RECEIVED
Jun 05 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Civil Action No. 2022-CP-21-01980

Appellate Case No. 2025-002541

Noah Veon, on behalf of himself and all others similarly situated ..... Respondent,

v.

Richard James Schueler, A/K/A "Richard Heart," ..... Defendant,

Benjamin DuBard .....Proposed Intervenor/Appellant

PROPOSED INTERVENOR/APPELLANT'S INITIAL REPLY BRIEF

Merritt G. Abney, SC Bar No. 71893
NELSON MULLINS RILEY & SCARBOROUGH LLP
E-Mail: merritt.abney@nelsonmullins.com
Ashley N. Hawkins, SC Bar No. 104662
E-Mail: ashley.hawkins@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Counsel for Proposed Intervenor/Appellant Benjamin DuBard

Respondent asks this Court to affirm the circuit court's denial of intervention by demanding that DuBard prove facts, submit evidentiary showings, and carry burdens that Rule 24, SCRCP, does not impose at this preliminary, procedural stage. The governing standard requires the court to accept a movant's allegations in support of intervention as true and does not require proof. The circuit court nevertheless abused its discretion by applying an unduly rigid timeliness test, by discounting unrebutted allegations regarding DuBard's interest, and by somehow concluding that Respondent adequately represents DuBard's interests in the action despite the fact that Respondent seeks the ***opposite*** outcome. Respondent's brief does not address these errors by the circuit court. Instead, it seeks to circumvent them by misstating the applicable legal standards, ignoring binding authority, and asking this Court to affirm on grounds the circuit court did not adopt.

ARGUMENT

I. Respondent misstates the law in claiming that DuBard was required to submit evidence to prove the allegations in his motion to intervene.

Respondent's principal contention is that DuBard's motion to intervene fails for lack of affidavits or other evidence proving that a declaration that HEX is a security would negatively impact DuBard. (Resp. Brief at 12–14.) Respondent asserts that "DuBard never argued from evidence" and that "[t]he arguments a person makes are not evidence in support of that person's position." (*Id.* at 12–13). Respondent cites no authority—from South Carolina or elsewhere—requiring an intervenor to submit affidavits or other extrinsic evidence to satisfy Rule 24(a) or similar rules from other jurisdictions. That requirement exists nowhere in the text of Rule 24 or in the cases interpreting it.

To the contrary, the South Carolina Supreme Court has emphasized that it takes a "broad view of the Rule 24(a)(2) standard," interpreting "the rules to permit liberal intervention

particularly [when] … judicial economy will be promoted by the declaration of rights of all parties who may be affected. Accordingly, we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).'" *Ex Parte Debordieu Colony Cmty. Ass'n*, 442 S.C. 285, 290, 898 S.E.2d 179, 181-182 (Ct. App. 2024) (quoting *Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)).

As a result, where, as here, a circuit court does not apply the liberal, permissive standard governing intervention, it abuses its discretion and must be reversed. That is because the proposed intervenor need only demonstrate that he "has *asserted* an interest in the action, has demonstrated that [he] *may be* impaired in [his] ability to protect the asserted interest if not allowed to intervene, and has shown that there *may be* inadequacy of representation by the existing parties." *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 191, 394 S.E.2d 712, 716 (1990) (emphasis original). Contrary to Respondent's suggestion, a circuit court should not make determinations on a factual record that does not yet exist in evaluating a motion to intervene.

Thus, a court ruling on a motion to intervene "must accept as true all material allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor." *Nat'l Park Conservation Assn. v. U.S. E.P.A.*, 759 F.3d 969, 973 (8th Cir. 2014). A wealth of authorities supports this position, while Respondent identifies none that takes a different approach. *See also Franciscan Alliance, Inc. v. Azar*, 414 F.Supp.3d 928, 936 (N.D. Tex. 2019) ("[M]otions to intervene are judged under the liberal pleading standard, and all 'allegations are accepted as true.'") (quoting *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977)); *Allstate Ins. Co. v. Kelter*, 842 N.E.2d 879, 882 (Ind. 2006) ("[T]he facts alleged in a petition to intervene must be taken as true and the decision on a motion to intervene turns on the sufficiency

of the claim asserted."); *Argonaut Ins. Co. v. Safway Steel Products, Inc.*, 822 N.E.2d 79, 85 (Ill. App. 2004) ("In determining the sufficiency of the intervenor's interest, the allegations of the petition to intervene must be taken as true."); *Am. Jur. Parties* § 213 ("The facts alleged in a motion to intervene as a matter of right must be taken as true."); *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 209 n.* (4th Cir. 1985) (ruling that "[s]ince plaintiffs' complaint and motion to intervene were dismissed at preliminary stages without evidentiary testing, we must accept plaintiffs' allegations as true"); *Va. Uranium, Inc. v. McAuliffe*, 2015 WL 6143105, at *2 (W.D. Va. Oct. 19, 2015) (allegations must be accepted as true in considering motion to intervene and accompanying pleading).

There is no requirement that the motion to intervene be supported by extrinsic evidence. *Kerrigan v. Comm. Of Pub. Health*, 904 A.2d 137, 145 (Conn. 2006) ("[N]either testimony nor other evidence is required to justify intervention, and '[a] proposed intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the proposed intervenor has a direct and immediate interest that will be affected by the judgment.'") (quoting *Washington Trust Co. v. Smith*, 699 A.2d 73 (Conn. 1997)). Thus, DuBard was not required to *prove* the allegations in his motion to intervene, nor did he even have any opportunity to do so. The circuit court erred by requiring him to prove so and rejecting his factual allegations.

None of Respondent's cited authorities are to the contrary. They do not concern intervention, which is a separate and distinct posture from those considered in the cases Respondent cites. (*See* Resp. Br. 12-13); *Trivelas v. S.C. DOT*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (considering weight of facts presented in argument on a motion for

summary judgment); *Higgins v. MUSC*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) (trial judge improperly considered facts not in record when granting summary judgment motion); *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 508 & n.7, 443 S.E.2d 401, 406 & n.7 (Ct. App. 1994) (affirming trial court decision upholding zoning board's determination where factual issue had only been raised in argument when appealing zoning board's determination to trial court); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (affirming rejection of testimony based on depositions not in the record). None of those authorities have any bearing on the intervention posture, nor do they contradict the authorities making clear that DuBard's allegations must be taken as true on a motion to intervene, with no evidence required at that stage.

Respondent also argues for the first time that DuBard's proposed answer to his complaint fails to support his motion to intervene because it "does not contain any allegations at all." (*Id.* at 12.) DuBard's proposed answer does exactly what Rule 8(b) requires of a responsive pleading: it responds to Respondent's complaint and denies the allegations therein. Rule 24(c) requires only that the motion to intervene be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." The grounds for intervention are stated in the motion itself—not the answer. (DuBard's Initial Brief at 7); *Nat'l Park Conservation Ass'n*, 759 F.3d at 973 ("A court ruling on a motion to intervene must accept as true all material allegations *in the motion to intervene* and must construe the motion in favor of the prospective intervenor." (emphasis added)). Respondent's contention that DuBard's proposed answer must contain evidentiary support beyond his denial of the allegations in the Complaint finds no support in Rule 24, Rule 8, or any authority Respondent cites. The Court should reject any attempt to import a heightened evidentiary burden into the Rule 24 analysis.

II. DuBard's interest is impaired by the litigation.

Respondent contends that DuBard's sole interest is to "affect any precedent that might flow" from a judgment that HEX is a security and that this general interest is insufficient under *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). (Resp.'s Br. at 14.) Respondent fundamentally mischaracterizes DuBard's interest. DuBard is a member of the putative class who owns HEX tokens—the very property that Respondent asks the circuit court to declare a security. (Mot. to Intervene at 2, R. __.) A declaratory judgment classifying HEX as a security would directly affect the value, legal risk, and transactional viability of DuBard's property. (*See* Appellant's Initial Br. at 15–22.) That is a direct, personal and financial interest—not a generalized concern about legal precedent. (*Id*. at 16). And it is ample justification for intervening. *See id.*; *Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (permitting intervention as of right because "declaratory judgment action would impair or impede the [proposed intervenors'] ability to protect [intervenor's] interest"). Respondent fails to address that distinction.

Respondent also argues that DuBard can simply "opt out" of the class when the time comes, rendering intervention unnecessary. (Resp.'s Br. at 17, 19.) This argument ignores DuBard's core concern about the relief sought. A declaratory judgment classifying all HEX tokens as securities would adversely affect the value and legal status of all HEX tokens, including DuBard's, regardless of whether he remains in the class. (DuBard's Initial Br. at 22–23.) One cannot "opt out" of a judicial declaration that the property one owns is a security or the resulting market, regulatory, and transactional consequences. Moreover, the law is clear that DuBard's interests can be adversely affected even if he opts out to avoid being bound by judgments applying to the class. *DeBordieu Colony*, 442 S.C. at 291, 898 S.E.2d at 182 (quoting *Berkeley Electric*, 302 S.C. at 190)

("'[A] party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene.'").

Likewise, Respondent's position that HEX tokens are essentially valueless, trading at a "tiny fraction of a cent," and therefore incapable of further devaluation conflates current market price with the legal and regulatory consequences of a securities classification, which would impose compliance burdens, restrict trading, and stigmatize the asset regardless of its present trading price. (*See* Appellant's Initial Br. at 15–22.) Moreover, this argument is a red herring. Even if tokens trade at a fraction of a cent, they can still decline significantly in value from there—as Appellant has alleged may occur if Respondent succeeds in having HEX declared to be a security. Thus, DuBard easily satisfies the standard of demonstrating that he would have difficulty adequately protecting his interests. The circuit court erred in ruling otherwise.

III. DuBard's motion to intervene was timely.

Respondent argues that DuBard's motion was untimely because he knew of the existence of the lawsuit in 2022 and, despite DuBard's contention that he was unaware until much later of the potential impact of the suit on his interests, DuBard's claim is "at odds with his Twitter history" and he is "charged with knowledge of [the lawsuit's] effect." (Resp.'s Br. at 15–16 (citing *Gregory v. Gregory*, 292 S.C. 587, 589–90, 358 S.E.2d 144, 146 (Ct. App. 1987)).

Both arguments fail. First, the applicable standard is not when DuBard learned a lawsuit existed, but when he "knew or should have known of his or her interest in the suit." *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991); (DuBard's Initial Br. at 9–10.) DuBard's interest is in opposing the declaratory judgment that HEX is a security and in challenging class certification. Respondent did not move to certify a class until May 10, 2024. (Docket, R. __.)

Within six weeks, DuBard learned of the need to protect his interest, retained counsel, and filed his motion. (Mot. to Intervene at 3, R. __; DuBard's Initial Br. at 10.)

Next, Respondent's reliance on a September 2, 2023 repost of a bulletin about the lawsuit on Twitter is misplaced. (Resp.'s Br. At 15-16.) Although Respondent characterizes the reposted bulletin as "discuss[ing] in detail, both this litigation and the parallel federal action," the bulletin described the case as one in which Respondent "seeks money and various other action by the Court." (Opp. to Mot. to Amend at 8, R. __.; Pl's Memo in Opp, Ex. A at 3, R. __.) It is undisputed that DuBard did not author the post or the bulletin but merely "reposted" it. *Id.* Moreover, neither the post nor the bulletin mention Respondent's request for a declaratory judgment that HEX is a security. Thus, even if DuBard read every word of the post or five-page bulletin before reposting—which would require a factual determination not appropriate at this intervention stage—none of that language would have informed him of the specific relief that threatened his interests or signaled the need to intervene. The circuit court therefore erred in finding DuBard's motion untimely based on his reposting of the Twitter bulletin.

Putting aside these factual contentions raised by Respondent, none of which can be evaluated at this stage, the repeated reliance on DuBard's "ignorance" of the law is misplaced. (Resp. Brief at 15, 16, 18.) *Gregory* had nothing to do with intervention. It concerned a party's ignorance of the law—specifically, a statute applicable to the party's retirement benefits. *See Gregory v. Gregory*, 292 S.C. 587, 589, 358 S.E.2d 144, 146 (Ct. App. 1987). The Court concluded that the party's ignorance of the statutory framework that governed his retirement was not sufficient justification to avoid granting the other party's motion to dismiss. *Id.* The present context has nothing to do with ignorance of applicable legal frameworks. Rather, it concerns whether DuBard, as a proposed intervenor, unduly delayed his motion based on his knowledge, or lack of

knowledge, of the factual and procedural context of the lawsuit at hand. As *Davis* makes clear, DuBard cannot be charged with complete knowledge of the lawsuit simply because it was filed. And, as explained above, his allegations make clear that he intervened promptly after becoming aware that his rights were in jeopardy.

IV. Respondent's argument that DuBard seeks only to delay this litigation is unsupported by the record.

Respondent characterizes DuBard's intervention as a mere "stall" tactic to further delay proceedings. (Resp.'s Br. at 19.) This accusation is unsupported by the record and ignores the circuit court's own findings. When DuBard moved to intervene there had been no substantive merits rulings, no certified class, and the core issue—whether HEX is a security—had not been adjudicated. (DuBard's Initial Br. at 11–13.) DuBard sought a single, short continuance of the class-certification hearing because his counsel had appeared only two days before. (Mot. for Continuance at 1, R. __.) The court granted that continuance over Respondent's objection, expressly finding no prejudice and stating that "[a]n international complex case is not something that I deal with frequently. I would like to hear what [DuBard's] got to say about whether or not it should be certified as a class." (6/25/2024 Hr'g. Tr. at 24, R. __; DuBard's Initial Br. at 13–14.) Other delays cited by Respondent are attributable to periods before DuBard moved to intervene (September 2022 to June 2024), a non-party's separate appeal (July to November 2024), and court and counsel scheduling conflicts—not to DuBard. (DuBard's Initial Br. at 14.)

Further, Respondent devotes the majority of his statement of facts to a non-party, Matthew Picchietti, and the circumstances of DuBard's legal funding, which have no bearing on the Rule 24 analysis. (Resp.'s Br. at 3–12, 19.) Respondent's own counsel conceded that "there's nothing wrong with a third-party raising money here." (6/10/2025 Hr'g. Tr. at 10:23 R. __.) Moreover, Respondent's logic that DuBard cannot truly represent his own interests if he cannot pay his legal

fees would apply equally to Respondent, whose legal work is presumably being covered by counsel on a contingency basis. (*See* Appellant's Initial Br. at 28.)

DuBard seeks only to protect his interest and to ensure that the circuit court hears both sides of the argument before rendering a sweeping declaratory judgment that HEX is a security. (DuBard's Initial Br. at 14–15.) Respondent's argument and the circuit court's finding that DuBard filed his motion with "clear intent . . . to prejudice the original parties" is unsupported by the record and constitutes clear error. (Order at 6, R. __)

V. Respondent cannot adequately represent an intervenor who seeks the opposite result.

Respondent does not even address DuBard's core contention that, absent intervention, the court will hear only one side of the argument on the key issues of class certification and whether HEX should be deemed to be a security. The circuit court's order suggested that DuBard should side with Respondent because—as a member of the purported class—DuBard might receive compensation if Respondent prevails. (*See* Order at 8, R. __; Resp.'s Br. at 14, 17.) But neither Respondent nor the circuit court can decide for DuBard what his interest should be. DuBard plainly has an interest in the outcome of this dispute and wishes to raise important arguments and authorities, including the recent dismissal with prejudice of the SEC's similar claims against Schueler in *SEC v. Schueler*, Case No. 1:23-cv-05749 (E.D.N.Y. Feb. 28, 2025), evolving SEC guidance on digital asset staking, and the impermissibility of using this proceeding to structure a nationwide class under *Bristol-Myers Squibb v. Superior Court of California*, 582 U.S. 255 (2017). (Resp. Brief at 20-21). Respondent cannot be expected to raise these arguments to the circuit court because they undermine his erroneous legal theories. (Appellant's Initial Br. at 19–21, 25); *see Feller v. Brock*, 802 F.2d 722, 729–30 (4th Cir. 1986) (holding it "reversible error" to deny

intervention where intervenor's arguments were opposed to those of existing litigants and "[o]nly the intervenors" had drawn important authorities to the court's attention).

Nor does Respondent address DuBard's concerns about the adequacy of Respondent as class representative. Public blockchain records demonstrate that Respondent purchased his HEX tokens on a secondary market exchange. That fact directly contradicts Respondent's allegations in the Complaint. (See Appellant's Initial Br. at 25–26; 6/6/2025 Class Cert. Opp'n at 9–10, R. __.) This fact raises serious questions about Respondent's fitness to represent a class, or even to be a *member* of the class that he is seeking to certify. It is troubling that Respondent has no answer to the information provided by DuBard demonstrating that Respondent mischaracterized his interest in the HEX tokens that are the subject of this litigation, to conceal the fact that he is not even a member of the class he purports to represent. Absent intervention, DuBard and other potential class members will be unable to scrutinize Respondent's fitness to serve as their representative, and the circuit court will be left to determine class certification after hearing only from Respondent and his counsel—parties with a vested interest in the outcome of that determination. (*See* Appellant's Initial Br. at 25–26.)

This Court recognizes an "obvious lack of adequate representation" where all existing parties are adverse or where the absentee's interests are not represented at all. *Horry Cnty. State Bank*, 361 S.C. at 509, 604 S.E.2d at 726. Respondent seeks a declaration that HEX is a security; DuBard seeks to oppose that declaration and to challenge certification. With the Defendant in default, no appearing party advances DuBard's position. The burden to show inadequate representation is minimal—DuBard "need only show that the representation of his interests 'may be' inadequate." *DeBordieu Colony*, 442 S.C. at 291, 898 S.E.2d at 182. DuBard has more than satisfied this minimal burden, and the circuit court erred by finding adequate representation.

CONCLUSION

For the foregoing reasons and those in DuBard's initial brief, this Court should reverse the Order of the circuit court denying DuBard's Motion to Intervene.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Merritt G. Abney*

Merritt G. Abney (SC Bar No. 71893)
E-Mail: merritt.abney@nelsonmullins.com
Ashley N. Hawkins (SC Bar No. 104662)
E-Mail: ashley.hawkins@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Counsel for Appellant/Proposed Intervenor Benjamin DuBard

Charleston, South Carolina
June 5, 2026