*In the*

# Supreme Court of Virginia

*At Richmond*

**Record No. 141195**

**BIRCHWOOD-MANASSAS ASSOCIATES, L.L.C.,**

***Appellant,***

**– v. –**

**BIRCHWOOD AT OAK KNOLL FARM, L.L.C. and**
**BIRCHWOOD AT WADING RIVER, L.L.C.,**

***Appellees.***

# OPENING BRIEF OF APPELLANT


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## ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the existence of an irreconcilable conflict of interest by the former managers of Plaintiff-Appellant Birchwood-Manassas Associates, L.L.C. ("**Birchwood-Manassas**"), which prevented Birchwood-Manassas from asserting its claims within the applicable statute of limitations, did not equitably toll the statute of limitations under Virginia law. Joint Appendix p. 765-67, hereafter "**J.A.**".

2. The Circuit Court erred in holding that multiple breaches of the fiduciary duties of undivided loyalty and care by the former managers of Birchwood-Manassas, which prevented Birchwood-Manassas from asserting its claims within the applicable statute of limitations, did not equitably toll the statute of limitations under Virginia law. *See id.*

## STATEMENT OF THE CASE

### I. Nature of the Case

This appeal raises important and unresolved questions regarding the scope and application of equitable tolling under Virginia law. In particular, the appeal asks whether the presence of an irreconcilable conflict of interest by the sole managers of a plaintiff entity, who simultaneously managed the defendant entities and affirmatively prevented the plaintiff from asserting and pursuing its multi-million dollar claims against the

defendants, equitably tolls the applicable statute of limitations during the continuation of the irreconcilable conflict of interest. It further asks whether breaches of the managers' fiduciary duties of undivided loyalty and care, which again prevented the plaintiff from asserting and pursuing its claims against the defendants, separately gives rise to equitable tolling. Both are questions of first impression in Virginia. The courts to consider these questions outside of Virginia and issue written opinions have answered yes to both, and equity demands the same holding in this case.

Birchwood-Manassas seeks to recover more than $7.2 million in outstanding demand obligations owed to it by Defendants-Appellees Birchwood at Oak Knoll Farm, L.L.C. ("**Oak Knoll**") and Birchwood at Wading River, L.L.C. ("**Wading River**") (collectively, the "**Defendants**"). Prior to January 2013, Birchwood-Manassas, Oak Knoll, and Wading River were all managed ***solely*** by the same two men, Ronald J. Horowitz ("**Mr. Horowitz**") and Burton Haims ("**Mr. Haims**"). Mr. Horowitz and Mr. Haims exercised their simultaneous and exclusive control over all three entities to cause Birchwood-Manassas to transfer approximately $14.65 million of its funds as undocumented loans to the Defendants between 2004 and 2009.

These loans were and are demand obligations under Virginia law.[1] Yet Mr. Horowitz and Mr. Haims held Birchwood-Manassas as a captive entity, sacrificing its interests to those of Oak Knoll and Wading River in breach of their fiduciary duties of undivided loyalty and care to Birchwood-Manassas, and failing and refusing to take appropriate action to demand, collect, and recover the loans from the Defendants within three years of their creation, the applicable statute of limitations period.

Mr. Horowitz's and Mr. Haims's irreconcilable conflict of interest and breaches of their fiduciary duties continued for the entire duration of the three-year statute of limitations, rendering it impossible for Birchwood-Manassas to pursue its claims against the Defendants. The conflict ended only as the result of a separate action commenced by a non-managing member of Birchwood-Manassas, at the conclusion of which the Circuit Court removed Mr. Horowitz and Mr. Haims as managers of Birchwood-Manassas because, as the Court ruled, an "irreconcilable conflict exists" between Mr. Horowitz and Mr. Haims as the simultaneous managers of the lender, Birchwood-Manassas, and the borrowers, Oak Knoll and Wading River. The Circuit Court appointed Lawrence E. Rifken as Liquidating

[1] Virginia law is clear that, "[a]n agreement to pay money, no time being specified, is held to be an agreement to pay the same on demand." *McComb v. McComb*, 226 Va. 271, 282 (1983) (citations omitted).

Trustee for Birchwood-Manassas (the "**Liquidating Trustee**") in December 2012, and the Liquidating Trustee accepted his appointment in January 2013. The acceptance of appointment by the Liquidating Trustee marks the first moment Birchwood-Manassas was freed of its prior, irreconcilably conflicted managers, and thus the first opportunity Birchwood-Manassas had to assert its claims against the Defendants. The irreconcilable conflict of interest and breaches of fiduciary duties at issue in this case unquestionably hindered, delayed, and prevented Birchwood-Manassas from pursuing its claims against the Defendants.

Equitable tolling should apply in these circumstances to toll the statute of limitations on all of Birchwood-Manassas's claims against the Defendants, until there were separately managed plaintiff and defendant entities capable of suing and being sued. This application of equitable tolling presents a question of first impression in Virginia, but its application in this case is supported both by the long-understood purpose underlying equitable tolling to advance fairness and substantial justice, and by the well-reasoned precedent of other jurisdictions to consider these questions and issue written opinions. Indeed, if this were not a case for equity to intervene to toll the statute of limitations, it is difficult to see how equitable tolling could ever apply.

The Circuit Court, however, held that the absence of "binding precedential case law" from this Court recognizing the application of equitable tolling based on an irreconcilable conflict of interest or breach of fiduciary duty effectively limits the doctrine solely to cases of fraud or deceit, because those are the factual circumstances supporting equitable tolling that this Court was presented with and recognized in *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 120 (2008). Yet Birchwood-Manassas was even more enfeebled to pursue its claims than the victim of a fraud or deceit; the latter might at least discover the fraud, whereas Birchwood-Manassas was literally powerless at the hands of its sole managers' irreconcilable conflict of interest and breaches of their fiduciary duties to pursue its claims.

Birchwood-Manassas respectfully submits that the Circuit Court's reading of *Schmidt* erroneously constrains equitable tolling to one particular formulation employed by this Court under a specific set of facts and circumstances involving allegations of fraud, to the exclusion of all others. *Schmidt* does not so hold, nor can such a formulaic reading be reconciled with the core principle that "equity will not suffer a wrong to be without a remedy." *Price v. Hawkins*, 347 Va. 32, 37 (1994). The Circuit Court's ruling was therefore erroneous and should be reversed.

## II. Material Proceedings Below

The material proceedings below begin with the Circuit Court's ruling and judgment in a predecessor case, which resulted in the Liquidating Trustee's appointment and the commencement of this suit. In 2011, due in part to the failure of Mr. Horowitz and Mr. Haims to timely dissolve Birchwood-Manassas, collect the demand obligations owed by Oak Knoll and Wading River, and distribute the proceeds to the members of Birchwood-Manassas, one of the members of Birchwood-Manassas, Seth Lieberman, filed suit in the Circuit Court of Prince William County. He sought, amongst other relief, an order dissolving Birchwood-Manassas and the appointment of a liquidating trustee to wind up its affairs (the "**Dissolution Suit**"). J.A. at 395-96, ¶ 13.

Following a seven-day bench trial, the Circuit Court ruled via a letter opinion on October 3, 2012, that an "irreconcilable conflict exists between the current managers of [Birchwood-Manassas], Horowitz and Haims, and the companies [Birchwood-Manassas] lent money to, Oak Knoll and Wading River." J.A. at 396, 404-05, 433-37, ¶¶14, 40-41. The October 3 opinion found that the "sole purpose for survival" of Birchwood-Manassas "is as a creditor for an outstanding seven-figure debt owed" to it by Oak Knoll and Wading River. J.A. at 435. On December 5, 2012, the Circuit

Court ordered that "Birchwood-Manassas is hereby dissolved," and appointed the Liquidating Trustee (the "**Dissolution Order**"). J.A. at 439.

The Liquidating Trustee accepted his appointment on January 29, 2013. J.A. at 396, ¶ 15. He promptly demanded the immediate repayment of the demand obligations owed by Oak Knoll and Wading River to Birchwood-Manassas. When payment was not forthcoming, he commenced this action by filing a Verified Complaint against the Defendants on June 14, 2013, alleging that the loans made by Birchwood-Manassas to Oak Knoll and Wading River were demand obligations under Virginia law, that Birchwood-Manassas had demanded repayment of the obligations, and that Oak Knoll and Wading River had failed and refused to pay. *See* J.A. at 13-19, ¶¶ 44-67. The Complaint asserted claims for unjust enrichment, imposition of constructive trusts, and breach of contract. *Id.*

The Defendants filed a Plea in Bar with respect to the original Complaint on September 5, 2013, asserting among other arguments that the unjust enrichment and constructive trust claims are barred by the applicable three-year statute of limitations because Birchwood-Manassas made the loans at issue more than three years prior to filing its Complaint. *See* J.A. at 95-112. The Defendants submitted their Plea in Bar on the pleadings alone, electing not to present any evidence and instead to rely

solely on the allegations of the Complaint. Birchwood-Manassas responded that the statute of limitations was equitably tolled during the period that Mr. Horowitz and Mr. Haims simultaneously served as the sole managers of Birchwood-Manassas, Oak Knoll, and Wading River and, thereby, exercised simultaneous control over all three entities. As a captive lender entity controlled by the same managers as the borrower entities, Birchwood-Manassas was incapable of asserting its claims with respect to the demand obligations prior to the appointment of the Liquidating Trustee. *See* J.A. at 128-201.

The Circuit Court granted the first Plea in Bar by letter opinion dated December 23, 2013, and Order dated January 10, 2014. The Circuit Court first recognized that it must rely "solely on the pleadings" and "must accept plaintiff's factual allegations as true" in resolving the Plea in Bar because it did not take evidence. J.A. at 308 (*citing Station #2, LLC v. Lynch*, 280 Va. 166, 169 (2010)). The Circuit Court further recognized that the Complaint alleged the existence of an "irreconcilable conflict of interest" prior to the appointment of the Liquidating Trustee due to the simultaneous management of both "the Plaintiff corporation" and "the Defendant corporations receiving the loans" by the same "sole managers," and, therefore, "no suit for unjust enrichment or constructive trust could have

been filed on behalf of the Plaintiff because the same managers controlled all of these corporate entities and could not be relied upon to assert Plaintiff's interests." *Id*. Nonetheless, the Circuit Court noted that there is "no binding precedential case law with regard to tolling and conflicts of interest in Virginia." *Id*. Citing this Court's ruling in *Schmidt*, the Circuit Court held that the Complaint failed to allege facts supporting equitable tolling, because it "has not alleged any misconduct or fraud by the Defendants in its complaint which would have led to a belated filing of its claims for unjust enrichment or constructive trust; nor has it alleged that despite exercising due diligence, it could not have discovered the facts forming the basis of its claims within the three-year statutory limitation period." J.A. at 308-09. The court dismissed the Complaint without prejudice and with leave to amend. J.A. at 388-90.

Birchwood-Manassas filed its Verified First Amended Complaint (the "**Amended Complaint**") on January 31, 2014. *See* J.A. at 391-540. The Amended Complaint was twice the size of the original Complaint, and added numerous detailed allegations concerning the misconduct of Mr. Horowitz and Mr. Haims during their tenure as the sole, simultaneous managers of Birchwood-Manassas, Oak Knoll, and Wading River. The alleged misconduct includes multiple breaches of their fiduciary duties of

undivided loyalty and care by repeatedly acting to benefit Oak Knoll and Wading River at the expense and to the detriment of Birchwood-Manassas and its members, including by failing and refusing to enforce the demand obligations. J.A. at 404-08, ¶¶ 36-50.

The Defendants filed a second Plea in Bar with respect to the Amended Complaint on February 19, 2014, again asserting that the claims were time-barred. *See* J.A. at 544-54. The Defendants again elected not to present any evidence, submitting their second Plea in Bar solely on the allegations of the Amended Complaint. Birchwood-Manassas opposed the second Plea in Bar, arguing, amongst other things, that the additional allegations of the Amended Complaint pled misconduct supporting equitable tolling. *See* J.A. at 555-601.

The Circuit Court granted the second Plea in Bar by letter opinion dated April 1, 2014, and Order dated May 9, 2014. Once more relying on *Schmidt*, the Circuit Court found that equitable tolling is only available where a defendant "misled or deceived a plaintiff in order to prevent the plaintiff from either discovering the existence of a cause of action or filing a timely claim." J.A. at 657-58. It concluded, "a conflict of interest, even irreconcilable, does not, of itself, give rise to the type of misconduct which would preclude the Plaintiff from timely filing suit." J.A. at 658. The Circuit

Court dismissed the Amended Complaint with prejudice. J.A. at 765-67. Birchwood-Manassas timely filed its Notice of Appeal on June 6, 2014. J.A. at 768-70. Upon the petition of Birchwood-Manassas, this Court awarded an appeal by Order entered December 11, 2014.

## STATEMENT OF FACTS

### I. The Birchwood Homebuilding Entities and Their Exclusive Common Control by Mr. Horowitz and Mr. Haims

Prior to its dissolution, Birchwood-Manassas was in the business of developing and selling luxury residential homes in Manassas, Virginia. J.A. at 392, ¶ 1. It was formed in 1997 for the purpose of owning, developing, and selling certain real estate, and was to be dissolved and its affairs wound up upon the happening of certain defined events, but in no event later than January 1, 2008. J.A. at 394, ¶ 8. From the time of Birchwood-Manassas's founding until the appointment of the Liquidating Trustee, Mr. Horowitz and Mr. Haims were managers of Birchwood-Manassas. *Id.* ¶ 9. From at least 2001 until the appointment of the Liquidating Trustee, Mr. Horowitz exercised day-to-day control over the entity. *Id*.

Birchwood-Manassas was part of a larger affiliation of Birchwood homebuilding entities around the country. *Id*. Defendants Oak Knoll and Wading River are two other Birchwood homebuilding entities, also under the sole management and control of Mr. Horowitz and Mr. Haims, with Mr.

Horowitz exercising day-to-day control over both entities. J.A. at 393-94, 398, ¶¶ 2-3, 10, 19. Oak Knoll was formed in 2001 for the purpose of developing certain residential real estate located in Loudoun County, Virginia, and is currently in the business of developing and selling luxury residential homes in Purcellville, Virginia. J.A. at 393, 397, ¶¶ 2, 17. Wading River was formed in 2001 for the purpose of developing certain residential real estate located in Suffolk County, New York, and is currently in the business of developing and selling luxury residential homes in Wading River, New York. J.A. at 393, 397, ¶¶ 3,17. Oak Knoll and Wading River routinely fail to observe corporate formalities and distinctions between them, and regularly engage in undocumented intercompany loans and commingling of funds. J.A. at 397-98, ¶18.

## II. The Mismanagement of Birchwood-Manassas to Create the Defendants' Demand Obligations

Beginning in August 2004, Mr. Horowitz and Mr. Haims began transferring or causing the transfer of millions of dollars of Birchwood-Manassas's funds to Oak Knoll and Wading River and, thus, created resulting demand obligations on the part of Oak Knoll and Wading River in favor of Birchwood-Manassas. J.A. at 394-95, 401,¶¶ 10, 29. The first two transfers of $5 million and $4.8 million took place on or about August 16, 2004 and November 30, 2004. J.A. at 398-99, ¶¶ 20-21. These transfers

were followed by millions of dollars of additional transfers over the next several years. J.A. at 399, 443-47, ¶ 22. Birchwood-Manassas loaned Oak Knoll and Wading River a total of approximately $14.65 million. *Id*. At its high mark in or around March 2006, the outstanding demand obligations owed to Birchwood-Manassas totaled approximately $12,006,018.32. J.A. at 400, ¶ 24. All funds transferred from Birchwood-Manassas to the Defendants (collectively, the "**BMA-Owned Funds**"), and the resulting demand obligations, were made without loan documents, interest provisions, or any terms of repayment, in exchange for little or no consideration. J.A. at 398-400, ¶¶ 20-22, 24.

The BMA-Owned Funds were used by the Defendants to develop and sell residential real estate located in Virginia and New York, respectively. J.A. at 400, ¶ 25. It is believed that Wading River used the BMA-Owned Funds to help develop approximately 150 homesites, a significant number of which have been developed and sold to third party purchasers, with a significant portion of the sales proceeds used for Wading River's benefit and not repaid to Birchwood-Manassas. J. A. at 400, ¶ 26. A number of the homesites have not yet been sold and title still remains with Wading River. J.A. at 400-01, ¶¶ 26, 28; J.A. at 448-50. Likewise, it is believed that Oak Knoll used the BMA-Owned Funds to help develop approximately 75

homesites, a significant number of which have been developed and sold to third party purchasers, with a significant portion of the sales proceeds used for Oak Knoll's benefit and not repaid to Birchwood-Manassas. J.A. at 401, ¶ 27. A number of the homesites have not yet been sold and title still remains with Oak Knoll. J.A. at 401, ¶¶ 27-28; J.A. at 448-50.

## III. The Defendants' Failure to Repay the Demand Obligations in Full During the Period of the Irreconcilable Conflict of Interest

As the simultaneous managers of Birchwood-Manassas, Oak Knoll, and Wading River, Mr. Horowitz and Mr. Haims were the sole authorized decision makers on both sides of the transfers of the BMA-Owned Funds and the creation of the demand obligations. J.A. at 398, ¶ 19. Mr. Horowitz and Mr. Haims both have ownership interests in Oak Knoll and Wading River, as well as in Birchwood-Manassas. *Id*. It is believed that Oak Knoll and Wading River have also paid Mr. Horowitz's salary for a number of years. *Id*. Mr. Horowitz's and Mr. Haims's divided loyalties between entities that they simultaneously managed and controlled, and which were on both sides of the transfers and demand obligations relating to the BMA-Owned Funds, created inherent, unavoidable, and irreconcilable conflicts of interest between their fiduciary duties of undivided loyalty and care to each entity. J.A. at 404-05, ¶¶ 36-41.

Because Mr. Horowitz and/or Mr. Haims directed the transfers of the

BMA-Owned Funds as loans without any terms of repayment, the loans were demand obligations under Virginia law and were due immediately at the time that the funds were loaned by Birchwood-Manassas, even without a demand for repayment. J.A. at 401, ¶ 29. Illustrative of the demand nature of the loans, Mr. Horowitz and/or Mr. Haims caused Oak Knoll and Wading River to make sporadic, partial repayments to Birchwood-Manassas at various times between 2004 and 2012, where, for example, doing so was necessary to address the payment of Birchwood-Manassas's members' income tax obligations, in order to provide Birchwood-Manassas's members with some disposable income, or where doing so otherwise served the interests of Mr. Horowitz and Mr. Haims in seeking to retain their simultaneous control and common management of Birchwood-Manassas, Oak Knoll, and Wading River. J.A. at 401-02, ¶¶ 30-31.

In total, the Defendants claim to have repaid approximately $9.445 million to Birchwood-Manassas, either as direct repayments or as the payment of liabilities on its behalf, from 2004 through 2012. J.A. at 402, ¶32.[2] The Defendants were obligated to make these repayments pursuant

[2] Birchwood-Manassas disagrees with and objects to the characterization of certain payments made by the Defendants to Birchwood-Manassas, such as payments in connection with the Dissolution Suit, as repayments of the demand obligations. Birchwood-Manassas believes the amount of the

to the demand obligations at times when Birchwood-Manassas needed the funds. J.A. at 403, ¶ 34. Yet the absence of loan documentation enabled Mr. Horowitz and Mr. Haims to exercise essentially unfettered control over the timing and amounts of the repayments that they caused the Defendants to make to Birchwood-Manassas, resulting in a continuing failure to repay much of the demand obligations. *Id*. ¶ 35. Consequently, a substantial portion of the BMA-Owned Funds currently remains due and outstanding. *Id*.

By 2009, Birchwood-Manassas had sold its last property and thus had satisfied the purpose for which it had been established. Yet despite the requirement that its dissolution occur no later than January 1, 2008 and despite fulfilling its purpose in 2009, neither Mr. Horowitz nor Mr. Haims ordered the dissolution of Birchwood-Manassas. J.A. at 395, ¶ 11. Instead, Mr. Horowitz and Mr. Haims improperly continued to maintain Birchwood-Manassas's existence solely as a creditor of Oak Knoll and Wading River. *Id*. ¶ 12. They intentionally failed to collect the remaining millions of dollars still owed to Birchwood-Manassas by the Defendants, and they therefore did not timely distribute Birchwood-Manassas's assets to its members. *Id*. In short, Mr. Horowitz and Mr. Haims acted contrary to the best interests of

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loan repayments made by the Defendants is approximately $8,130,434 instead of $9,445,000. J.A. at 402-03, ¶ 33.

Birchwood-Manassas, and solely for the Defendants' benefit. J.A. at 395, 405-06, ¶¶12, 42-45. At the time of filing of the Amended Complaint, the Defendants still owed Birchwood-Manassas, jointly and severally, the minimum principal amount of $7,286,279.17, plus all associated and applicable interest (the "**Outstanding BMA Funds**"). J.A. at 396-97, ¶ 16.

The failure of Birchwood-Manassas to demand, collect, and recover the full outstanding balance of the BMA-Owned Funds was the result not just of Mr. Horowitz's and Mr. Haims's irreconcilable conflict of interest, but also of multiple other breaches of their fiduciary duties of undivided loyalty and care. First, they failed to document the loans of the BMA-Owned Funds to the Defendants and they failed to provide for repayment terms, thereby rendering the loans demand obligations that were immediately due and payable and subject to a three-year statute of limitations. J.A. at 405, ¶ 43. Second, Mr. Horowitz and Mr. Haims failed to obtain the repayment of the demand obligations from the Defendants within three years from the dates that each loan was made, even when the Defendants possessed the funds necessary to repay the demand obligations in full. *Id.* ¶ 44. Third, having not obtained timely repayment of the demand obligations, Mr. Horowitz and Mr. Haims also failed to file suit on behalf of Birchwood-Manassas against the Defendants within the three-year statute of limitations period. J.A. at

406, ¶45.

## IV. Birchwood-Manassas's Inability to Assert and Pursue Its Rights and Remedies While under the Sole Control of Mr. Horowitz and Mr. Haims

Until the Circuit Court's removal of Mr. Horowitz and Mr. Haims as the sole managers of Birchwood-Manassas and the appointment of the Liquidating Trustee, Birchwood-Manassas was unable to protect and enforce its legal rights and remedies regarding the demand obligations owed by the Defendants. J.A. at 407, ¶49. As a manager-managed LLC, Birchwood-Manassas could only act through its managers, Mr. Horowitz and Mr. Haims, who had chosen to serve the interests of the Defendants at Birchwood-Manassas's expense, and who would not and did not take the appropriate and necessary actions to collect the demand obligations from and/or sue the Defendants they managed and controlled. *Id.* This left Birchwood-Manassas powerless and unable to protect and enforce its legal rights and remedies. *Id.* Birchwood-Manassas remained incapacitated for the duration of its management by Mr. Horowitz and Mr. Haims, a condition that changed only following the commencement of the Dissolution Suit, the entry of the Dissolution Order appointing the Liquidating Trustee, and the Liquidating Trustee's acceptance of his appointment on January 29, 2013. *See* Statement of the Case, *supra*.

## V. The Defendants' Continuing Failure to Repay the Demand Obligations Following the Dissolution Order

Shortly after accepting his appointment on January 29, 2013, the Liquidating Trustee, by counsel, sent a letter to Oak Knoll and Wading River on May 14, 2013, demanding the immediate repayment of the outstanding balance of the BMA-Owned Funds (the "**Demand Letter**"). J.A. at 396, 408, 451-54, ¶¶15, 50. Despite the Demand Letter, the Defendants still did not repay the demand obligations. J.A. at 396-97, 408, ¶¶ 16, 50. The Defendants repeatedly failed to make the requisite payments to Birchwood-Manassas even when they came into possession of sales proceeds that could and should have been used for the repayment of the demand obligations. J.A. at 413, ¶ 65.

For example, after the Circuit Court appointed the Liquidating Trustee (and in one instance before he accepted his appointment), the Defendants received sales proceeds totaling in excess of $3 million from the sale of five improved lots believed to have been developed or partially developed using the BMA-Owned Funds. J.A. at 413-15, ¶¶ 66-73. Not only did the Defendants fail to pay any of the sales proceeds to Birchwood-Manassas, they did not even inform the Liquidating Trustee of the sales. J.A. at 415-16, ¶¶ 73-78. The Defendants' misconduct and withholding of sales proceeds continued after commencement of this suit, as evidenced by a

December 2013 sale yielding net sale proceeds in excess of $735,000, again done without informing the Liquidating Trustee and without the payment of any of the sale proceeds to Birchwood-Manassas. J.A. at 416-21, ¶¶ 79-95; J.A. at 503-40. The Defendants accomplished this sale, in part, through Mr. Horowitz's affirmative misrepresentations to the purchaser that the lot was not encumbered and to the title company that the Liquidating Trustee's *lis pendens* on the lot would be consensually released. J.A. at 419-21, ¶¶ 90-92, 94.

## AUTHORITIES AND ARGUMENT

The Defendants' pleas in bar did ***not*** dispute any allegations of the original or amended complaints. Accordingly, the Circuit Court did not hold any evidentiary hearing, acknowledged its obligation to rely solely on the pleadings, and accepted as ***true*** all of Birchwood-Manassas's allegations that an irreconcilable conflict of interest prevented Birchwood-Manassas from asserting its claims against the Defendants while it remained under the control of Mr. Horowitz and Mr. Haims. The court also accepted as ***true*** all of the allegations that Mr. Horowitz and Mr. Haims committed multiple breaches of their fiduciary duties of undivided loyalty and care to Birchwood-Manassas by failing to take action to document the demand obligations, and to demand, collect, and recover the outstanding balance of

the BMA-Owned Funds from the Defendants. The Circuit Court held that, notwithstanding these allegations, Virginia law (i) does not recognize equitable tolling in the context of an irreconcilable conflict of interest, and (ii) does not recognize equitable tolling for misconduct other than outright fraud or deceit, such as breach of fiduciary duty.

Birchwood-Manassas respectfully submits that the Circuit Court erred on these questions of first impression. Narrowing the doctrine of equitable tolling solely to circumstances of fraud or deceit is over-limiting, and leaves a wronged plaintiff without a remedy in cases like this one, where either an irreconcilable conflict of interest or a breach of fiduciary duty directly prevents a plaintiff from asserting its claims within the applicable statute of limitations. Core principles of equity and precedent strongly support equitable tolling under either circumstance. To hold otherwise is to leave equity helpless in the face of clear misconduct—the mismanagement of a plaintiff corporation by irreconcilably conflicted managers—which prevented a plaintiff from timely asserting its claims and deprived it of substantive rights just as effectively, if not more so, than any act of fraud or deceit. The fundamental principles of equity animating the doctrine of equitable tolling cannot and will not countenance such an unjust outcome, and instead require tolling the applicable statute of limitations until the irreconcilable

conflict of interest has been removed and the misconduct has ceased.

## I. Standard of Review

Appeal of a decision on a plea in bar of the statute of limitations involves a question of law that this Court reviews *de novo*. *Van Dam v. Gay*, 280 Va. 457, 460 (2010) (*citing Hilton v. Martin,* 275 Va. 176, 180 (2008)). Where no evidence was presented on the plea in bar, as was the case here, the Court's review is "limited to the facts set forth in the complaint and the defendant has the burden of proof on the issue that the limitation period had run when the complaint was filed." *Id*. (*citing Schmidt v. Household Fin. Corp., II,* 276 Va. 108, 112 (2008)). "The facts as stated in the pleadings by the plaintiff are taken as true for the purpose of resolving the special plea." *Gray v. Virginia Sec'y of Trans.*, 276 Va. 93, 97, (2008) (*quoting Niese v. City of Alexandria,* 264 Va. 230, 233 (2002) (internal citation omitted)). The standard of review is, in short, "substantially similar" to a demurrer. *Sullivan v. Jones*, 42 Va. App. 794, 802 (2004). This Court has repeatedly cautioned that a trial court acts "incorrectly" and will be reversed where it "has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 22 (1993) (*quoting Renner v. Stafford,* 245 Va. 351, 352 (1993)); *see also Assurance Data,*

*Inc. v. Malyevac*, 286 Va. 137, 139 (2013) (same).

## II. The Circuit Court Erred in Holding that Virginia Law Does Not Apply Equitable Tolling to an Irreconcilable Conflict of Interest

The Circuit Court's first error is its determination that "a conflict of interest, even irreconcilable" does not give rise to equitable tolling under Virginia law. J.A. at 658; *see also* J.A. at 308-09. The statute of limitations for Birchwood-Manassas to assert its claims for unjust enrichment and constructive trust was three years. *See* J.A. at 657-58 (*citing* Va. Code § 8.01-246(4); *Belcher v. Kirkwood*, 238 Va. 430, 432 (1989))). Because the Defendants submitted their pleas in bar on the pleadings and without an evidentiary hearing, the Circuit Court was required to accept and did accept as true Birchwood-Manassas's allegations that no suit could have been filed on its behalf during this three-year period, because at the time of the creation of the demand obligations and for more than three years afterwards, Mr. Horowitz and Mr. Haims alone simultaneously managed both Birchwood-Manassas and the Defendants "and could not be relied upon to assert [Birchwood-Manassas's] interests." J.A. at 308. Yet the Circuit Court nonetheless refused application of equitable tolling because it could find "no binding precedential case law with regard to tolling and conflicts of interest in Virginia," and construed this Court's ruling in *Schmidt* as limiting equitable tolling to cases of "fraud or misconduct," and only to

cases “when a defendant misled or deceived a plaintiff” in order to prevent timely assertion of the claim. J.A. at 308-09; *see also* J.A. at 657-58.

The Circuit Court erred in concluding that the absence of “binding precedential case law” from this Court specifically addressing equitable tolling in the context of an irreconcilable conflict of interest required the doctrine to be limited to the particular facts and circumstances of fraud addressed in *Schmidt*. Though the facts and circumstances calling for the application of equitable tolling in this case differ from those addressed in this Court’s prior decisions such as *Schmidt*, the fundamental principles underlying equitable tolling still require its application in the context of an irreconcilable conflict of interest no less than in the context of fraud or deceit. And though it is a question of first impression before this Court, the well-reasoned precedent of other courts to consider the issue strongly supports the same result in Virginia.

### A. Fundamental Principles of Equity Require the Application of Equitable Tolling in the Context of an Irreconcilable Conflict of Interest

This Court has long recognized that equity will toll a statute of limitations under certain “extraordinary circumstances.” *Brunswick Land Corp. v. Perkinson*, 153 Va. 603, 608 (1930). Two such extraordinary circumstances that have arisen in the past are (1) where fraud prevents a

plaintiff from asserting its claims, ***or*** (2) where the defendant "has by affirmative act deprived the plaintiff of his power to assert his cause of action in due season [.]" *Id*. A defendant who so impedes the assertion of a cause of action in due season "will not be permitted to avail himself of the statute when this obstruction to the plaintiff's action shall have been at length removed." *Id*.

This Court's application of equitable tolling principles to "extraordinary circumstances" beyond fraud, including, but not limited to, impeding the assertion of a cause of action, is consistent with the broader principles of basic fairness underlying the doctrine of equitable tolling. Equitable tolling applies where the plaintiff shows that "some extraordinary circumstance stood in [the] way" of the diligent pursuit of the plaintiff's rights and "prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (*quoting Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).[3] Equitable tolling requires "flexibility" and avoids "mechanical rules," following "a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Id*. at 650

[3] This Court has looked to the precedent of the U.S. Supreme Court as a guidepost on principles of equitable tolling. *See Schmidt*, 276 Va. at 119-20 (*citing Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

(*quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). Application of the doctrine of equitable tolling thus requires courts to "exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id*.

The fundamental principle underlying equitable tolling, and guiding the analysis in this appeal, was articulated half a century ago by Justice Black: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (citations omitted) (applying equitable tolling principles to the Federal Employers' Liability Act). Equitable tolling applies to statutes of limitations "because their main thrust is to encourage the plaintiff to 'pursu[e] his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (*quoting Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014)). By

"extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute," equitable tolling "seeks to vindicate what might be considered the genuine intent of the statute." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting).

Consistent with these principles, and contrary to the Circuit Court's rulings, equitable tolling cannot be limited in its application solely to circumstances of fraud or deceit if it is to be a meaningful form of equitable relief to a disenfranchised plaintiff, particularly when the same wrongful actor is on both sides of the subject transaction. Equitable tolling must encompass conduct as well:

> The principle is that where one party has by his representations ***or his conduct*** induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

*Glus*, 359 U.S. at 234 (*quoting Ins. Co. v. Wilkinson*, 80 U.S. 222, 233 (1871) (emphasis added). *See also Holland*, 560 U.S. at 651 (reversing Eleventh Circuit and holding that professional misconduct, even absent "bad faith, dishonesty, divided loyalty, [or] mental impairment" may

"nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling").

The Circuit Court's ruling erroneously elevates form over substance, creating a rigid and mechanical test for equitable tolling based on the words that this Court selected in *Schmidt* to address equitable tolling under one specific set of facts and circumstances, where allegations of fraud and deceit were the sole basis for the assertion of equitable tolling. *See Schmidt*, 276 Va. at 120. In *Schmidt*, the plaintiff alleged that, in connection with entering into a new loan, the defendant's employees made certain misrepresentations regarding the source of the loan, the interest rate, and the allocation of $17,467 to closing costs rather than prepaid finance charges. *Id*. at 113-14. The plaintiff further alleged that the defendant's agents forged his signature on loan documents and provided false information to the lender regarding his income. *Id*. This Court held on these facts that equitable tolling did not toll the one-year statutes of limitations under the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq*., and Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq*., because the plaintiff's factual allegations "do not show that, despite the exercise of due diligence, he could not have discovered the facts forming the basis of his federal claims within the statutory limitation periods." *Id*. at 120.

*Schmidt* and cases like it stand ***only*** for the proposition that, where equitable tolling is asserted on the basis of fraud, the fraud must be actual and not merely constructive, and must be supported by sufficient allegations that the plaintiff could not have discovered the fraud through the exercise of reasonable due diligence. *See, e.g., Schmidt*, 276 Va. at 120; *Boykins Narrow Fabrics Corp. v. Weldon Roofing and Sheet Metal, Inc.*, 221 Va. 81, 87 (1980); *Housing Authority v. Laburnum Corp.*, 195 Va. 827, 840 (1954). Yet Birchwood-Manassas does not claim equitable tolling on the basis of fraud, but rather, in part, as a result of an irreconcilable conflict of interest which prevented the assertion of its claims as much or more than any actual fraud might have accomplished, but for different reasons. Unlike a fraud, which might be overcome by inquiry and discovery of the claim, nothing can avail a plaintiff controlled by irreconcilably conflicted management save removal of the conflict. The problem is not inability to ***discover*** the claim, but inability to ***assert*** it because the managers responsible for taking action stand on both sides of the claim.

In short, applying the fraud standard for equitable tolling as articulated in *Schmidt* as a “mechanical rule” to the separate and distinct factual context of an irreconcilable conflict of interest invites the very “evils or archaic rigidity” that courts have long sought to avoid by requiring

"flexibility" in the application of equitable tolling. *Holland*, 560 U.S. at 650. Nothing in *Schmidt* suggests that this Court intended to depart from its long-articulated statement that a defendant "will not be permitted to avail himself" of the statute of limitations where he has "by affirmative act deprived the plaintiff of his power to assert his cause of action in due season[.]" *Brunswick Land Corp.*, 153 Va. at 608. Nor has this Court ever disregarded the principle underlying equitable tolling that "equity and good conscience" will not suffer a defendant to "take advantage of his own wrong" and thereby "defeat the ends of justice[.]" *Glus*, 359 U.S. at 232-34.

The question that the Circuit Court should have asked, but did not, is whether the application of the three-year statute of limitations in the face of Mr. Horowitz's and Mr. Haims's irreconcilable conflict of interest in their sole, simultaneous management of both Birchwood-Manassas and the Defendants, which affirmatively prevented Birchwood-Manassas from asserting its claims during the limitations period, suffers a wrong to exist without a remedy. Had the Circuit Court undertaken such an inquiry, rather than relying upon the absence of Virginia conflict-of-interest precedent and a highly constrained reading of this Court's opinion in *Schmidt*, it could only have reached the conclusion that the irreconcilable conflict of interest ***did prevent*** the assertion of Birchwood-Manassas's claims in this case as

effectively, if not more so, than any fraud or concealment could have done.

### B. The Well-Reasoned Precedent of Other Jurisdictions Further Supports the Application of Equitable Tolling in the Context of an Irreconcilable Conflict of Interest

Though a question of first impression in Virginia, several other courts have considered equitable tolling in the specific context of an irreconcilable conflict of interest, and ***all*** have held that such a conflict of interest equitably tolls the statute of limitations. Aside from the Circuit Court's ruling in this case, no decision could be found in any jurisdiction holding to the contrary. Indeed, the principle is so clear that, notwithstanding the limited precedent available, *Corpus Juris Secundum* acknowledges as a given that the statute of limitations "does not begin to run until there are in being a person capable of suing and a different person capable of being sued." 54 *C.J.S. Limitations of Actions* §130. "Where one person represents both sides of conflicting claims or interests, the statute does not run." *Id.*

The equity of this rule is well-expressed by the courts to consider it. In *Peyton v. Chase County Nat. Bank*, 262 P.595 (Kan. 1928), an estate administrator brought suit against the former executor of the estate and a bank, of which the former executor was president, to recover funds that were alleged to have been wrongfully used by the former executor and the bank's officers for the benefit of the bank. *See id.* at 595. The defendant

executor caused the estate he administered to make loans of estate funds to the defendant bank, of which he was simultaneously president and managing officer. When the successor executor was appointed and brought suit for conversion of the estate's funds, the defendant bank asserted that the action was barred by the statute of limitations.

The Supreme Court of Kansas rejected the defense, holding that "there was no one who could effectively maintain the action sought to be maintained" until the former executor had been removed and an administrator appointed. *Id.* at 596. The court explained that "[t]o expect that a suit might be maintained by [the executor] against the bank in which he charged himself as executor with fraud, and charged himself and other officers representing the bank with fraud, and all of them with a conspiracy wrongfully to use the money of the estate for the benefit of the bank, would be an anomaly, at least, and one in which it could not be expected that there would be a fair determination of the rights of the parties." *Id.* The court added that "[i]t is ***inconceivable*** that [the executor] could have been expected to maintain [such a suit]." *Id.* at 597 (emphasis added).

The Tenth Circuit decided *Yager v. Liberty Royalties Corp.*, 123 F.2d 44 (10th Cir. 1941), along similar lines. There, the defendant exercised his simultaneous control over two entities to cause one to acquire control of the

other and its cash at a nominal cost. When the acquired entity filed a proof of claim years later in the acquiring entity's bankruptcy case, the acquiring entity asserted a statute of limitations defense. The Tenth Circuit, upon reviewing relevant authority, held that the statute of limitations "is tolled during the time one person represents both sides of a conflicting claim" and "did not run" during that time. *Id.* at 47 (*citing Bremer v. Williams*, 210 Mass. 256, 96 N.E. 687 (1911) (statute did not run when the same person served as the trustee of multiple estates, which had claims against each other, and the trustee was the only person who could represent each such estate); *Judge of Probate v. Bowker*, 270 Mass. 497, 170 N.E. 451 (1930) (statute did not run when the same person served as the trustee of a claimant estate while also serving as the executor of a different estate against which a claim was being made); *Thompson v. Thompson*, 77 Ga. 692, 3 S.E. 261 (1887); *Julliard v. Orem's Executors*, 70 Md. 465, 17 A. 333 (1889); *Long v. Long*, 118 Md. 198, 84 A. 375 (1912)).

The court observed that the defendant "could not reasonably be expected to assert in good faith a claim against a corporation . . . which he had controlled and in which he had a large financial interest . . . ." *Id.* at 47. Thus, the statute of limitations first began to run when the court appointed ***different*** receivers for both entities, "ending single control of both the

debtor and creditor and ***bringing initially into existence a situation in which a fair determination of the rights of the parties could reasonably be expected***." *Id.* (emphasis added).

The Circuit Court erred in disregarding these authorities in favor of a strict construction of *Schmidt* as if it were this Court's articulation of the ***only*** circumstances that could ***ever*** give rise to equitable tolling. This Court did not so hold in *Schmidt*—a case decided on the particular facts and circumstances presented, which there involved insufficient allegations of fraud and concealment as the basis for equitable tolling, where reasonable due diligence would have uncovered the fraud. *Schmidt*, 276 Va. at 120. Limiting equitable tolling exclusively to the particular facts and circumstances of *Schmidt* runs directly counter to the recognition that equitable tolling is intended to address all extraordinary circumstances, including affirmative acts or conduct by the opposing party, in which a plaintiff is deprived, by no fault of its own, of the power to assert its claims within the limitations period. *See Brunswick Land Corp.*, 153 Va. at 608; *Holland*, 560 U.S. at 651; *Glus*, 359 U.S. at 232-34.

Here, with or without "misconduct or fraud," it is alleged ***and the Circuit Court has already found*** that both Birchwood-Manassas and the Defendants were being simultaneously managed solely by the same

persons acting under an “irreconcilable conflict of interest” throughout the statute of limitations period. So long as Mr. Horowitz and Mr. Haims controlled the entities on both sides of the demand obligations, these were extraordinary circumstances making it impossible for Birchwood-Manassas to assert its rights and remedies. Like the executor in *Peyton*, it is inconceivable that Mr. Horowitz and Mr. Haims would cause Birchwood-Manassas to bring suit against the Defendants, due to the fact that they both controlled those entities and held a financial interest in them, and they had already chosen the Defendants’ interests over those of Birchwood-Manassas. This Court should hold that this irreconcilable conflict of interest, insofar as it straightjacketed Birchwood-Manassas and precluded the assertion of its claims against the Defendants, equitably tolled the statute of limitations until the conflict was removed when the Liquidating Trustee accepted his appointment and Mr. Horowitz and Mr. Haims no longer served as the managers of Birchwood-Manassas.

## III. The Circuit Court Erred in Holding that Virginia Law Does Not Apply Equitable Tolling to Breaches of Fiduciary Duties

The Circuit Court committed a second error when it granted the Defendants’ plea in bar with respect to the Amended Complaint, holding that Birchwood-Manassas’s allegations of multiple breaches of fiduciary duties failed to present a sufficient claim of “misconduct” to support

equitable tolling. J.A. at 657-58. The Circuit Court reiterated that allegations of "fraud ***or misconduct***" might support a claim of equitable tolling under this Court's precedent, but then once again quoted *Schmidt* to limit the availability of equitable tolling solely to cases of fraud or deceit where a defendant "misled or deceived a plaintiff" to prevent timely assertion of the claim. *Id*. (emphasis added). The Circuit Court then incorrectly characterized the breach of fiduciary duty allegations in the Amended Complaint as just another "irreconcilable conflict of interest" theory, and held that this was not the "type of misconduct which would preclude [Birchwood-Manassas] from timely filing suit." J.A. at 658. This holding was also erroneous.

The Circuit Court's treatment of the substantial new allegations of misconduct in the Amended Complaint as a mere reassertion of the "irreconcilable conflict of interest" theory ignores the substance of the allegations. Birchwood-Manassas alleged in its Amended Complaint not only that Mr. Horowitz and Mr. Haims labored under divided loyalties, but specifically breached their fiduciary duties of undivided loyalty and care as a result of their competing and incompatible roles. Mr. Horowitz and Mr. Haims breached their fiduciary duties of undivided loyalty and care to Birchwood-Manassas by: (1) failing to document the loans of the BMA-

Owned Funds to the Defendants and failing to provide for repayment terms; (2) failing to obtain repayment of the resulting demand obligations from the Defendants within three years from the date each loan was made; and (3) failing to file suit on the demand obligations within the three-year statute of limitations period. J.A. at 405-06, ¶¶43-45. This was self-dealing by Mr. Horowitz and Mr. Haims, undertaken to benefit their ownership interests in Oak Knoll and Wading River and to perpetuate Mr. Horowitz's salary from Oak Knoll and Wading River. J.A. at 398, 405-06, ¶¶19, 43-45.

Contrary to the Circuit Court's holding, this is precisely the "type of misconduct" other courts have held sufficient to trigger equitable tolling of a statute of limitations. In *Sheffield Steel Corp. v. HMK Enterprises, Inc.*, 320 B.R. 405 (N.D. Oka. 2004), a corporation in bankruptcy sought to recover transfers made through dividends and stock repurchases to two of its former directors. The directors sought dismissal under Delaware's three-year statute of limitations. *Id*. at 416-17. The court denied dismissal on equitable tolling grounds, holding that tolling is appropriate "in cases where defendants are alleged to have breached fiduciary duties by engaging in self-dealing and self-enrichment." *Id*. at 417 (*citing Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808 (Del. 1944)). The court observed that, because "trust and good faith are the essence" of the fiduciary relationship, it would be

"corrosive and contradictory for the law to punish reasonable reliance on that good faith by applying the statute of limitations woodenly or automatically to alleged self-interested violations of trust." *Id*. at 418 (*quoting Kahn v. Seabord Corp.*, 625 A.2d 269, 275 (Del.Ch. 1993). Thus, where a complaint "contains allegations of self-dealing for profit by a fiduciary," it is "ordinarily inappropriate to summarily dismiss a claim as untimely under an otherwise applicable statute of limitations[.]" *Id*. at 419.

Consistent with *Sheffield Steel*, other courts recognize that tolling is "frequently applied where the conduct of a fiduciary is alleged to have lulled a plaintiff into failure to protect his interests within the statutory limitations period." *Ray v. Queen*, 747 A.2d 1137, 1142 (D.C. 2000). *See also Rubin, Quinn, Moss, Heaney & Patterson, P.C. v. Kennel*, 832 F. Supp. 922, 935 (E.D. Pa. 1993) (noting that a "wayward fiduciary" is enabled, by virtue of his "very special relationship" with the principal, to cause the principal "to relax vigilance or deviate from the right of inquiry") (internal citation omitted); *Schwartz v. Pierucci*, 60 B.R. 397, 403 (E.D. Pa. 1986) ("Where a fiduciary commits an act of fraud against his principal, the statute of limitations will be tolled, since the very position the fiduciary is in, prohibits the principal from uncovering the fraud.").

Here, the Amended Complaint alleges in detail that Mr. Horowitz and

Mr. Haims, while simultaneously managing both Birchwood-Manassas and the Defendants on both sides of the demand obligations and owing each various fiduciary duties, were driven by self-interest to favor the Defendants over Birchwood-Manassas. J.A. at 406, ¶ 45. To that end, they used their control over Birchwood-Manassas to extend undocumented loans to the Defendants, failed to collect the resulting demand obligations within the three-year statute of limitations period, and failed to file suit against the Defendants within the statute of limitations period. J.A. at 405-06, ¶¶ 43-45.

Under these circumstances, it was error for the Circuit Court to decide the statute of limitations defense on a plea in bar. "In such cases, the resolution of a defendant's statute of limitations defense and the plaintiff's counter-defense of equitable tolling requires factual development and a full presentation of evidence relevant to the equities that must be assessed and balanced." *Sheffield Steel*, 320 B.R. at 419.[4] This Court

[4] For example, the Circuit Court speculated in a footnote to its April 1 opinion that a shareholder derivative action "could have been brought in addition to the action for dissolution" of Birchwood-Manassas. J.A. at 658, n.1. The ability to assert a derivative claim is heavily fact-dependent. *See* Va. Code §§ 13.1-1042 to 13.1-1043; *Cattano v. Bragg*, 283 Va. 638, 646 (2012) (listing seven factors relevant to the viability of a derivative claim). The Circuit Court could not properly conclude on a plea in bar, without further factual development and evidence, whether a derivative action was legally or practically viable here, and Birchwood-Manassas would show on the evidence that it was not.

should therefore hold that Virginia law recognizes a breach of fiduciary duty as a basis for equitable tolling, where, as in this case, the breach prevents a plaintiff from timely asserting its claims.

## IV. The Circuit Court Correctly Denied Oak Knoll's Attempts to Quash Birchwood-Manassas's Lis Pendens

This Court's Order of December 11, 2014 also awards an appeal as to Oak Knoll's Assignment of Cross Error, which involves an entirely routine issue of statutory application that the Circuit Court easily and correctly resolved below. Oak Knoll attempts to assign error to the Circuit Court's denial of Oak Knoll's multiple attempts to quash the lis pendens recorded by Birchwood-Manassas on certain lots of residential real estate located in Loudoun County, Virginia (the "**Remaining Oak Knoll Lots**"). The Circuit Court correctly denied all such attempts because Birchwood-Manassas "seeks to establish an interest" in both the Remaining Oak Knoll Lots and related sales proceeds, satisfying the plain language of Va. Code § 8.01-268(b) and applicable case law.

Birchwood-Manassas alleges a claim for unjust enrichment against Oak Knoll and the remedy of a constructive trust upon both the Remaining Oak Knoll Lots and their future sales proceeds. This claim "seeks to establish an interest" in the property under Virginia law, and serves the important purpose of preserving Birchwood-Manassas's ability to recover

against Oak Knoll. The unjust enrichment claim and constructive trust remedy allege a direct interest in the Remaining Oak Knoll Lots. Oak Knoll developed the lots using millions of dollars of BMA-Owned Funds, which Mr. Horowitz and Mr. Haims caused Birchwood-Manassas to transfer to Oak Knoll ***specifically*** for the purpose of developing the lots, but ***without*** loan documents, interest provisions, or terms of repayment, and in exchange for little or no consideration. The transfers created demand obligations in favor of Birchwood-Manassas, which Oak Knoll refused to pay when the Liquidating Trustee made demand for repayment. This left the demand obligations unsatisfied and Oak Knoll enriched to the extent of its continued ownership of the Remaining Oak Knoll Lots and their sales proceeds. Accordingly, the Circuit Court correctly concluded that it could not quash the lis pendens on the Remaining Oak Knoll Lots.

### A. Birchwood-Manassas Seeks to Establish an Interest in the Remaining Oak Knoll Lots and Their Sales Proceeds, in Accordance with the Virginia Lis Pendens Statute and Applicable Case Law

Virginia Code Section 8.01-268(b) states that "[n]o memorandum of lis pendens shall be filed unless the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum." The "central purpose" of a lis pendens is "to preserve the ability of a litigant to enforce any relief granted by the court

even if the property at issue is transferred to a third party prior to judgment." *Palm Harbor Homes, Inc. v. Leader Funding, Inc.*, 70 Va. Cir. 31, at *4 (Brunswick Cty. 2005). The imposition of a valid lis pendens is ***not*** limited to suits "where one party is attempting to take control of the title to a property," as the statute only requires that a party seek to "establish an interest" in the property, and "[c]ertainly, under Virginia law, a party can have an interest in property without seeking title to it." *Id*.

The Complaint[5] filed by Birchwood-Manassas, and forming the basis for its lis pendens, seeks to establish just such an interest. It alleges that Mr. Horowitz and Mr. Haims, while in simultaneous control of both entities, caused Birchwood-Manassas to confer a benefit upon Oak Knoll by transferring millions of dollars of BMA-Owned Funds to Oak Knoll for the specific purpose of developing residential real estate in Loudoun County, Virginia, including the Remaining Oak Knoll Lots. J.A. at 394, 397-401, 422, 424, 426, ¶¶ 10, 17-28, 98, 104, 110. When the Liquidating Trustee demanded repayment of the Outstanding BMA Funds, Oak Knoll refused to pay. J.A. at 395-97, 408, ¶¶ 13-16, 50. Yet Oak Knoll retains an unjust benefit in the form of its continued retention of title to the Remaining Oak

[5] Oak Knoll's Motion to Quash Lis Pendens was originally filed during the pendency of BMA's original Complaint. The allegations in the Complaint that support the filing of a lis pendens, however, are also found in BMA's First Amended Complaint.

Knoll Lots and any proceeds from their sales, and, as a consequence, is unjustly enriched to the full extent of its property interest in the Remaining Oak Knoll Lots and their sales proceeds. J.A. at 422-27, ¶¶ 99-102, 105-108, 111-14. Birchwood-Manassas therefore asserts a constructive trust over the Remaining Oak Knoll Lots and any proceeds derived from the sales of those lots. J.A. at 424-28, Counts II & III.

Birchwood-Manassas's assertion of a constructive trust as a remedy for unjust enrichment "seeks to establish an interest" in the Remaining Oak Knoll Lots and their sales proceeds. This is a straightforward legal conclusion applying the plain language of Virginia law. Every Virginia case to consider the issue, including the *Palm Harbor Homes* case cited in Oak Knoll's Assignment of Cross Error, confirms that a party's assertion of a constructive trust upon real property or its sale proceeds as a remedy for unjust enrichment satisfies the "interest" requirement of Section 8.01-268(b), even where the party seeking the constructive trust does not seek title to the property.

In *Palm Harbor Homes*, the court surveyed Virginia law and denied the defendant's motion to quash a lis pendens filed by the builder of a home, who claimed breach of contract and unjust enrichment for the unpaid portion of its purchase price. 70 Va. Cir. 31, at *4-5. The court held that a

party claims an "interest" under the lis pendens statute even where it does not "specifically attempt to have the property reconveyed to it, but rather seeks a constructive trust or the placement of an equitable lien on any funds tied to the sale of the property." *Id*. at *4. The court reached this conclusion even though the underlying claim sought "constructive trust and a lien on funds related to the property, and not on the property itself." *Id.*

Similarly, in *Lee v. Garrett Homes of Virginia, L.C.*, 60 Va. Cir. 235, at *1 (Spotsylvania 2002), the court denied the defendant's motion to quash a lis pendens filed by the prospective purchasers of a home, even though plaintiffs' "primary goal" was "to recover only the money that they invested in the transaction." *Id*. at *1. Notwithstanding plaintiffs' "ultimate goal" of recovering money rather than property, the court held that the plaintiffs' allegation of a constructive trust and assertion of "an equitable interest" in the subject property was sufficient to satisfy the "interest" requirement. *Id*. *See also DRHI v. L'Ambiance Assocs.*, 39 Va. Cir. 434 (Fairfax 1996) (holding that the requisite "interest" to support a lis pendens did not have to concern a dispute over title, but instead could merely seek to establish an equitable lien in the real property at issue).

Here, Birchwood-Manassas claims an interest in both the Remaining Oak Knoll Lots and any proceeds derived from the sales of those lots

based on Oak Knoll's appropriation and use of the BMA-Owned Funds specifically for the purpose of developing the lots, followed by its refusal to pay its demand obligations. Birchwood-Manassas alleges that Oak Knoll has thereby been unjustly enriched at Birchwood-Manassas's expense. Accordingly, Birchwood-Manassas seeks to impose a constructive trust on both the Remaining Oak Knoll Lots (Count II) and the sales proceeds from all future sales of the Remaining Oak Knoll Lots (Count III). These constructive trusts "seek[ ] to establish an interest" in the Remaining Oak Knoll Lots.

### B. Birchwood-Manassas's Lis Pendens Is Not an Attachment

Throughout the underlying Circuit Court litigation and in its Assignment of Cross Error, Oak Knoll has consistently ignored the plain language of Section 8.01-268(b), repeatedly mischaracterizing Birchwood-Manassas's lis pendens as a "pre-judgment attachment," because Birchwood-Manassas does not "seek title in" the Remaining Oak Knoll Lots. Oak Knoll's repetitious use of the words "pre-judgment attachment" does not make it so, and cannot invalidate Birchwood-Manassas's proper exercise of its lis pendens rights under Virginia law.

A lis pendens is ***not*** a pre-judgment attachment, and cannot be construed as one, where the underlying claim "relate[s] to an interest in

property," as the lis pendens then merely serves its purpose "to maintain the status quo with respect to the property until that adjudication is made." *In re Rice*, 362 B.R. 687, 689-90 (Bankr. E.D. Va. 2006) (rejecting the argument that a lis pendens was a pre-judgment attachment). The fact that Oak Knoll disputes Birchwood-Manassas's interest in the Remaining Oak Knoll Lots is a question of fact to be determined by adjudication, not on a motion to quash. To quash a lis pendens based on nothing more than a defendant's denial of the asserted property interest "would be unjust," as it would leave the plaintiff "with no way of recovering the sum owing to it[.]" *Palm Harbor Homes*, 70 Va. Cir. 31, at *4.

Throughout this litigation, Oak Knoll has repeatedly attempted to evade this problem by conflating "interest" with "title," arguing that Birchwood-Manassas "has never had an interest" in the Remaining Oak Knoll Lots because it does not "seek title" in the lots. As discussed in the preceding section, however, an "interest" in property is not limited to attempts "to take control of the title," as "a party can have an interest in property without seeking title to it." *Id*. The assertion of a constructive trust on property or its sale proceeds constitutes such an "interest" even where the goal of the lawsuit is recovery of "funds tied to the sale of the property" rather than the property itself. *Id*.; *Lee*, 60 Va. Cir. 235, at *1. *See also*

*DRHI*, 39 Va. Cir. 434, at *1. Oak Knoll's principal authority, *Republic Servs. of Va., LLC v. Am. Timberland LLC*, No. 6:06-CV-00041, 2006 WL 3421840 (W.D. Va. Nov. 28, 2006), is inapposite. There, the plaintiff claimed "nothing conventionally called an 'interest'" in the property on which it filed a lis pendens, and sought an injunction regarding a covenant that did not run with the land. *Id*. at *1.[6] Here, by contrast, Birchwood-Manassas claims a direct interest in the Remaining Oak Knoll Lots as the result of Oak Knoll's unjust enrichment based on its retention of the lots following its use of the BMA-Owned Funds to develop them, and its subsequent refusal to repay the demand obligations. J.A. at 422-27, ¶¶ 98-114.

### C. Birchwood-Manassas Properly Invokes the Remedy of Constructive Trust

Throughout this litigation, Oak Knoll has also repeatedly attempted to sidestep Birchwood-Manassas's interest in the Remaining Oak Knoll Lots and the sales proceeds resulting from the sales of those lots by asserting that a constructive trust "does not arise just because money is loaned to a

[6] Oak Knoll's other authority is inapposite as well. *See O'Bryan v. O'Bryan*, 28 Va. Cir. 30, at *3 (Fairfax Cty. 1992) (quashing lis pendens where plaintiff's "right, if any, is to personalty, rather than to the real property"); *Hellberg v. Valley Hardware Co.*, 46 Va. Cir. 112, at *2 (Rockingham Cty. 1998) (holding that a suit for a "personal money judgment" will not support a lis pendens).

person who owns real property." This wholly disregards the substance of the allegations giving rise to Birchwood-Manassas's unjust enrichment claim and its constructive trust remedy. The salient point here is not just that Birchwood-Manassas loaned money to Oak Knoll which Oak Knoll refused to repay; it is that Mr. Horowitz and Mr. Haims, as insiders and simultaneous managers on both sides of the loan transactions, caused Birchwood-Manassas to transfer the BMA-Owned Funds to Oak Knoll on inequitable terms ***specifically for the purpose*** of developing the Remaining Oak Knoll Lots, and Oak Knoll has unjustly retained the benefit of this transfer by retaining the lots and their sales proceeds while refusing to repay the resulting demand obligations. J.A. at 394-401, 408, 422-27, ¶¶ 10, 13-28, 50, 98-114.

These circumstances clearly meet the elements of unjust enrichment. Birchwood-Manassas alleges that it "conferred a benefit" on Oak Knoll, Oak Knoll "knew of the benefit and should reasonably have expected to repay" Birchwood-Manassas, and Oak Knoll "accepted or retained the benefit without paying for its value" by retaining the Remaining Oak Knoll Lots and their sales proceeds. *See id.*; *Schmidt*, 276 Va. at 116. Constructive trust is the appropriate remedy for unjust enrichment "not only where property has been acquired by fraud or improper means, but also where it has been

fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit." *Jones v. Harrison*, 250 Va. 64, 70 (Va. 1995) (*quoting Richardson v. Richardson*, 242 Va. 242, 245 (1991)). Birchwood-Manassas alleges facts under which it is contrary to the principles of equity for Oak Knoll to retain the Remaining Oak Knoll Lots or their sales proceeds for its own benefit. A constructive trust properly arises to remedy Birchwood-Manassas's competing interest in the property and sales proceeds, and Birchwood-Manassas properly recorded a lis pendens under Virginia Code Section 8.01-268(b) to preserve this competing interest.

## CONCLUSION

The Circuit Court's ruling that equitable tolling in Virginia is constrained to the narrow circumstances of fraud or deceit misconstrues this Court's ruling in *Schmidt*, is incompatible with the fundamental principles underlying the doctrine of equitable tolling, and cannot be reconciled with the well-reasoned precedent of other jurisdictions applying equitable tolling in cases of irreconcilable conflict of interest or breach of fiduciary duty. The ultimate analysis for equitable tolling purposes is simple: Did an extraordinary circumstance prevent Birchwood-Manassas, through no fault of its own, from timely asserting its claims against Oak Knoll and

Wading River? The answer is yes, it clearly did.

In fact, there were two such extraordinary circumstances in this case—the simultaneous management of both the plaintiff and the defendant entities by the same irreconcilably conflicted managers, and the managers' repeated breaches of their fiduciary duties of undivided loyalty and care throughout the applicable statute of limitations period. These facts inescapably prevented Birchwood-Manassas from asserting its claims until the appointment of the Liquidating Trustee lifted the conflict and for the first time presented a separate plaintiff who could sue and separate defendants to be sued. Yet this did not occur until after the applicable three-year statute of limitations had already passed. This is precisely the kind of extraordinary injustice the doctrine of equitable tolling exists to address, as allowing the Defendants to take advantage of the statute of limitations under these circumstances would suffer an egregious wrong to stand without a remedy. For these reasons, Birchwood-Manassas respectfully requests that this Court reverse the Circuit Court's ruling, vacate its dismissal order, remand this case for further proceedings, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 15, 2015, fifteen copies of the foregoing Opening Brief and of the Joint Appendix, with a copy on CD, were hand delivered to the clerk's office. This same date, three copies of the Opening Brief, two copies of the Joint Appendix and a copy on CD were served via third party commercial carrier upon:

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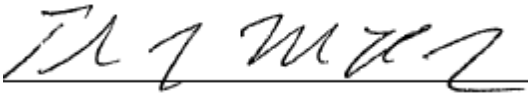

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