

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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APPELLATE CASE NO. 2013-002676

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**RECEIVED**

JUL 22 2015

SC Court of Appeals

William. F. Tomz and Francis W. Tomz, Individually and as Class Representatives,  
..... Respondents,

v.

Capital Investment Funding, LLC, and Arthur M. Field, Defendants.  
Of Whom Arthur M. Field is the ..... Appellant.

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**APPELLANT'S MEMORANDUM IN OPPOSITION TO  
MOTION TO INTERVENE OF CAPITAL INVESTMENT FUNDING, LLC,  
BY AND THROUGH ITS RECEIVER, JERRY T. SAAD**

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Attorneys for Appellant Arthur M. Field

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Appellant, Arthur M. Field (“Dr. Field”), by and through his undersigned counsel, hereby submits this Memorandum in Opposition to the Motion to Intervene in this Appeal filed by Capital Investment Funding, LLC, by and through its Receiver, Jerry Saad (“CIF”).

### **SUMMARY OF ARGUMENT**

The Court of Appeals should deny CIF’s Motion to Intervene because it is procedurally defective, untimely, and fails to demonstrate that the existing Respondents cannot protect CIF’s interests in this Appeal.

### **SUMMARY OF PERTINENT BACKGROUND FACTS**

In 2008, Plaintiffs/Respondents William Tomz and Francis W. Tomz., Individually and as Class Representatives, initiated this action against Dr. Field and CIF seeking recovery of their investments in notes issued by CIF. The case was settled in 2009 by a Mediated Global Settlement Agreement (“MGSA”) and Dr. Field was dismissed as a party to the case, subject to an obligation to produce certain identified records within ten days of court approval of the MGSA. Dr. Field timely made his production of records and assisted the Receiver in marshaling CIF’s assets. More than four years after Dr. Field had produced the records in his possession or control, in August 2013, a Rule to Show Cause was issued, by which it was sought that Dr. Field be held in contempt of court for noncompliance with his production and cooperation obligations. Dr. Field asserted a number of grounds, both jurisdictional and factual, that he could not be found to be in contempt because he had complied with all obligations governing his cooperation and production of records. Following a hearing in September 2013, the lower court entered an order finding Dr. Field in contempt.

Dr. Field filed his Notice of Appeal, which showed Tomz, et al. as Respondents. A letter dated January 10, 2014 from the Clerk of the Court of Appeals clearly showed that neither CIF

nor the Receiver, Jerry T. Saad, is a Respondent in the appellate case. Following a hearing in the lower court to settle the record, a corrected Transcript was served, and thereafter, Appellant's Initial Brief was filed and served. Shortly before Respondents' Initial Brief was due, George Brandt, III, Esquire, informed the Clerk of the Court of Appeals that CIF, by and through its Receiver, Jerry T. Saad, should be designated as a Respondent in the Appeal. The Clerk's response was to instruct Mr. Brandt of the necessity to file a Motion to Intervene.

### **ARGUMENT**

The Court of Appeals should deny CIF's Motion to Intervene as a Respondent in this Appeal because: 1) it is procedurally defective under Rule 240(c), SCACR; 2) it is untimely; and 3) it fails to establish that CIF's interests cannot be adequately represented by the existing Respondents.

A. CIF's Motion to Intervene is Procedurally Defective

This Court must deny CIF's Motion to Intervene initially because it is procedurally defective. Rule 240(c), SCACR requires that all motions filed in the appellate court "shall" include a "memorandum with citation of authorities in support of the motion" and, where the Record on Appeal has not been filed, the movant "shall file affidavits and other documents in support of their positions." No memorandum, no citations of authority, nor any affidavits supporting allowance of intervention were filed.

B. CIF's Motion to Intervene is Untimely

This appeal has been pending since December 2013. Almost two years have elapsed. Nothing has prevented CIF or its Receiver from filing a Motion to Intervene during this lengthy period of time. Instead, CIF waited until just before the due date of Respondents' Initial Brief

before writing to the Court of Appeals to assert that CIF is, in fact, a Respondent in the pending Appeal. Such action was highly dilatory and is prejudicial to Dr. Field.

It is axiomatic that “timeliness is a cardinal consideration” of whether to permit intervention.” *Scardelletti v. Debarr*, 265 F.3d 195 (4th Cir. 2001) (intervention denied). “The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.” *Ibid* citing *United States v. South Bend Commun. Sch. Corp.*, 710 F.2d 394, 96 (7th Cir. 1983). “To determine whether an application for intervention is timely, we examine the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene. See *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989).” *Scardelletti, supra*.

Examining each of the factors, it is clear that CIF fails all of them: 1) The appeal is at its briefing stage; 2) Field will be prejudiced by the additional delay; and 3) CIF offers no excuse for its extreme tardiness in seeking intervention. Absent timely intervention, CIF cannot participate in this appeal. *Houston Gen. Ins.Co. v. Moore*, 193 F.3d 838 (4<sup>th</sup> Cir. 1999). One can only conclude the lengthy delay with a ‘last-minute’ attempt to intervene was a tactical or strategic decision made by CIF or the Receiver and should be denied. See *Moten v. Bricklayers, Masons, & Plasterers Int’l Union of Am.*, 543 F.2d 224, 228 (D.C.Cir. 1976) cited in *Alt v. U.S. E.P.A.*, 13-22000 (4<sup>th</sup> Cir. 2014).

C. CIF is not a Necessary Party to this Appeal.

CIF’s interest is adequately represented by the existing Respondents, who ultimately have the greatest interest in determining whether Dr. Field has complied with the MGSA, since they are the Plaintiffs who ultimately will receive compensation from the assets of CIF. The South Carolina Supreme Court has adopted the following factors for determining the adequacy of

representation by existing parties to an action: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent. *Berkeley Electric v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712, 715 (1990). *Accord, Ex Parte Horry County State Bank*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004).

The burden to show that the representation may be inadequate is on the intervenor. As stated in 3B J. Moore, *Moore's Federal Practice* Section 24.07[4] (2d ed. 1987): "When an applicant for intervention and an existing party have the same ultimate objective a presumption arises that its interests are adequately represented and the application should be denied unless a showing of inadequate representation is made by demonstration of adversity of interest, collusion, or nonfeasance." *Ex Parte Horry, supra*.

CIF has made no attempt to show that representation by Respondents Tomz et al. is inadequate. On the contrary, CIF has demonstrated privity with the existing Respondents.<sup>1</sup> See also, *S.C. Tax Comm'n v. Union County Treasurer*, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988), affirming the trial court's denial of the Tax Commission's application for intervention "precisely because we were unable to discern from the Commission's argument that its ultimate objective in th[e] case[was] different from that of the Auditor and Treasurer." *Id.* at 260-61, 368 S.E.2d 74.

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<sup>1</sup> This 2008 state court action was brought by William Tomz et al. as Plaintiffs, represented by attorney Stanley T. Case, counsel for Respondents in this Appeal. Tomz was also a plaintiff in a federal district court case arising out of the same facts, *Brooks, et al. v. Field, et al.*, 6:14-cv-02267-BHH-JDA (D.S.C. 8/26/14), brought by other attorneys for CIF (in federal district court case *Capital Investment Funding LLC v. Field, et al.*, 6:12-cv-03401-BHH (D.S.C. 11/29/12) also arising out of the same facts), although purporting to represent a class of Plaintiffs. Appearing as counsel in the 2014 federal case as an additional counsel for Tomz is attorney Case. CIF is theoretically adverse to the "Tomz" class of Noteholders, yet some of the same attorneys have represented the interests of both Tomz and CIF. Thus, whatever interest CIF has in this appeal, the existing Respondents can adequately represent that interest.

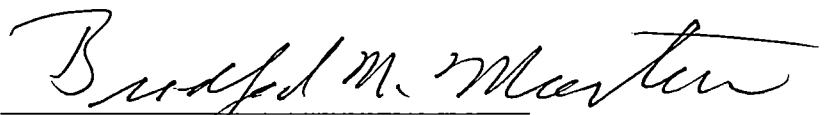
“[W]here, as here, the interests of the applicant in every manner match those of an existing party and the party’s representation is deemed adequate, the district court is well within its discretion in deciding that the applicant’s contributions to the proceedings would be superfluous and that any resulting delay would be undue.” *Hoots v. Commonwealth of Pa.*, 672 F.2d 1133, 1136 (3<sup>rd</sup> Cir. 1982) (intervention denied) cited in *Acra Turf Club, LLC v. Zanzuccki*, 13-1634, (3<sup>rd</sup> Cir. 2014). *See also*, *U.S. v. Terr. Of Virgin Islands*, 748 F.3d 514 (3<sup>rd</sup> Cir. 2014).

As the Court of Appeals concluded, in denying intervention in *Ex Parte Horry County State Bank, supra*, the Respondents Tomz et al. and CIF “share the same ultimate objective and seek the same outcome.” *See also*, *McHenry and Gov’t of the Virgin Islands, Intervenors v. Comm’r of Internal Revenue*, 677 F.3d 214 (4th Cir. 2012) (denying both intervention as of right and permissive intervention).

### CONCLUSION

CIF’s Motion to Intervene must be denied as procedurally defective, untimely, and without any adequate substantive foundation that meets the requirements for either permissive intervention or intervention as of right.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT ARTHUR M. FIELD

July 20, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
Case No. 2008-CP-23-3665

Edward W. Miller, Circuit Court Judge

APPELLATE CASE NO. 2013-002676

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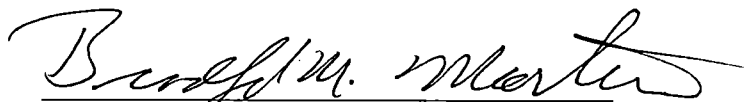
v.

Capital Investment Funding, LLC, and Arthur M. Field, Defendants  
Of Whom Arthur M. Field is the ..... Appellant.

**PROOF OF SERVICE**

I, the undersigned attorney for Appellant Arthur M. Field, certify that I have served the South Carolina Court of Appeals with one original and seven copies of **Appellant's Memorandum in Opposition to Motion to Intervene of Capital Investment Funding, LLC, by and through its Receiver, Jerry T. Saad** by depositing a copy in the U.S. Mail, postage prepaid, on July 20, 2015, to The Honorable Jenny Abbott Kitchings, 1220 Senate St., Columbia, SC 29201, and a copy addressed to Stanley T. Case, Esq., Butler, Means, Evins & Brown, P.A., P.O. Drawer 451, Spartanburg, SC 29304 and George Brandt, III, Esq., Henderson Brandt & Vieth, P.A., 360 E. Henry Street, Spartanburg, SC 29302.

July 20, 2015



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July 20, 2015

The Honorable Jenny Abbott Kitchings  
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SC Court of Appeals

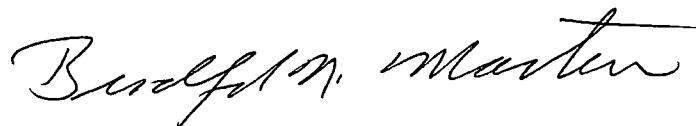
Re: *William F. Tomz, et al. v. Capital Investment Funding, LLC, et al.*  
Appellate Case No. 2013-002676

Dear Ms. Kitchings:

Enclosed for filing are an original and seven copies of Appellant's Memorandum in Opposition to Motion to Intervene of Capital Investment Funding, LLC, by and through its Receiver, Jerry T. Saad, and the original and seven copies of the Proof of Service, in the above captioned matter. Please file these documents with your Court and return one clocked copy of the Memorandum and Proof of Service to me in the enclosed stamped, self-addressed return envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm  
enclosures

cc: George Brandt, Esq.  
Stan Case, Esq.



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