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JAN 28 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-3665

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,  
And Capital Investment Funding, LLC is a ..... Respondent.

[Appellate Case No. 2013-002676]

**MOTION TO AMEND APPELLANT’S ADDITIONAL DESIGNATION OF MATTER,  
TO FILE AN APPENDIX TO RECORD ON APPEAL, AND FOR EXTENSION OF  
TIME TO FILE AND SERVE APPELLANT’S FINAL REPLY BRIEF  
WITH CITATIONS TO THE APPENDIX**

Appellant respectfully moves to Amend Appellant’s Additional Designation of Matter to Be Included in the Record on Appeal<sup>1</sup> (which was filed and served on November 25, 2015 with Appellant’s Initial Reply Brief) to designate the following pages from an additional transcript:

Transcript of Special Meeting *In Re: Capital Investment Funding* held before the Honorable Edward W. Miller, Circuit Court Judge, on December 14, 2011, pages 1, 5, 8-9, 29, and 67.

Appellant also moves for an extension of time to file Appellant’s Final Reply Brief due to the need to cite to references to this additional matter that are contained in Appellant’s Initial

<sup>1</sup> Rules 212(b), 240, and 263(b).

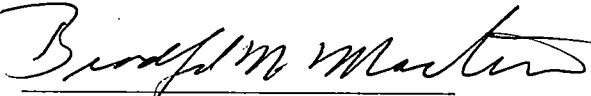
Reply Brief. The proposed "Amended Designation of Matter to be Included in the Record on Appeal" is attached as Attachment A.

The Record on Appeal was timely served on Respondents on January 13, 2016 and is due to be filed with the Court on February 2, 2016, the deadline for filing final briefs. As the additional matter proposed to be designated, to be set forth in an Appendix, is cited only in Appellant's Reply Brief, Appellant does not seek an extension to file and serve its Final Appellant's Brief or to file the Record on Appeal with the Court, both of which will be filed on February 2, 2016. Appellant moves to file and serve an Appendix to the Record on Appeal and its Final Reply Brief within ten (10) days of the Court's Order in response to this Motion.

In further support of Appellant's Motion, Appellant has submitted a Memorandum in Support of Motion.

Respectfully Submitted,

Dated: 28 January 2016



Bradford N. Martin, Esq.  
Laura W. H. Teer, Esq.  
Brook Bristow, Esq.  
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**APPELLANT'S AMENDED ADDITIONAL DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

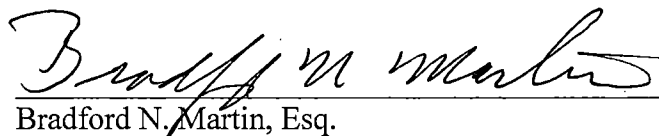
Appellant Arthur M. Field proposes that the matter set forth as item 5 below be added to Appellant's previously filed Additional Designation of Matter to be Included in the Record on Appeal. The matter set forth as item 5 below would be contained in an Appendix to the Record on Appeal.

1. Field Memorandum of Law in Support of Motion to Dismiss and Other Relief, dated December 26, 2012, Superior Court of New Jersey;
2. Field Affidavit in Support of Motion to Dismiss and Other Relief, dated December 26, 2012;
3. Order of Judge Perez Priscia filed February 15, 2013, and Rider to Order, Superior Court of New Jersey;
4. Add to Item 14, Appellant's Designation of Matter to Be Included in the Record on Appeal, Receipt for Court Ordered Documents dated 9/20/13 and Receipt for Documents dated 11/19/13.

5. Transcript of Special Meeting *In Re: Capital Investment Funding* held before the Honorable Edward W. Miller, Circuit Court Judge, on December 14, 2011, pages 1, 5, 8-9, 29, and 67.

I certify that this designation contains no matter which is irrelevant to this appeal.

Dated: 28 January 2016



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**Attorneys for Appellant Arthur M. Field**

1 STATE OF SOUTH CAROLINA )

) SPECIAL MEETING  
) 2008-CP-23-35514

2 COUNTY OF GREENVILLE )

3 )  
4 )  
5 Capital Investment )  
Funding )

6  
7 December 14, 2011  
Greenville, South Carolina

8 B E F O R E:

9 THE HONORABLE EDWARD W. MILLER, Judge.

10 A P P E A R A N C E S

11 Jerald Saad, Esquire  
Appointed Receiver

12 Creighton Waters, Esquire  
13 Assistant Attorney General

14 Stanley Case, Esquire  
Class Action Counsel

15 Gene Covington, Esquire  
16 Class Action Counsel

17  
18 CAROLINE HISKELL  
19 Circuit Court Reporter  
20  
21  
22  
23  
24  
25

## Capital Investment Funding Special Meeting

1 person that are working with them, and you may be  
2 introduced to some of them or may know some of them as  
3 well, have done an extraordinary job. And it is -- I will  
4 just tell you some of the most complex dodging and weaving  
5 shell game type stuff that I've seen and I've been  
6 involved in, when I was a lawyer for 25 years I was a  
7 defense lawyer and I've seen quite a few, but this as  
8 sophisticated a shell game as I've seen.

9 In any event, what we will do today is I'm  
10 going to ask Mr. Saad to come up so that I guess -- Jerry,  
11 if you want to come up here? Would you be comfortable up  
12 here? He's going to give you some idea about some of the  
13 things that have gone on.

14 Now, I want to tell you and I know that y'all  
15 are interested in the bottom line. I want to tell you  
16 that there is no disbursement that's going to be made  
17 today. Mr. Saad is going to post on the Internet, January  
18 15th it will be up and available, a balance sheet so to  
19 speak. And I want to tell you that there are a number of  
20 things that we can not tell you. You might say, why?  
21 We're members of the class. Well, although each of you  
22 would like to know all the information but I think that  
23 you will understand and trust each of you to have to  
24 ability to invest. You are intelligent folks and you can  
25 understand, even though you might not like it, you can

## Capital Investment Funding Special Meeting

1 status or the existence of any investigation. What I can  
2 tell you that is that in any case where there are  
3 allegations of criminal activity, the Attorney General's  
4 Office takes that very seriously. I understand that's  
5 probably a very unsatisfying answer for many of you but  
6 because of the lack of detail, but again, these are  
7 statutory rules that exist to protect the integrity of the  
8 process and I'm not at liberty to violate those even if  
9 they are frustrating. I ask you to understand that that's  
10 the best I can offer you.

11 I'll be here after the proceedings have  
12 concluded. If anybody wants to approach you, I'd be glad  
13 to talk with you, but, again, I'm not going to be able to  
14 offer any specifics because of those rules.

15 THE COURT: Thank you very much.

16 Let me just say this, ladies and gentlemen,  
17 he can't talk with you about and he can't talk with me  
18 about it. That's how stringent these rules are and y'all  
19 ought to be very thankful in the big picture we have  
20 persons with kind of integrity who follow the rules  
21 exactly as they are written. So it ought to restore some  
22 faith that you have in our system. And I will tell you  
23 that Mr. Saad is cooperating with any appropriate persons  
24 with whom he needs to cooperate with.

25 And the other thing I would point out to you

1 is the fact that Mr. Waters is here and you all just have  
2 to make a reasonable inference about that. I think that  
3 about covers that.

4 Jerry, would you tell us a little bit about  
5 the IRA issue without giving any advice.

6 MR. SAAID: I understand through the process  
7 having received email and calls from several note holders  
8 that several note holders --

9 THE COURT: Is that on?

10 MR. SAAID: Is this better? I'm not used to  
11 this. I'll give you some of the background information.  
12 The records that I have shows that there was about 141  
13 note holders that had their investments in IRAs and the  
14 IRAs have their own set of patch rules and part of the  
15 problem that I know was coming up is people were getting  
16 letters and notices about 1099s issued to the Internal  
17 Revenue Service reporting taxable income from these  
18 distribution of the notes coming out of the IRAs to the  
19 individuals named directed. So I contacted a company that  
20 was holding predominantly all of this IRA accounts which  
21 was called Physeve(ph) which later changed their name of  
22 Lincoln Trust Company and became familiar with what was  
23 going on so I'll give you a broad stroke background.

24 In 2008 there was approximately 30 note  
25 holders who notified the custodian that they wanted to

## Capital Investment Funding Special Meeting

1 could just pick up and look and see. It took extensive  
2 amount of digging, looking through records, traveling to  
3 Georgia looking at opposing counsel records down there to  
4 understand how all this could have occurred. And this is  
5 not the only time -- I believe this is not the only time  
6 this type of thing has occurred in this case and that's  
7 why we are spending time to go search, seek, and recover  
8 whatever we can.

9 THE COURT: Having heard that and I've heard  
10 it three or four times and I still do not have a complete  
11 understanding of it. When I say shell game, a lot of  
12 these people are connected in other matters and it's  
13 moving around and it's hard to keep up with which cup has  
14 got the pea under it. And what they have done in the last  
15 two years -- this is what your receiver has done. He has  
16 uncovered information, try and trace the funds and where  
17 they went, what happened to them and I just want to --  
18 there is no way to sugar coat the thing. There is no pot  
19 of gold out there.

20 All the 38 million dollars we're trying to  
21 find it, but ladies and gentlemen, we don't know where it  
22 all went. We know eighteen million is up in New Jersey.  
23 There are a lot of things we can not tell you because it  
24 might impair our ability to pursue some of this stuff, but  
25 I wanted Jerry to give you an idea the flavor of what he's

## Capital Investment Funding Special Meeting

1 even have access to some of this information and some of  
2 the confidential documents, but does the AG have access to  
3 that information if they wanted to have access, if there  
4 was an investigation?

5 THE COURT: I don't know if you all remember  
6 but we sat in this courtroom when we settled this matter  
7 in '09 and that was how we were able to get an agreement  
8 was that Mr. Field refused to give up his Fifth Amendment  
9 Rights. If he's innocent, I don't know why he would need  
10 those but that was written into the agreement and we got  
11 into -- well, I was kind of in a pickle because of the law  
12 with respect to the State Grand Jury and there's a  
13 specific judge who -- it's a long story, but the bottom  
14 line is there is no Fifth Amendment Right for a  
15 corporation and these were corporate documents and I will  
16 say that the -- I think I said before that Mr. Saad will  
17 continue to cooperate with any appropriate person in  
18 pursuit of all relevant issues surrounding the failure of  
19 CIF.

20 MR. MAULMAN: Part of the settlement was  
21 there was no agreement not to sue Author Field.

22 THE COURT: Hang on a second. I will read  
23 from Page 9 of the settlement order. "In consideration of  
24 Dr. Field being dismissed without prejudice in the above  
25 actions, he agrees to forego the severance pay allegedly

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[Appellate Case No. 2013-002676]

**APPELLANT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO  
AMEND APPELLANT’S ADDITIONAL DESIGNATION OF MATTER, TO FILE  
AN APPENDIX TO RECORD ON APPEAL, AND FOR EXTENSION OF TIME  
TO FILE AND SERVE APPELLANT’S FINAL REPLY BRIEF WITH  
CITATIONS TO THE APPENDIX**

**Argument**

Appellant filed his Initial Reply Brief and Additional Designation of Matter on November 25, 2015. The Initial Reply Brief referenced comments alleged to show impermissible bias made by the lower court from the bench at a Special Meeting (status conference) on December 14, 2011 entitled *In Re: Capital Investment Funding*. An issue on appeal is the lower court’s denial to recuse itself at the hearing on the Rule to Show Cause that is the subject of this Appeal. Through oversight, the pages to be designated

from the Special Meeting transcript were not included in Appellant's Additional Designation of Matter, because counsel believed the matter was already designated in its initial Designation of Matter, however that was a different status conference. This error was inadvertent and by no means intentional.

It is Appellant's intent to provide the Court of Appeals with a complete Record upon which to review this case and each party's arguments. (See Forner v. Butler, 319 S.C. 275, 460 S.E.2d 425 (Ct. App. 1995)). Rule 208(b) governs contents of briefs, and requires "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 208(b)(4), SCACR.

This Additional Designation of Matter does not affect any of the arguments or citations in Respondents' Brief, and therefore does not prejudice Respondents in any way or impact their ability to file Respondents' Final Brief relying upon the bound Record on Appeal already served on Respondents. An Appendix to the Record on Appeal would be filed by Appellant, upon the granting of this Motion, along with Appellant's Final Reply Brief which would include citations to the pages in the Appendix. The matter proposed to be included supports Appellant's salient facts and would aid in the Court's review of an issue in this Appeal, in order to ultimately render its opinion based on factual and legal arguments supported by appropriate portions of the Record. (See Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992) (it is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review)).

The South Carolina Supreme Court has held that "[w]hen through inadvertence some material fact is omitted from the Transcript of Record, counsel should promptly

seek permission, if the opposing party refuses to consent, to supply the deficiency.” Furman v. Nelson, 208 S.C. 249, 37 S.E.2d 741, 742 (1946). The timing of this Motion is appropriate, as it is filed prior to the due date for filing of final briefs.

Appellant does not seek an extension to file its Final Appellant’s Brief, which does not cite to the matter at issue in this Motion, nor an extension to file the Record on Appeal with the Court that has already been prepared and served on Respondents, both of which will be filed with the court by the due date of February 2, 2016. Only the Appellant’s Final Reply Brief cannot have its citations finalized until this Motion is ruled upon and this Motion will not unduly delay the final disposition of this Appeal. Thus, this Motion asks for a stay of the time for the Final Reply Brief to be filed in order to eliminate the expense of filing an incomplete Final Reply Brief that would need to be revised and filed again upon the granting of this Motion. Appellant requests that this stay of time to file his Final Reply Brief, and the deadline to file the Appendix, would be for a period of seven (7) days from the date this Court issues its Order in response to this Motion.

There is no prejudice to the Respondents as their Initial Respondents’ Brief was not premised on the inclusion or absence of the additional matter proposed to be included. (See Moody v. Dickinson, 54 S.C. 526, 534, 32 S.E. 563, 566 (1899)), wherein the Supreme Court held that there was no error "in allowing the defendant to correct a mere clerical error where the other party would not in any way be prejudiced. . . .”). The additional matter goes to the issue of recusal, and presents significant facts that are necessary for the Court to fully assess the lower court’s decision not to recuse.

In Camden Inv. Co. v. Gibson, 204 S.C. 513, 517, 30 S.E.2d 305, 306 (1944) the

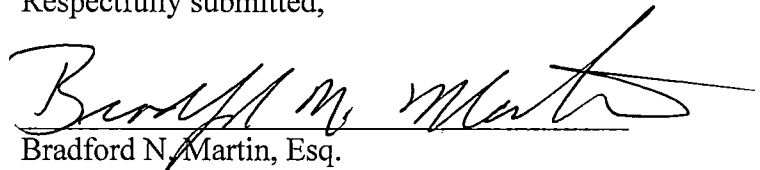
Supreme Court found while: “[i]t is necessary that the rules of court and statutes be followed in perfecting an appeal, ...it would be sacrificing substance for form to hold that appellant's right to have the testimony and exhibits included was lost simply because, through an apparent oversight, its attorneys failed to provide for the inclusion of same in the transcript of record . . . .”

**Conclusion**

Appellant has timely filed this Motion and there is no prejudice to the Respondents. The proposed Amended Additional Designation of Matter to be included in the Record includes pages from one additional hearing; they are pages from a transcript that directly impact the recusal issue, and therefore need to be included as part of the Record. Appellant respectfully asks the Court to grant this Motion.

Dated: 28 January 2016

Respectfully submitted,



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Laura W. H. Teer, Esq.  
Brook Bristow, Esq.  
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Post Office Box 10410  
Greenville, South Carolina 29603  
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Attorneys for Appellant Arthur M. Field

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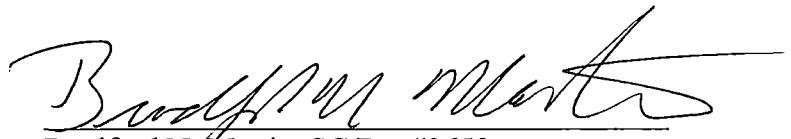
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Of Whom Arthur M. Field is the ..... Appellant,  
And Capital Investment Funding, LLC is a ..... Respondent.

**PROOF OF SERVICE**

I certify that I have served a copy of the Motion and Memorandum of Law in Support to Amend Appellant's Additional Designation of Matter, to File An Appendix To Record on Appeal, and for Extension of Time To File And Serve Appellant's Final Reply Brief With Citations to the Appendix by depositing a copy in the U.S. Mail, postage prepaid, on January 28, 2016, addressed to Respondents' attorneys, Stanley T. Case, Esq., P.O. Drawer 451, Spartanburg, SC 29304 and George Brandt, III, Esq., Henderson Brandt & Vieth, P.A., 360 E. Henry Street, Spartanburg, SC 29302.



Bradford N. Martin, SC Bar #3658  
Laura W. H. Teer, SC Bar #16698  
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January 28, 2016

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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Re: *William F. Tomz v. Capital Funding, et al*  
C/A No.: 2008-CP-23-3665  
Tracking No. 2013-002676

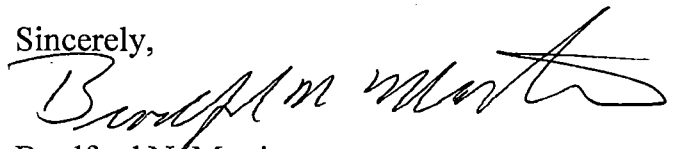
Dear Ms. Kitchings:

Enclosed for filing in the above captioned matter are an original and six (6) copies of Appellant's Motion to Amend Appellant's Additional Designation of Matter, to File an Appendix to Record on Appeal, and for Extension of Time to File and Serve Appellant's Final Reply Brief with Citations to the Appendix, and Memorandum in Support. Please note that this Motion does not seek to extend the time for filing the Record on Appeal, which is due to be filed by February 2, 2016, and which was served on Respondents' counsel on January 13, 2016, nor does this Motion seek to extend the time for filing the Final Appellant's Brief.

Also enclosed are a Proof of Service and our firm's check in the amount of \$25.00. Please file the original Motion with your Court and return a clocked copy to me in the enclosed envelope.

By copy of this letter I am notifying Respondents' counsel of the filing of this Motion. 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.