversion claims can also be supported by the facts arising of the subject transaction, and their availability should be determined by the trial court.

**Club for its members pursuant to the plan**. Whether it was intentional or by mistake, TwinEagles breached its duty to Petitioners by delivering Petitioners' funds to Respondent, who knowingly accepted Petitioners' funds, and refused to return them to Petitioners. Respondent was unjustly enriched at Petitioners' expense. If Respondent had returned Petitioners' funds, it would have been made whole from other assets in TwinEagles' bankrupt estate. That was due to Respondent's preferred status as a secured creditor. Petitioners seek restoration of their funds delivered to, and accepted by, Respondent. There are other relevant facts that bear upon the pleadings and a decision on the merits, but since those facts are not part of the record, Petitioners will not assert them here. [10]

This Court, in *Wadlington v. Edwards*, 92 So.2d 629 (Fla. 1957), described a constructive trust as follows:

> [A] constructive trust is a relationship adjudicated to exist by a court of equity based on particular factual situations created by one or the other of the parties. The element of intent or agreement either oral or written to create the trust relationship is totally lacking. The trust is "constructed" by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem.

*Id.* at 631.

*Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (Fla. 1927) recognized the broad

[10] *See Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983).

nature of a confidential or fiduciary relationship:

> Stripped of all embellishing verbiage, it may be confidently asserted that every instance in which a confidential or fiduciary relation in fact is shown to exist will be interpreted as such. The relation and duties involved need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.

*Id*. at 423.

The relationship, out of which the abuse of confidence or mistake in the transaction that originates the problem, does not have to be between the one seeking to impose a constructive trust (Petitioners) and the one who has been unjustly enriched (Respondent). It is not required that that the property be delivered directly from the one seeking to impose the constructive trust to the one who has been unjustly enriched. [11] As for tracing, this Court has refused to allow comingling or dissipation to defeat the imposition of the trust. When trust funds are comingled, and then disbursed, there is a presumption that the disbursements were from the trustee's property, and not the property of the beneficiary. [12] Under circumstances

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[11] *See e.g., Quinn, Nuveen v. Bd. of Public Instruction of Gadsden Cty*., 88 F. 2d 175 (5th Cir. 1937), *Holmes by Holmes v. Holmes*, 463 So. 2d 578 (Fla. 1st DCA 1985), *Blaney v. McCluskey*, 529 So. 2d 314 (Fla. 1st DCA 1988) and *Browning v. Browning*, 784 So. 2d 1145 (Fla. 2d DCA 2001).

[12] *See e.g., Glidden v. Gutelius*, 96 Fla. 834, 119 So. 140 (Fla. 1928) and *First State Trust & Sav. Bank of Springfield v. Therrell,* 103 Fla. 1136, 138 So. 733 (Fla. 1932).

where funds have been converted into another type of asset such as by purchase of some item of property, the constructive trust will be imposed by tracing and identifying the transaction in which conversion occurred and thus tracing money into an item of property. [13] Confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass. [14] Will Petitioners be able to trace their funds? Yes! Their identifiable funds were deposited into a specific Textron account. Petitioners request the opportunity to prove that.

**3. Petitioners sufficiently asserted their claim for unjust enrichment in the federal proceedings, and therefore their state law claims filed in the Circuit Court within 30 days of the federal court's dismissal are entitled to the tolling provisions of 1367(d).**

Citing *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999), Respondent claimed that "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." *Respondent's Answer Brief on the Merits* p. 26. *Dade County School Bd.* does not stand for the proposition asserted. It involved no prior federal action, and there was no § 1367(d) issue. It involved the "Tipsy coachman" rule, but not in terms that bear upon the applicability of § 1367(d). Respondent cited no case that stood for the asserted proposition.

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[13] *Arduin v. McGeorge*, 595 So. 2d 203 (Fla. 4th DCA 1992).

[14] *Rackley v. Matthews*, 141 Fla. 307, 193 So. 69 (Fla. 1940).

Respondent claimed "the ***first*** time that Petitioners sought unjust enrichment as to Respondent was in the state court litigation which Petitioners commenced after dismissal of the Adversary proceeding." *Respondent's Answer Brief on the Merits* p. 27. Respondent glossed over the significant point in paragraph 21 of that Complaint (App. at Tab 1, P. 4), where Petitioners alleged:

> …Golf, the debtors in the related bankruptcy cases and **Textron have all been unjustly enriched by retaining or encumbring** the membership sale proceeds from the Plaintiffs' memberships.

Petitioners sufficiently asserted a claim for unjust enrichment to have permitted recovery from Respondent under that theory, despite the absence of a request in their prayer for relief. The rules [15] and the interpreting cases [16] allow for this. Because Petitioners' claim for unjust enrichment was sufficiently asserted to allow for recovery under that theory, it follows that it was sufficiently asserted to enjoy the tolling provisions of § 1367(d). Tolling accomplishes, rather than distorts, § 1367(d)'s purpose.

The relationship, out of which the abuse of confidence or mistake originates,

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[15] Fed. R. Civ. P. 8 and Fla. R. Civ. P. 1.110(b). Rule 1.110(b) provides that "all prayers for relief are deemed prayers for general relief."

[16] The facts alleged and the issues and proof, not the form of the prayer for relief, determines the nature of the relief to be granted. *See Golden v.Carter v. Diamondback Golf Club, Inc*., 2007 WL 951408 (11th Cir. 2007), *Chasin v. Richey*, 91 So. 2d 811 (Fla. 1957), *Davidson v. Lely Estate, Inc.*, 330 So. 2d 528 (Fla. 2d DCA 1976), and *Circle Finance Co. v. Peacock*, 399 So. 2d 81 (Fla. 1st DCA 1981).

need not be between the one seeking unjust enrichment (Petitioners) and the one who has been unjustly enriched (Respondent). Further, it is also not required that that the property be delivered directly from the one seeking unjust enrichment (Petitioners) to the one against who the unjust enrichment is being sought (Respondent). [17] In neither *Sharp* nor *Tolin* nor *Shands* were the funds delivered directly from the one seeking unjust enrichment to the party against whom it was sought. Also, note the lack of relationships between the litigating parties in *Shands* and *Tolin*. They were not in privity, yet the claims for unjust enrichment were viable.

**4. Petitioners should be permitted to avoid or extend the running of the statute of limitations based upon doctrines of equitable estoppel/tolling.**

In the Second DCA, Petitioners identified the equitable tolling issue, but neglected to develop the argument. *See Initial Brief of Appellants* p. 7. That issue was addressed in the *Reply Brief of Appellant* pp. 6-7. Petitioners acknowledge that it is good appellate practice to identify and argue their points on appeal, so that the appellate court may appreciate the merits, and make an informed decision. Although new to this litigation, on behalf of Petitioners, counsel apologizes to this Court, to the Second DCA, and to Respondent and its attorneys. A ruling that Petitioners

[17] *See e.g., Sharp v Bowling*, 511 So. 2d 363 (Fla. 5th DCA 1987), *Estate of Tolin*, 622 So. 2d 988 (Fla. 1993) and *Shands.*

waived this issue is not necessary, and Petitioners would ask this Court for an accommodation. [18] Although lack of subject matter jurisdiction can be raised at virtually any time, Petitioners suggest that Respondent's 5-year delay subjects it to the operation and effect of those tolling doctrines, or at least represents unclean hands. Petitioners rely on *Petitioners' Amended Brief on the Merits* pp. 44-47 concerning the function and applicability of these doctrines.

## CONCLUSION

Based on the foregoing, this Court should determine that Petitioners' Circuit Court state law claims were timely filed in pursuant to the tolling provisions of § 1367(d) or common law equitable tolling doctrines, that Petitioners' adversary complaint in the Bankruptcy Court sufficiently asserted unjust enrichment so as to enjoy the tolling provisions of § 1367(d), and that Petitioners be given the opportunity to develop and present their constructive trust and unjust enrichment claims on the merits. The April 17, 2009 decision of the Second DCA, *Krause v. Textron Financial Corp.*, 10 So. 3d 208 (Fla. 2d DCA 2009), should be reversed, and this matter should be remanded to the Circuit Court for disposition on the merits, as requested.

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[18] *See Williams v. State of Florida Department of Transportation*, 579 So. 2d 226 (Fla. 1st DCA 1991) overruled on other grounds by *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to Jordi Guso and Paul A. Avron, Berger Singerman, P.A., 200 S. Biscayne Blvd., Suite 1000, Miami, FL 33131 by United States Mail, this 19th day of January, 2010.

## 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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WILIAM A. DONOVAN
Florida Bar # 228958
WILLIAM A. DONOVAN, P.A.
Attorney for Petitioners, Andrew Krause and David Bautsch
2671 Airport Road, South, Suite 304
Naples, FL 34112
239-793-0013 Telephone
239-885-8581 Facsimile
wdonovan@comcast.net