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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 Janes Schueler, A/K/A “Richard Heart,” Defendant,

Benjamin DuBard.....Proposed Intervenor/Appellant

PROPOSED INTERVENOR/APPELLANT’S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in denying DuBard, a South Carolina-based member of the purported class, leave to intervene as a matter of right under Rule 24(a), where Plaintiff seeks the opposite outcome from DuBard regarding the issues for which DuBard sought to intervene?
- II. Did the circuit court err in denying DuBard permissive intervention under Rule 24(b)?

STATEMENT OF THE CASE

This appeal arises from the circuit court’s denial of Benjamin DuBard’s (“DuBard”) motion to intervene (“Motion”).

Plaintiff Noah Veon filed this purported class action, under the pseudonym “John Doe,” on September 21, 2022. The Complaint relates to “HEX,” a software program comprising a digital token that runs on a cryptographically secured, decentralized network of computers known as the Ethereum blockchain. (Compl. ¶ 2, R. p. 0044.) Plaintiff alleges that HEX “offers investors profit through the use of a ‘smart contract’—essentially, a computer program—that operates on the internet.” (*Id.*, R. p. 0044.) Plaintiff requests a declaratory judgment that “the HEX investment smart contract is a security within the meaning of the Securities Act of 1933 and the South Carolina Uniform Securities Act of 2005.” (*Id.* ¶ 100, R. p. 0067.) Plaintiff also asserts that the sale of HEX violated those state and federal securities laws. (*Id.* ¶ 108, 115, R. pp. 0068-0070.) Plaintiff purports to represent a class consisting of “all individuals or entities who purchased HEX tokens within the statute of limitations.” (*Id.* ¶ 91, R. p. 0065.)

The sole defendant in this action is Richard James Schueler (“Schueler” or “Defendant”). Plaintiff alleges that Schueler created and promoted the sale of HEX. (*Id.* ¶ 1, R. p. 0044.) Alleging that Schueler is a citizen of the United States living abroad, Plaintiff purported to serve him via

social media pursuant to Rule 4.1(a)(3) of the South Carolina Rules of Civil Procedure. (Mem. Supp. Ex Parte Mot. To Approve Service by Other Means, R. pp. 0077-0088.) On October 24, 2022, the circuit court granted Plaintiff's *ex parte* motion to serve Schueler via Twitter (now known as "X"), Telegram and email. (Order Granting Mot. for Service by Other Means, R. pp. 0001-0006.) On November 15, 2022, the circuit court placed Schueler in default for failure to answer the Complaint. (Entry of Default, R. pp. 0007-0008.)

On January 18, 2023, the circuit court designated the case complex and assigned it to Judge Michael E. Nettles.¹ (Complex Case Order, R. pp. 0009-0010.)

On August 4, 2023, a third party, Schueler's mother, filed a Motion for Protective Order in her capacity as a third-party subpoena recipient. Among other things, she provided evidence demonstrating that Plaintiff's attempts at alternative service were defective, including because (1) Plaintiff did not create a public post on Twitter as ordered but instead created a "semi-private" post not reasonably calculated to provide notice; (2) Plaintiff's posts in a Telegram chat room did not attach the Complaint or any of the other documents to be served; (3) Plaintiff's own exhibits showed that his private Telegram messages were not received by Schueler; and (4) Plaintiff did not effect service on an e-mail address with any indicia of reliability or ownership by Schueler. (Aug. 4, 2023 Mem. Supp. Mot. for Protective Order, at 22-30, R. pp. 0146-0154.) This same motion also argued that service was defective as a legal matter pursuant to the binding obligations of the Hague Service Convention, a treaty of which the United States is a signatory. (*Id.* at 18-22, R. pp. 0142-0146.) The circuit court denied this motion and upheld Plaintiff's alternative service with minimal analysis of the demonstrated defects. (Oct. 18. 2023 Order Denying Mot. For

¹ Judge Nettles retired from the bench effective December 31, 2025. As of this filing a new judge had not yet been assigned this action.

Protective Order, R. pp. 0011-0018.) However, the lower court did require Plaintiff to reveal his identity. (*Id.*, R. p. 0017.)

On October 18, 2023, Plaintiff amended the caption to identify himself for the first time as the plaintiff in this action. (Notice of Am. Caption, R. p. 0072.)

On May 10, 2024, with Schueler still in default, Plaintiff filed a motion to certify the following class:

All individuals or entities that purchased HEX while located in the United States or its territories at any time between 12:00 AM EST September 21, 2021 and May 10, 2024 and have suffered a financial loss in excess of one hundred dollars while either (a) retaining the HEX, or (b) selling the HEX at a loss.

(Mot. for Class Cert., R. p. 0218.) Plaintiff also sought an order naming himself as class representative and his attorneys in this action as class counsel. (*Id.*)

On June 24, 2024, Benjamin DuBard filed the Motion that is the subject of this appeal. DuBard is a South Carolina resident who, like Plaintiff, owns HEX tokens. (Mot. to Intervene, R. pp. 0237-0244.) Because DuBard purchased the tokens within three years before this action commenced, he is a member of the purported class. (*Id.*) However, DuBard opposes Plaintiff's efforts to have the circuit court declare HEX a security and seeks to ensure that Plaintiff's expansive and erroneous view of the federal and state securities laws does not improperly interfere with the rights, financial interests, and legal activities of HEX owners like himself. (*Id.*) Moreover, DuBard asserts that a determination by the circuit court that HEX is a security would adversely impact the value of his financial position in HEX tokens and have a negative impact on him and on thousands of other owners of HEX tokens. (*Id.*) Because DuBard and Plaintiff have opposing views, and the only defendant, Schueler, is in default, no existing party to this litigation represents DuBard's interest in the outcome of this case. (*Id.*)

When DuBard filed his Motion, Plaintiff's motion for class certification was scheduled to be heard, along with four additional motions, by the circuit court on June 26, 2024.² Having appeared for the first time on this action on the day before, DuBard moved for a continuance until after August 1, 2024, only of the hearing on the motion for class certification to allow his attorneys time to prepare a response in opposition to that motion before the hearing. (Mot. for Continuance, R. p. 0245.)

On June 25, 2024, the scheduled hearing went forward on certain discovery motions. After hearing argument related to DuBard's motion to intervene and for a continuance of the motion to certify the class, the circuit court determined that DuBard's motion to intervene was not ripe, having been filed only the day before, and the court granted DuBard's motion for a continuance of the motion for class certification over Plaintiff's objection. (Order Granting Continuance, R. p. 0019-0020.) The court explained 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. p. 0449, lines 17-19.)

On June 6, 2025, while his motion to intervene was pending, DuBard filed a proposed memorandum in opposition to class certification. (June 6, 2025 Memo in Opp. to Class Cert., R. pp. 0270-0288.) DuBard filed this opposition in recognition of the fact that, with Defendant in default and his intervention still pending, there was nobody else to challenge Plaintiff's erroneous legal and factual arguments in support of class certification or to otherwise provide the perspective

² The pending motions included Plaintiff's motion for class certification, Plaintiff's motion for approval of a non-resident subpoena on Massachusetts resident, Caitlin A. Miranda, and two motions filed by non-party Lorraine Schueler for reconsideration and relief from the circuit court's October 18, 2023 Order denying Ms. Schueler's motion for a protective order. (See Docket, R. 0579, 0581.)

of DuBard and other affected class members who opposed class certification and Plaintiff's objective to classify HEX tokens as a security.

On June 10, 2025, the circuit court held a hearing on DuBard's motion to intervene. After the hearing, on July 23, 2025, the court issued a written order denying the motion (the "Order"). (Order, R. pp. 0027-0037.) The circuit court concluded that DuBard failed to satisfy the requirements for intervention as of right under Rule 24(a) and declined to exercise its discretion to allow DuBard to intervene under Rule 24(b).

DuBard filed a motion to alter or amend pursuant to Rule 59(e), SCRCF, on August 1, 2025. (Mot. to Alter or Am., R. pp. 0309-0331.) On December 9, 2025, the court issued a Form 4 order denying DuBard's motion to alter or amend, and, on December 17, 2025, issued an amended order to correct a typo referring to DuBard as a "defendant" rather than a proposed intervenor. (12/17/25 Am. Order Denying Motion to Alter or Am., R. pp. 0041-0043.)

DuBard timely filed a notice of appeal on December 18, 2025.

STANDARD OF REVIEW

When reviewing the denial of a motion to intervene pursuant to Rule 24, SCRCF, appellate courts apply an abuse of discretion standard. *Ex parte DeBordieu Colony Cmty. Ass'n, Inc.*, 442 S.C. 285, 290, 898 S.E.2d 179, 181 (Ct. App. 2024); *In re Horry Cnty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (citing *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). "As precedent notes, the term 'abuse of discretion' is 'an old unfortunate statement' and is really just shorthand for describing that 'the appellate [c]ourt is simply of the opinion that there was commission of an error of law in the circumstances.'" *DeBordieu Colony*, 442 S.C. at 290, 898 S.E.2d at 181 (citing *State v. Wallace*, 440 S.C. 537, 541 n.2, 892 S.E.2d 310, 312 n.2 (2023)). "An error of law includes failing to

consider all of the factors relevant to a particular decision.” *Id.* (citing *Burke v. Republic Parking System, Inc.*, 421 S.C. 553, 560-61, 808 S.E.2d 626, 629 (Ct. App. 2017) (finding the circuit court’s failure to weigh all relevant factors in its order was an abuse of discretion)).

ARGUMENT

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. *In re Horry County State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (citing *Black’s Law Dictionary* 826 (7th ed. 1999)). Intervention may be of right or permissive. Intervention of right is governed by Rule 24(a), SCRCP, and permissive intervention is governed by Rule 24(b), both of which are identical to the federal rules.³

The South Carolina Supreme Court has taken a “broad view of the Rule 24(a)(2) standard, explaining: ‘We interpret 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).’” *Debordieu Colony*, 442 S.C. at 290, 898 S.E.2d at 181-182 (quoting *Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)) (emphasis added).

³ Because Rule 24 is substantially the same as Fed. R. Civ. P. 24, this Court may consider federal case law interpreting the federal rule in deciding issues under the South Carolina version of the rule. *Zurich Am. Ins. Co. of Illinois v. Palmetto Contract Servs., Inc.*, 434 S.C. 104, 110, 862 S.E.2d 714, 717 (Ct. App. 2021).

I. THE CIRCUIT COURT ERRED IN DENYING DUBARD LEAVE TO INTERVENE AS OF RIGHT UNDER RULE 24(a).

A person seeking to intervene as of right under Rule 24(a) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *Horry County State Bank*, 361 S.C. at 507, 604 S.E.2d at 725. A proposed intervenor who meets these criteria “**shall** be permitted to intervene.” Rule 24(a), SCRPC (emphasis added). Thus, allowing a qualified applicant to intervene as of right is mandatory, and denying a qualifying motion to intervene constitutes a “reversible error.” See *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986); see also *Loyd v. Ala. Dep’t of Corr.*, 176 F.3d 1336, 1340-41 (11th Cir. 1999) (“Once a party establishes all prerequisites to intervention, **the trial court has no discretion to deny the intervention.**”) (emphasis added).

In addition, the United States Supreme Court has recognized that “[m]embers of a class **have a right to intervene** if their interests are not adequately represented by existing parties.” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013) (quoting 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16:7, at 154 (4th ed. 2002)) (emphasis added).

DuBard met the applicable criteria of Rule 24(a), SCRPC. In erroneously denying DuBard’s motion to intervene, the circuit court made several legal errors warranting reversal by this Court.

A. The circuit court erred in concluding that DuBard’s motion to intervene was untimely.

In determining that DuBard’s motion to intervene was untimely, the circuit court erred in several respects. First, the court incorrectly applied an overly stringent standard for determining

whether DuBard's application was timely. The court also erroneously applied each factor in its analysis.

- i. *The circuit court erroneously applied an overly demanding legal standard to whether DuBard's motion was timely.*

The circuit court applied the following four-part test to determine whether DuBard's motion to intervene was timely: "(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial." *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). (Order at 4–5, R. pp. 0030-0031.) However, the law is clear that these are mere factors to be considered, not a four-part test for which each element must be satisfied.

The circuit court misstated the law by ruling that the "failure to satisfy any one of the four requirements precludes intervention." (Order at 5; R. p. 0031 (quoting *Ex parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993)). That is not the law; it is an error resulting from Plaintiff's misuse of the quotation from *Ex parte Reichlyn* in its proposed order. That case, as well as the case that it in turn cites, makes clear that the "four requirements" in question are the ***four requirements for intervention as of right, not the four factors considered with respect to timeliness***. See *Ex parte Reichlyn*, 310 S.C. at 498, 427 S.E.2d at 663 (referencing the four-part test for intervention as of right: (1) timely application; (2) property interest; (3) interest in the proceedings; (4) inadequate representation by existing parties); *id.* at 500, 664 (declining to consider "the remaining factors required for intervention") (citing *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 62 (5th Cir. 1987) (also referencing the four-factor test for intervention as a matter of right). None of the authorities relied upon by the circuit court suggest that the intervenor must "satisfy" four timeliness factors. Consequently, the circuit court applied an erroneous and overly

stringent legal standard to DuBard's motion to intervene in direct violation of our Supreme Court's direction not to do so. *See Berkeley Electric Co-op., Inc.*, 302 S.C. at 189, 394 S.E.2d at 714 ("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).***") (emphasis added).

The circuit court also erred in its application of each factor in the timeliness analysis. When properly evaluated, each factor supports a determination that DuBard's Motion was timely.

- ii. *The circuit court erred in measuring DuBard's motion to intervene from commencement of the action rather than when DuBard learned of the need to protect his interest through intervention.*

The lower court erred by finding the Motion untimely on the ground that DuBard moved to intervene twenty months after this action was commenced. (Order at 5–6, R. pp. 0031-0032.) The relevant passage of time cannot be measured from when the action commenced, or even from when DuBard learned about the lawsuit. Rather, it must be measured as the "time that has passed since the applicant 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 interest in the suit is to challenge Plaintiff's attempt to certify an inappropriate class of HEX owners and to oppose Plaintiff's request for a declaratory judgment that HEX is a security. Plaintiff did not move to certify a class until May 10, 2024, and DuBard intervened a mere six weeks later. (Docket, R. pp. 0578-0579).

Furthermore, DuBard alleged in the Motion that he "was ***unaware until the week of June 17, 2024***, that Plaintiff sought a declaratory judgment that HEX is a security or that any procedure existed under which DuBard could become personally involved in the action." (Mot to Intervene at 3, R. p. 0239) (emphasis added). "After he became aware of these facts, DuBard promptly retained counsel and filed this motion less than a week later." (*Id.*). The circuit court erred in disregarding these allegations as a factual matter, all of which must be accepted as true for purposes

of DuBard’s Motion. *Nat’l Park Conservation Assn. v. U.S. E.P.A.*, 759 F.3d 969, 973 (8th Cir. 2014) (“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. This standard is identical to the standard applied to a typical motion to dismiss for lack of jurisdiction.”)).

Instead of focusing on when DuBard became aware of the need to protect his interest in the litigation, the lower court erroneously focused on DuBard’s general awareness that this lawsuit *existed* sometime in late 2022. (Order at 6, R. p. 0032.) The court also engaged in impermissible fact-finding, determining that DuBard’s allegations were “contradicted” by an online bulletin that DuBard “reposted” on September 2, 2023, nearly a year after Plaintiff’s case was filed. (Order at 5, R. p. 0031.) It is undisputed that DuBard did not author or otherwise substantively engage with the bulletin, but merely “reposted” another user’s post about it on the platform “X” (formerly Twitter). (Opp. to Mot. to Intervene at 8, R. p. 0296.) Even assuming—without conceding—that DuBard read and understood every comment in the bulletin, it states only that the Plaintiff “seeks money and various other action by the Court.” (*Id.*) The bulletin says nothing about requesting a declaratory judgment that HEX is a security. Thus, even if DuBard had read and understood the entire bulletin before “reposting” another user’s post about it, as the Order incorrectly assumed, none of that language would have informed him of *his interest in the suit* in that Plaintiff was seeking a declaratory judgment that HEX is a security, which is the outcome DuBard seeks to prevent through intervention.

Furthermore, numerous authorities make clear that it is an error to rely on “general awareness of the case,” as the lower court did here. *See United States ex rel Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023) (reversing a denial of intervention based on a

delay of “approximately 1.5 to 2.5 years” from commencement of litigation). Rather, the lapse of time must be “measured from the moment that the prospective intervenor knew that his interests would ‘no longer be protected.’” *Id.* See also *Legal Aid Soc. of Alameda Co. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980) (determining timeliness based on “when the intervenor became aware that its interest no longer would be protected adequately by the parties.”). This requirement makes good sense, because before an intervenor becomes aware that his interests are not being adequately represented, he would have no valid basis on which to seek intervention. See *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1085 (10th Cir. 2017) (last-minute intervention did not constitute undue delay where the movant had no previous reason to believe interests were being inadequately represented). DuBard moved to intervene within mere *days* after becoming aware that his interests were in jeopardy. Finding delay in those circumstances constitutes clear error.

iii. *The circuit court erred by concluding that the procedural posture of the litigation when DuBard moved to intervene weighed against permitting intervention.*

The circuit court concluded that DuBard’s petition was untimely because “significant proceedings have taken place in this case.” (Order at 6, R. p. 0032.) To the contrary, *nothing* substantive in this case had occurred when DuBard sought to intervene. The circuit court relied primarily on the fact that Plaintiff took two depositions and that “numerous motions have been filed seeking to prevent the Plaintiff from taking additional discovery.” (Order at 6, R. p. 0032.) When DuBard moved to intervene, however, the circuit court had not yet heard most of these motions.⁴

⁴ Several discovery motions were scheduled to be heard with DuBard’s Motion on June 10, 2025, but the circuit court *sua sponte* instructed the parties at the hearing that the court would hear only the Motion to Intervene and would hear the remaining discovery motions and Plaintiff’s motion for class certification at a later date. (6/10/2025 Hr’g Tr., R. pp. 0462-0463).

More importantly, none of the discovery or discovery motions had any bearing on DuBard or his intervention concerning whether HEX is a security. Timeliness must be assessed in relation to the ***purpose of the movant's intervention***. In fact, the United States Supreme Court has held that intervention is timely where a “later motion to intervene in [the] case [is] for a wholly different purpose” than the events in the litigation that have already transpired. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392, 97 S. Ct. 2464, 2468 (1977) (affirming intervention to allow appellate challenge to class certification ruling despite not intervening for “five years” from filing of the litigation); *see also Hill v. W. Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982) (reversing a denial of permissive intervention to intervenors who waited until after an adverse ruling on a petition for writ of certiorari, concluding the intervenors “were under no obligation to seek intervention until the Supreme Court denied plaintiff’s petition”).

Here, as set forth above, the circuit court improperly relied upon a handful of actions primarily involving non-party discovery that was unrelated entirely to the purpose of DuBard’s motion to intervene in a class-wide action determining whether HEX is a security. Plaintiff has made no attempt to demonstrate that the depositions and discovery disputes at issue thus far had any bearing on that issue. Moreover, no class had yet been certified when DuBard sought to intervene, and, crucially, neither Plaintiff nor the lower court has yet *begun* to address the primary issue for which DuBard requests to intervene—namely, whether or not HEX is a security. Concluding that DuBard’s Motion was untimely under such circumstances constituted clear error. As discussed further below, this error is compounded by the fact that nobody other than DuBard is available to address this critical issue. Because the Defendant is in default—potentially as a result of defective service—no party is present to protect the rights of affected class members, such as DuBard, who disagree with Plaintiff’s contention that HEX is a security. Thus, not only is this

crucial issue as-yet unaddressed in this litigation, but absent intervention, there will be no one else to address it.

iv. *The circuit court erred in finding DuBard's intervention would prejudice Plaintiff.*

“The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.” 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1916 (3rd ed. 2008); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (“In fact, [prejudice] may well be the *only* significant consideration when the proposed intervenor seeks intervention of right.”) (emphasis in original).

The circuit court erred by finding that DuBard's intervention would prejudice Plaintiff. (Order at 6–7, R. pp. 0032-0033.) First, the circuit court incorrectly, and without any factual basis, ruled that DuBard's Motion to Intervene had *already* prejudiced Plaintiff by “delaying this action for nearly one year.” (Order at 6, R. p. 0032.) DuBard requested *one* continuance of a hearing on *one* motion—Plaintiff's motion for class certification—on the basis that his counsel was retained only two days before and needed additional time to get up to speed. (6/24/2024 Mot. for Continuance at 1, R. p. 0245.) Moreover, DuBard requested a continuance of that motion for only 36 days. (*Id.*) (requesting an “order continuing the hearing on Plaintiff's motion for class certification, which is currently scheduled for June 25, 2024, at 10am, to a motions term not before August 1, 2024”). Despite DuBard's motion for a continuance, all counsel still appeared for that hearing, at which other motions were heard and decided. (6/25/2024 Hr'g. Tran., R. p. 0426.) Importantly, in granting DuBard's motion for a continuance, the Court correctly found that the request would prejudice no one, explaining 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. p. 0449, lines 17-19.)

DuBard did not request any further continuances and cannot be responsible for the other delays in this case, which 1) occurred before DuBard sought to intervene (September 21, 2022 to June 24, 2024) (R. pp. 0578-0585); 2) resulted from an appeal by non-party subpoena recipient Lorraine Schueler (July 26, 2024 to November 18, 2024) (Docket, R. p. 0577); 3) or were delays due to scheduling difficulties between the Court and counsel other than DuBard’s.⁵ *See* (Docket, R. pp. 0572-0576.) The circuit court’s finding that DuBard was somehow responsible for a one-year delay in this case by attempting to intervene is unsupported by the record and unfair to DuBard.

Even worse, the court accused DuBard, without basis, of filing his Motion to Intervene with the “clear intent . . . to prejudice the original parties to the case.” (Order at 6, R. p. 0032.) Nothing in the record supports that determination either. DuBard seeks only to protect his interest and prevent the circuit court from erroneously deciding that HEX is a security simply because it has heard only one side of the argument.

DuBard also seeks to protect his interest in ensuring that Plaintiff is not allowed to certify an improper class consisting of DuBard and thousands of other individuals that Plaintiff does not adequately represent, simply because no other party has appeared in the case to challenge Plaintiff’s adequacy. The Order erroneously states that DuBard’s arguments are prejudicial simply because DuBard “seeks to file an answer seeking to litigate the factual and legal allegations of the complaint” and “to defeat class certification—not to promote it.” (Order at 6-7, R. pp. 0032-0033.)

⁵ Additionally, Plaintiff has further caused delay by insisting on the circuit court below hearing and resolving pending out-of-county discovery motions, while the same motions have repeatedly appeared on out-of-county motions rosters.

But that is not prejudice. DuBard opposed certification of the proposed class because Plaintiff is not fit to represent it and the claims Plaintiff is pursuing are legally flawed and contrary to DuBard's interests. It is no prejudice to Plaintiff to have to defend his legal positions on the merits, and his adequacy as a class representative, particularly where he seeks declaratory and class relief that will affect DuBard and thousands of others, as explained more fully below—all without the presence of any adverse party. The circuit court erred in finding that permitting DuBard's intervention would prejudice anyone. Indeed, *prohibiting* DuBard from intervening, and thus allowing a proceeding affecting him and thousands of other class members without any litigant to represent their interests or otherwise test Plaintiff's claims, will greatly prejudice DuBard and other class members who oppose Plaintiff's position and ultimately cause further delay.

B. The circuit court erred by concluding that DuBard lacked a sufficient interest in the outcome of the litigation to warrant intervention.

In addition to erroneously finding DuBard's Motion untimely, the lower court erred by concluding that DuBard's interest in the outcome of this action is insufficient to justify intervention. The circuit court expressly recognized that DuBard purchased HEX tokens within three years before Plaintiff filed this action and that DuBard is a member of the very class that Plaintiff seeks to represent. (Order at 2, 8, R. pp. 0028, 0034.) DuBard, therefore, has just as much of an interest in the case as Plaintiff does—they both own HEX and have a clear interest in whether HEX is deemed to be a security under state and federal securities laws. The only difference between the two is that DuBard believes and alleged that Plaintiff's action and his legally erroneous theories will harm DuBard and thousands of other potential class members and owners of HEX tokens.

DuBard also believes that Plaintiff, having filed this action under a pseudonym because of his unpopularity among the online community of HEX owners, having misrepresented critical facts

and legal issues concerning Plaintiff’s investment in HEX, and having taken positions detrimental to HEX owners, is an inadequate representative of the class. (June 6, 2025 Memo in Opp. to Class Cert., R. pp. 0278-0279, at 9-10.) In that regard, DuBard notes that Plaintiff’s purchase of only about \$1,800 worth of HEX tokens (Compl. ¶ 27, R. p. 0048), combined with his willingness to maintain inaccurate allegations to avoid legal requirements that may defeat class certification, raises serious questions as to whether Plaintiff represents the interests of the class. These disputed issues need not be litigated yet in this appeal, but they demonstrate that, by his ownership of HEX and his legal interests relating thereto, DuBard plainly alleged a sufficient interest in the outcome of this case to warrant intervention. The circuit court erred by concluding otherwise.

The circuit court also improperly concluded that DuBard sought to intervene merely to “affect legal precedent.” (Order at 7, R. p. 0033.) That was not the case. DuBard sought to avoid a declaratory judgment that HEX—*property that he owns*—is subject to state and federal securities laws. Such a declaration would severely and negatively impact the value of HEX and make it more difficult, complicated, and legally risky to trade. The contrary declaration that Plaintiff now seeks would impact DuBard and other members of the purported class by declaring that assets they own are subject to federal and state securities law, thereby placing a cloud of legal uncertainty over their assets and their ability to transact in them, irrespective of whether they are personally bound by the judgment. Intervention is therefore appropriate to allow DuBard to protect those interests. *See Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (holding that where “declaratory judgment action would impair or impede the [proposed intervenors’] ability to protect their interest,” intervenors were “entitled to intervention as of right”).

The Order erroneously cited *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989), to conclude that DuBard’s interest in how this litigation affects his HEX holdings is too remote to

warrant intervention. (Order at 8, R. p. 0034.) In *Gould*, a group of Corporation's stockholders alleged that Corporation violated federal securities laws and state common law. The parties ultimately agreed upon a settlement without objection from any class member, but a non-class member, a bondholder of the Corporation, filed an "opposition." *Id.* at 283. Later, after the bondholder and others filed their own lawsuit, they moved to intervene in the stockholders' suit. *Id.* The primary basis for the motion to intervene was that payment of the settlement would reduce the assets available to the bondholder if they prevailed in the second lawsuit. *Id.* at 285. In affirming the district court's denial of intervention, the Fourth Circuit noted that "[m]erely claiming a general interest in [Corporation's] assets based on a speculative recovery in an unrelated civil action does not, however, satisfy Rule 24's requirement that the claim be 'relating to the property or transaction which is the subject of the action.'" *Id.* In other words, a mere *potential* judgment creditor of a corporation lacks a sufficient interest to intervene in litigation involving the company. *Id.*

Gould is plainly inapposite here. DuBard's interest is not that of a judgment creditor or even remotely similar. Unlike the bondholder in *Gould*, who was not a member of the class certified in the case in which the bondholder sought to intervene and who was not an owner of the company's stock, *DuBard is a member of the purported class and is an owner of HEX*, and therefore he has a direct and substantial interest in Plaintiff's request for a declaratory judgment that HEX is a security.

Indeed, despite the Order's ruling to the contrary, courts in stockholder class actions *do* permit stockholder class members to intervene to protect their interests where, as here, those interests are not adequately protected by an existing party. For instance, the Seventh Circuit reversed the denial of a stockholder's motion to intervene where the stockholder was a class

member and alleged that class counsel was not representing his interests. *Alcaarez v. Akorn, Inc.*, 99 F.4th 368, 375 (7th Cir. 2024). The court permitted intervention because the stockholder had moved to intervene soon after learning about the mootness fee that he challenged, concluding that “as an investor in [the company] whose shares’ value was affected . . . [the stockholder] has a claim in common with the main action; how could it be otherwise?” *Id.* See also *Gomes v. Eventbrite, Inc.*, No. 5:19-cv-02019-EJD, 2020 U.S. Dist. LEXIS 203108, at *12 (N.D. Cal. Oct. 30, 2020) (permitting intervention by stockholders in another action where class counsel inadequately represented stockholders’ legal interests). The same result must follow here.

DuBard also submitted meritorious arguments for why HEX is not a security. In the unusual circumstances of this case—where there is no appearing defendant to make such arguments—DuBard’s intervention is the only means by which the lower court can consider these arguments. Plaintiff’s Complaint acknowledges that the test applied by the Supreme Court in *SEC v. W.J. Howey Co.* applies here for purposes of determining whether HEX tokens are “investment contracts” and therefore securities under state and federal securities laws. (See Compl. ¶¶ 52, 56, 59, 103, R. pp. 54-57, 67.) In *Howey*, the Court held that an “investment contract” is a “contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” 328 U.S. at 298–99.

In decisions following *Howey*, courts have affirmed that for a contract or agreement to create an expectation of profit as required by *Howey*, one party must have a continuing obligation to another to generate profits. See, e.g., *SEC v. Edwards*, 540 U.S. 389, 397 (2004); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 239–40 (2d Cir. 1985) (finding assets were investment contracts where investors relied on the skill, financial stability, and ongoing monitoring of their wealth manager); *SEC v. Aqua-Sonic Products Corp.*,

687 F.2d 577, 578 (2d Cir. 1982) (sales license was an investment contract because it created ongoing sales obligations). Conversely, where (as is the case here) no continued obligation is owed from one party to another, courts have rejected assertions that an investment contract exists. *See, e.g., Revak v. SEC Realty Corp.*, 18 F.3d 81 (2d Cir. 1994) (condominium purchase contracts, without more, were not investment contracts); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 11 (1st Cir. 1993) (no investment contract without a showing that any “obligated person or entity was promising the buyers to build or provide anything”).

DuBard has an interest in advancing the argument that HEX is not a security under the *Howey* test because it does carry the expectation of profits derived from the ongoing efforts of others or any continuing obligation necessary for the formation of an “investment contract.” For example, Plaintiff alleges that the HEX software allowed individuals to use their Ethereum tokens to create HEX tokens, (Compl. ¶¶ 25-28, R. pp. 0048-0049), and to “stake” their HEX tokens to programmatically create additional HEX tokens. (*Id.* ¶ 4, R. pp. 0044-0045.) DuBard contends, however, that those functions were built into the HEX software from the start and required no further input from anyone but those who chose to use it, thereby requiring no ongoing managerial efforts, as required by *Howey*. The Complaint does not allege otherwise. Accordingly, DuBard contends that HEX tokens are a simple digital asset with no intended or promised functionality beyond its software code, like other cryptocurrencies that have been treated as non-security commodities.

Further, without the possibility of continued efforts through a common enterprise, there can be no investment contract. As the Complaint concedes, the HEX software was published on an existing blockchain network, Ethereum. (Compl. ¶ 2, R. pp. 0044.). Many software programs and tokens exist on the Ethereum network, and “smart contract tokens can be created by anyone

with a basic understanding of Ethereum . . .” See *Risley v. Universal Navigation Inc.*, 690 F. Supp. 3d 195, 203 (S.D.N.Y. 2023). The Complaint does not allege that Schueler’s efforts were required to maintain or develop the HEX software.

Moreover, the United States District Court for the Eastern District of New York recently dismissed similar claims related to HEX, finding that the Securities and Exchange Commission (“SEC”) failed to state a claim against Schueler for violation of federal securities laws. *SEC v. Schueler, et. al.*, Case No. 1:23-cv-05749, Doc No. 57, 850-880 (Feb. 28, 2025, E.D.N.Y.). In addition to ruling that the SEC failed to establish personal jurisdiction in federal court over Schueler, the district court also held that the SEC failed to sufficiently allege that the HEX offering occurred within the United States, a necessary requirement for application of federal securities laws. *Id.* at 22. The SEC neither appealed nor amended its complaint. The dismissal is final and with prejudice. DuBard contends that dismissal of Plaintiff’s case is warranted for the same reasons, and that the circuit court erred by not permitting him to assert these positions.

Moreover, recent developments in SEC guidance have further undermined the viability of Plaintiff’s theory that HEX tokens constitute securities. As noted above, the Complaint relies heavily on the concept that individuals can “stake” HEX tokens to generate additional HEX tokens. (*Id.* ¶ 4, R. pp. 0044-0045.) On May 29, 2025, the SEC’s Division of Corporation Finance released guidance that certain digital asset staking activities were “not securities transactions within the scope of the federal securities laws.”⁶ Absent intervention, no party will present these developments in digital asset law and regulation to ensure that the circuit court is fully informed in its determinations.

⁶ See Statement of SEC Commissioner Hester M. Peirce, *Providing Security is not a “Security” – Division of Corporation Finance’s Statement on Protocol Staking* (May 29, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-protocol-staking-052925>.

DuBard also attempted to raise important issues to the circuit court regarding the scope of the class that implicate his interests as an owner of HEX tokens, including whether secondary market purchases from persons other than the Defendant may be included within the class definition based on important differences in how the federal securities laws treat primary offerings by a seller, as opposed to secondary market trades. (See 6/6/2025 Class Cert. Opp’n at 10, R. p. 0279.) These distinctions differentiate the potential claims of purported class members that directly purchased HEX tokens during its initial offering period as opposed to those that purchased HEX tokens on a secondary market, as DuBard asserts Plaintiff did here. For instance, DuBard points out that the SEC alleged only that the initial offering of HEX tokens was a security, while the Plaintiff here suggests that the tokens themselves are securities and include secondary market sales within the class definition. Plaintiff’s position that HEX tokens themselves constitute securities is contrary to reasoned opinions issued by federal courts analyzing these issues in depth. *See, e.g., SEC v. Binance Holdings Ltd.*, 738 F. Supp. 3d 20, 44 (D.D.C. 2024) (criticizing argument that cryptocurrency token is “the embodiment of the investment contract” as opposed to the “subject of the investment contract”); *SEC v. Coinbase, Inc.*, 726 F. Supp. 3d 260, 281 (S.D.N.Y. 2024) (noting that “the SEC does not appear to contest that tokens, in and of themselves, are not securities”).

DuBard also raises issues concerning whether the class should be limited to members within South Carolina under the U.S. Supreme Court’s ruling in *Bristol-Myers Squibb v. Superior Court of California*, 582 U.S. 255 (2017). (6/6/2025 Class Cert. Opp’n at 16–17, R. pp. 0285–0286.) Such a distinction is of critical importance, as it will determine whether the circuit court’s administration of the class action and resulting effect of any rulings should be confined only to South Carolina residents, or whether it may properly administer a sweeping, nationwide securities

class action litigation potentially binding class members from across the country, despite the only nexus to South Carolina being that two identified class members—Plaintiff and DuBard—reside there. Intervention should be allowed so that DuBard can present the important policy implications that this question presents in light of the Supreme Court’s guidance in *Bristol-Myers Squibb*, as well as the policy goals embodied by South Carolina’s door-closing statute. *See* S.C Code Ann. § 15-5-150(2).

These issues give rise to interests distinct from those represented by the Plaintiff. As the circuit court implicitly recognized in a hearing, without DuBard’s intervention, these issues impacting DuBard and other class members will not receive the benefit of full briefing, particularly because Defendant is in default. (6/25/2024 Hr’g. Tr. at 24, R. p. 0449, lines 17-19.) (“I would like to hear what [DuBard’s] got to say about whether or not [this case] should be certified as a class.”). Thus, the circuit court erred by doing an about-face and holding that DuBard lacked sufficient interest in this case to intervene.

C. The circuit court erred in concluding that denial of intervention would not impair or impede DuBard’s ability to protect his interest.

This Court has recognized “[t]he ‘impairment’ factor is not designed to be a difficult standard.” *DeBordieu Colony*, 442 S.C. at 291, 898 S.E.2d at 182. “[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.” *Id.*

As previously discussed, a declaration from the circuit court that HEX is a security will adversely affect the value of DuBard’s HEX tokens, regardless of whether DuBard is personally bound by this Court’s judgment. (Sec. I.B. *supra*). Moreover, the only defendant is in default, so no party (other than Plaintiff) has appeared in this action to address whether HEX is a security, which transactions involving HEX can properly be brought within the class action framework, and

whether Plaintiff and his counsel can fairly and adequately represent a nationwide class of affected individuals. By denying DuBard's motion to intervene, the circuit court ensured that it will hear only one side of the argument on the significant legal issues of state and federal securities law in this case that will affect DuBard as well as other absent class members from around the country. It has also ensured that it will only hear from Plaintiff and his counsel on the critically important issue of their adequacy to represent such a class—a matter in which they plainly have a vested interest. Therefore, denial of intervention would impair DuBard's ability to protect his interests, and the circuit court's conclusion otherwise was error.

D. The circuit court erred by finding that DuBard's interests are adequately represented by Plaintiff.

The circuit court also erred by finding that DuBard's interests are adequately represented in this litigation. To determine whether the proposed intervenors' interest is adequately represented, the court must consider “(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.” *Id.* This factor presents a “minimal” burden for DuBard because “***the applicant 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 (emphasis added). In fact, this Court has recognized that where, as in this case, “the interest of the absentee is not represented as all” or where “all existing parties are adverse to him,” the case presents “***an obvious lack of adequate representation***” warranting intervention. *Horry County State Bank*, 361 S.C. at 509, 604 S.E.2d at 726 (emphasis added).

The circuit court considered *none* of these factors in ruling without any legal basis that Plaintiff would adequately represent DuBard's interests. (See Order, R. pp. 0027-0036; Form 4

Order, R. pp. 0041-0043). Although the circuit court correctly recognized that class members typically have the right to intervene under Rule 24(a)⁷, the court erred by concluding that DuBard has no such right here because his interest is adequately represented by **Plaintiff**. (Order at 8, R. p. 0034) (“DuBard’s status as a putative class member does not give him a right of intervention unless ‘its interest is inadequately represented by other parties.’”). **But Plaintiff cannot possibly represent DuBard’s interest because Plaintiff and DuBard want exactly the opposite outcome.** Plaintiff seeks a declaration that HEX is a security; DuBard maintains that it is not. Plaintiff obviously does not represent DuBard’s interests.

The circuit court appears to have recognized this dichotomy but nevertheless concluded that Plaintiff is adequately representing what DuBard’s interest **should be**. (Order at 8, R. p. 0034) (“[D]espite the fact that DuBard may be entitled to significant compensation should the Plaintiff be successful in his case, DuBard wishes to argue against his interests by insisting the [Securities Act] does not apply. DuBard has shown no authority that permits an intervenor to assume a position contrary to his financial well-being in order to create the specter of ‘inadequate representation’”). But neither Plaintiff, nor the circuit court, can dictate to DuBard what his “interest” is, especially when the “interest” that the court finds to be overriding is an “entitlement” to a judgment against an absent defendant that, even if rendered, may or may not be collectible. The interest that DuBard seeks to protect by intervention is a finding that HEX is not a security.

⁷ Courts have noted the importance of the intervention mechanism to protect class members’ interests. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013) (“[M]embers of a class have a right to intervene if their interests are not adequately represented by existing parties.”) (quoting 5 A. Conte & H. Newberg, *Class Actions* § 16:7, p. 154 (4th ed. 2002)); *Smith v. SEECO, Inc.*, 865 F.3d 1021, 1022 (8th Cir. 2017) (noting that “a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court”) (quoting advisory notes to Fed. R. Civ. P. 24).

As explained above, DuBard has ample basis for maintaining that interest, including protecting the financial value of his HEX tokens and avoiding legal and logistical challenges that would result from such tokens erroneously being ruled as securities. Plainly, that interest is not adequately represented by a Plaintiff who seeks the *opposite* outcome. Indeed, given that Plaintiff only purchased about \$1,800 in HEX tokens (Compl. ¶ 27), it is not clear whether Plaintiff's desire to achieve the opposite outcome reflects his interest.

Case law makes clear that intervention is mandatory here. For instance, the Fourth Circuit held that it was "reversible error" to deny intervention as of right where the intervenor's arguments on the merits were opposed to those of the litigants, concluding that "the nature of [the litigant] and its conduct in this litigation to date indicate that [it] cannot adequately represent the interests of intervenors." See *Feller v. Brock*, 802 F.2d 722, 729, 730 (4th Cir. 1986). The Court found that the differences in their arguments, including legal authorities that "[o]nly the intervenors have drawn [to] the court's attention," made it impossible for the intervenors' interests to be adequately represented by the existing parties. *Id.* That is precisely the problem at hand. DuBard wishes to raise important arguments and authorities that Plaintiff has not only failed to raise, but that are directly opposed to Plaintiff's erroneous legal theories. There is no legal basis for concluding that DuBard's interests can be represented by Plaintiff in such a circumstance. The fact that Plaintiff so strenuously opposes DuBard's intervention proves that Plaintiff does not and cannot represent DuBard's interest.

Beyond the distinct legal interests and issues discussed above, DuBard also raises serious concerns regarding Plaintiff's and his counsel's adequacy to represent the class in light of the Complaint's mischaracterizations regarding Plaintiff's investment. Public blockchain records demonstrate that Plaintiff knowingly purchased HEX tokens on a secondary market exchange,

contrary to what he alleged in the Complaint. These facts place Plaintiff outside of any proper class definition and disqualify him from serving as a class representative. (*See* Class Cert. Opp’n at 9, R. p. 0278.) These facts also raise questions as to Plaintiff’s fitness to represent a nationwide class given his submission and maintenance of inaccurate allegations on a legally dispositive issue.

Absent intervention, DuBard and other potential class members will be unable to vindicate their significant interest in scrutinizing Plaintiff’s fitness to serve as their representative. Equally problematic, with no one to raise these issues, the circuit court will be left unable to determine whether Plaintiff has proposed a proper class and whether he and his counsel can adequately represent the interests of thousands of unnamed class members across the country. By failing to address this issue, the Order does not account for the substantial risk that Plaintiff’s factual misrepresentations and lack of standing as a class member render him an inadequate representative of the class.

The circuit court also erred in denying DuBard’s Motion based on what it characterized as “evidence suggest[ing that] DuBard has worked in concert with a third party to fund and file his appearance as an intervenor.” (Order at 8, R. p. 0034.) The lower court failed to explain how that suggestion has any bearing on the question of whether DuBard’s interests are adequately represented by the *Plaintiff* in this action. Moreover, as DuBard explained repeatedly below, there is a large community of HEX owners who are opposed to a ruling that HEX is a security. (6/10/25 Hr’g Tr., R. p. 0472, line 24-p. 0473, line 22.; R. p. 0475, line 23-p. 476, line 11.) Indeed, almost 40,000 HEX owners, many of whom may be members of the purported class, signed a petition asserting that HEX is not a security. (PulseChain Foundation Amicus Brief, filed in *SEC v. Schueler, et. al.*, Case No. 1:23-cv-05749 at Dkt. No. 37-1, R. 0517; PulseChain Hex Petition for Amicus Brief, <https://pulsepetition.org/>). That DuBard shares this interest with many members,

some of whom may wish to assist with his legal expenses, is no reason to deny him the right to intervene. Instead, the circuit court should have granted DuBard's Motion so that these voices can be heard and the court can receive the benefit of advocacy on both sides of the issue.

In addition, the Order erroneously adopted Plaintiff's unfortunate and unfounded accusation that, because DuBard sought assistance with payment of his legal fees, "it is another person's interest that DuBard seeks to promote." (Order at 8., R. p. 0034.) As part of its denial of the motion to intervene, the Order opined that "the purpose of intervention is to protect the interest of the intervenor, not the interest of some unknown person or entity on whose behalf the intervenor is act[ing]." (Order at 9, R. p. 0035.) This conclusion is an error of law because it improperly conflates a third person's decision to pay a party's legal fees with that party representing the third-person payor's legal interests rather than his own.

As Plaintiff admitted at the hearing on DuBard's Motion, "there's nothing wrong with a third-party raising money here." (6/10/2025 Hr'g. Tr. at 10:23, R. p. 0464, line 23.) Yet the Order erroneously assumed, without any basis, that a third party's assistance with legal fees compromises the ability of DuBard and his counsel to represent DuBard's own interests. DuBard's counsel will advocate for his interests regardless of who pays his legal fees. *See* S.C. R. Prof. Conduct 1.8(f)(3) (requiring "no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship"). The Order takes issue with the fact that the community fundraising was anonymous, but the lack of any identifiable person only *reinforces* the fact that DuBard and his counsel are representing DuBard's interests, not the unspecified interests of persons unknown to them.

The Order in effect concludes that DuBard cannot truly represent his own interests if he cannot pay his own legal fees. If that logic were adopted, however, then the same would be true of

Plaintiff, whose substantial legal work is doubtless being covered by his counsel on a contingency basis. By the same logic, Plaintiff would be serving the interests of his counsel in earning contingency fees, rather than Plaintiff's own interests or the interests of the class. Of course, this is not, and should not be, how a party's interests in litigation are determined.

What the Order should have considered is that DuBard has specifically and emphatically alleged that his interests diverge significantly from Plaintiff's. DuBard and thousands of other potential class members have voiced their disagreement with Plaintiff's harmful attempts to declare HEX a security. DuBard is unaware of *any* other putative class members who agree with Plaintiff's position, and Plaintiff has not come forward with any such member. In fact, DuBard concealed his identity, commencing this action under a pseudonym, because of the significant opposition to his claims among the community of HEX owners. By concluding that DuBard may not intervene because he asked for the HEX community to assist with his legal fees, the Court has left him and other potential class members unable to adequately represent their interests. That is reversible error.

The result of that error would be to allow a single individual who made a mere \$1,800 purchase in HEX tokens to pursue securities claims with vast implications for a sweeping nationwide class of thousands of people, none of whom have voiced support for Plaintiff's position and thousands of whom have signed a petition suggesting that they oppose it, without affording them *any* voice in the matter. Without any other party appearing in the case, the views and incentives of Plaintiff would be all but certain to prevail, thereby trumping the interests and objectives of those whom Plaintiff purportedly seeks to represent. Such a result would be both legally unsound and profoundly unfair.

II. THE CIRCUIT COURT ERRED IN DENYING PERMISSIVE INTERVENTION UNDER RULE 24(b).

“To warrant intervention under Rule 24(b) an applicant should ordinarily show . . . he has a claim or defense involving a question of law or fact in common with the main action.” *Ex Parte Trustgard Ins. Co.*, 442 S.C. 485, 513, 900 S.E.2d 448, 463 (Ct. App. 2023). Permissive intervention under Rule 24(b) is within the Court’s discretion. *South Carolina Tax Com’n v. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988).

The circuit court abused its discretion in denying DuBard leave to intervene under the more lenient standard of Rule 24(b) for the same reasons stated above, and the court’s denial of DuBard’s request under Rule 24(b) suffers from the same errors discussed above. Additionally, the circuit court erred in finding that DuBard lacks “a claim or defense involving a question of law or fact in common” with this action. (Order at 9, R. p. 0035.) Because the classification of HEX is a central legal issue in this case, DuBard as both a HEX owner and potential class member has a direct interest in the lower court’s determination.

The Order erroneously focuses on the fact that DuBard cannot assert defenses because he has not “been accused of wrongdoing.” (Order at 9, R. p. 0035.) But DuBard has made clear from the outset that he intends to argue that HEX is not a security, thereby defending against Plaintiff’s declaratory judgment claim. DuBard is defending against that declaratory judgment claim because it will negatively affect him, not because it involves any alleged “wrongdoing” on his part. Plaintiff’s claims seek a declaratory judgment that HEX is a security, and DuBard seeks the opposite, thereby clearly implicating claims and defenses concerning a common question of law. By erroneously denying DuBard leave to intervene, the circuit court is prevented from receiving argument from both sides of the issue and declaring the rights of all affected parties. *See Stoney v. Stoney*, 425 S.C. 47, 63, 819 S.E.2d 201, 210 (Ct. App. 2018) (“Generally, the rules of intervention

should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties.”). Denial of permissive intervention constituted abuse of the circuit court’s discretion. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order of the circuit court denying DuBard’s Motion to Intervene.

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