

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

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ANTHONY AQUINO, et al.,

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Plaintiffs,

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v.

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Case No. C-15-CV-25-731

BRUCE J. SCHANZER, et al.,

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Defendants

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Donald J. Enright, Esq., Levi & Korinsky LLP and Joshua E. Fruchter, Esq., Wohl & Fruchter, LLP,

Attorneys for Plaintiffs and the Proposed Class

William M. Krulak, Jr., Esq., Megan J. McGinnis, Miles & Stockbridge P.C., and Douglas H. Flaum, Esq., Jennifer Burns, Esq., Goodwin Proctor LLP,

Attorneys for Defendants

Jerrold A. Thorpe, Esq., Gordon Feinblatt LLC

Attorney for Proposed Intervenor

Memorandum and Order

The plaintiffs in this putative class action, preferred stockholders, have asserted a single claim for breach of the standards of conduct under Section 2-405.1 of the Corporations and Associations Article against the former directors of Cedar Realty Trust, Inc. (“Cedar”). Wheeler Real Estate Investment Trust, Inc. (“Wheeler”), which acquired Cedar by merger, seeks permissive intervention “for all pretrial purposes” under Md. Rule 2-214(b). According to the

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motion, Wheeler “does not seek to participate as a party at trial given that no direct claims are asserted against it.” At bottom, Wheeler wants to participate in discovery, class certification, and summary judgment, without asserting or defending against any claim for relief. Furthermore, Wheeler does not want to be a defendant at trial or have the factfinder decide any issues with respect to its rights or obligations.

The main reasons given by Wheeler for permissive intervention are, first, that Section 6.8 of the merger agreement between Cedar and Wheeler requires Wheeler to indemnify Cedar’s former directors (consistent with Section 8.01 of Cedar’s by-laws) and, second, the amount of damages sought by the plaintiffs in their complaint against the former directors “far exceeds the amount of any insurance coverage potentially available to Cedar and would have a material effect on Cedar and Wheeler.” But these are matters strictly between the former Cedar directors and Wheeler, as they have no direct bearing on the merit (or lack thereof) of the plaintiffs’ single claim that has been asserted in this case – a claim asserted solely against the former Cedar directors. Wheeler is free to litigate its indemnity rights and obligations in a forum and at the time of its choosing, but Wheeler has not chosen to pursue them at all, much less in this case.

Critically, in contrast with the plaintiffs in *Kim v. Cedar Realty Trust, Inc.*, 116 F.4th 252 (4th Cir. 2024), the plaintiffs here have not asserted a claim against Wheeler for aiding and abetting the former Cedar directors (or any other cause of action). The existing defendants have not sought to bring a third-party claim against Wheeler in this lawsuit, despite the suit against them having been pending for nearly a year. Cedar’s former directors are represented experienced counsel and it is unlikely that they will “miss” an important issue or “throw in the towel” to Wheeler’s prejudice and just trigger indemnification to get it over with.

The plaintiffs oppose Wheeler’s intervention motion on several grounds. In the alternative, they request that if permissive intervention is granted, it be with certain conditions and that Wheeler be designated a third-party defendant or allowed to participate only as an *amicus curiae*. Of particular concern to the plaintiffs is the possibility that Wheeler, if joined as a party, could attempt to remove this case to federal court, as it had done in a prior state court lawsuit filed regarding the Cedar/Wheeler merger. This prior litigation resulted in the Fourth Circuit’s decision in *Kim* which was adverse to the Cedar’s preferred stockholders. *Kim*, 116 F.4th at 252. This court has, respectfully, disagreed with the Fourth Circuit. The court’s reasons for this disagreement were stated from the bench on November 20, 2025, and amplified in this court’s written decision, entered on January 2, 2026.

The plaintiffs also worry about unnecessary duplication of effort and delay if Wheeler is permitted to participate as a party (against whom they have not sought any relief). Their concerns include duplicative and repetitive motions practice, the effect on pretrial proceedings, and discovery burdens and the inevitable discovery disputes.

The court hear argument on Wheeler’s motion on January 6, 2026. For the reasons that follow, Wheeler’s motion is granted, in part, but with conditions and subject to an important election.

#### Background

This case was filed on February 18, 2025. Service of process on the named defendants, the former members of Cedar’s board of directors, was completed on March 6, 2025.

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The named defendants filed a motion to dismiss on May 2, 2025. The plaintiff's opposition to the dismissal motion was filed on June 20, 2025, and the defendants' reply was filed on July 21, 2025.

The court held a scheduling conference on September 18, 2025. The court set a trial date for December 7, 2026, asked the parties to brief a specific issue regarding Corporations and Associations Article, Section 2-405.1, and set a hearing for the motion to dismiss on November 20, 2025.

On November 10, 2025, nearly two months after the scheduling conference, and ten days before the hearing on the motion to dismiss, Wheeler filed its original motion for permissive intervention. At the November 20, 2025 hearing, the court noted that Wheeler's motion to intervene was not yet ripe but nonetheless heard from Wheeler's counsel before addressing the motion to dismiss. After argument, the court denied the motion to dismiss. Wheeler's counsel then advised that the intervention motion was moot.

On November 26, 2025, Wheeler filed an "amended" motion to intervene permissively, stating that its "amended" motion "supersedes the Motion for Permissive Intervention previously filed in this action which is withdrawn." The plaintiff's filed an opposition to the "amended" motion on December 3, 2025. As noted, the court held a hearing on Wheeler's motion on January 6, 2026. Additional facts will be supplied, as necessary.

#### Discussion

Timeliness is a prerequisite to a motion to intervene, whether intervention is sought as of right or permissively. *Jenkins v. City of College Park*, 379 Md. 142, 154 (2003). Md. Rule 2-214(b)(1) does not establish a fixed standard for determining timeliness. The considerations the

court may take into account include the purpose for which intervention is sought, the prejudice, if any, to the parties already in the case, the extent to which proceedings have progressed, and the reasons given for any delay. *Maryland Nat. Cap. Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. 37, 70 (2009).

The other prerequisites for permissive intervention are that “the person’s claim or defense has a question of law or fact in common with the action,” Md. Rule 2-214(b)(1), and intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties.” Md. Rule 2-214(b)(3). Frequently, the putative intervenor is simply worried that, absent its intervention, the trial court will “get it wrong.” See *Doe v. Alternative Medicine Maryland, LLC*, 455 Md. 377, 418-19 (2017). Maryland Rule 2-214 (and its predecessor Rule 208), are derived in part from Federal Rule 24, F.R.C.P. Consequently, federal decisions construing Rule 24 may be instructive, and often, even persuasive authority. *Montgomery County v. Ian Corp.*, 282 Md. 459, 463 (1978); *Hiyab, Inc. v. Ocean Petroleum, LLC*, 183 Md. App. 1, 11 (2008).

At the hearing on January 6, 2026, Wheeler adequately explained why it waited to seek to intervene until November 2025, and why it filed its amended motion. The court credits Wheeler’s explanation, and finds that, given the posture of this case, its amended motion to intervene is timely.

Nonetheless, permissive intervention is not simply about adding one more party to an existing lawsuit. “[M]otions to intervene can have profound implications for [trial] court’s management functions. Additional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motions practice, thwart settlement, and delay trial.” *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). Adding Wheeler as a party defendant likely

“would necessarily complicate the discovery process and consume additional resources of the court and the parties.” *Id.*

The court also has concerns about the reasons why Wheeler seeks to intervene permissively as a party defendant, particularly since it does not want to participate at trial or have the factfinder resolve questions regarding its potential indemnity obligations. Under this proposed scenario, Wheeler may not even be bound by a judgment. Additionally, the application of *res judicata* or collateral estoppel would be uncertain at best because Wheeler, and its “claim or defense” would not have been before, or decided by, the factfinder.

Although Wheeler invokes its potential indemnity obligations under both Cedar’s by-laws and the merger agreement as a reason for allowing permissive intervention, it has not affirmatively sought to resolve those indemnity obligations in this case. *See Secure Our City, Inc. v. ECI Sys., LLC*, 594 F. Supp. 3d 96, 102-103 (D. Mass. 2022) (allowing insurer to intervene permissively to determine facts regarding potential coverage under its policy); *United States v. Continental Casualty Co.*, 2017 WL 3642957 at \*5-6 (D. Md., Aug. 24, 2017) (allowing general contractor to intervene and assert a counterclaim in a payment suit by its subcontractor.) The former Cedar directors have not taken any steps in this litigation to impair or impede Wheeler’s indemnity interests, as is sometimes the case when an insured concedes liability in the underlying lawsuit leaving the carrier “on the hook” to pay any judgment. *See Chapman v. Kamara*, 356 Md. 426, 443-45 (1999).

Wheeler cannot question the competence or diligence of the attorneys who represent the former Cedar directors. Lawyers in that firm were instrumental in crafting the 2016 amendments to Section 2-405.1 of the Corporations and Associations Article and filed a key amicus brief in *Eastland Food Corp. v. Mekhaya*, 486 Md. 1 (2023), arguing, successfully for the reversal of the

decision of the Appellate Court in that case. The former Cedar defendants raised (and preserved) the issue that they are immune from money damages due to the exculpation clause in Cedar's charter. There is little doubt that this issue will surface at summary judgment, and at trial.

It is hard to see how Wheeler's lawyers could add anything material to the legal mix. The conclusion that the named defendants adequately represent Wheeler's interests, while not decisive, militates against permissive intervention because it suggests that the opportunities for Wheeler to make meaningful contributions to this case are likely to be limited. To that point, Wheeler's brief in support of intervention, addressing Section 2-405.1 of the Corporations and Associations Article, albeit well written is, with one exception, a rehash of arguments previously made by the former Cedar directors in arguing for dismissal. Wheeler agreed at the hearing that the board owes duties to Cedar's preferred stockholders under Section 2-405.1 of the Corporations and Associations Article separate and apart from their contract rights. This is different from the contention of the former Cedar directors about the extent of their duties to the preferred stockholders. Wheeler maintains nonetheless, as do the former Cedar directors, that the complaint fails to state sufficient facts to constitute a cognizable claim for relief regardless of the source of the duties.

As for the specter of removal to federal court, adding Wheeler as a named defendant could be more problematic than Wheeler has represented. The plaintiffs have carefully avoided suing Wheeler, to prevent federal removal as happened in *Kim*, 116 F. 4th at 252. However, if Wheeler were allowed to intervene as a party, the existing defendants could assert a crossclaim (or, possibly even a third-party claim) against Wheeler for indemnification (or Wheeler could assert a cross-claim against the former Cedar defendants to determine its indemnity obligations), both potentially giving rise to a basis for removing all or part of the case to federal court and, in

that event, further complicating the issues to be resolved in this case. This court is not steeped in the rules on federal removal, but even an inartful attempt at removal to federal court would automatically stay this case for some indeterminate period, perhaps years, while the removal was litigated first in district court and then in the Fourth Circuit. 28 U.S.C. § 1446(d) (“State court shall proceed no further unless and until the case is remanded.”)

The issues in this case involve fundamental questions of Maryland corporate law and should be decided by state courts, with the ultimate say by the Maryland Supreme Court, not a federal tribunal doing its best to “predict” what the Maryland Supreme Court would do. The removal of this action by Wheeler (or the former Cedar directors) would frustrate the ability of state courts to decide important questions of state law without good reason.

At least with respect to permissive intervention, the federal courts have broad discretion in crafting conditions when granting this form of intervention. See 7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1922 (3d ed.). The court is persuaded that Md. Rule 2-214(b) too affords the court discretion to impose reasonable conditions on permissive intervention.

Federal courts considering permissive intervention under Rule 24 have allowed *amicus* status as an alternative to permissive intervention as a party. *Ohio Valley Environmental Coalition, Inc. v. McCarthy*, 313 F.R.D.10, 32 (S.D. W.Va. 2015). Although this form of relief is not set out in the text of the rule, it has been allowed by the federal courts to permit a non-party to present their views to the court without either the complications of party status or being bound by a judgment. *Stuart*, 706 F.3d at 355. This court did so in *Montgomery County v. Ian Corp*, 282 Md. 459, 462 (1978), although the Maryland Supreme Court did not rule upon its propriety when deciding the case on appeal.

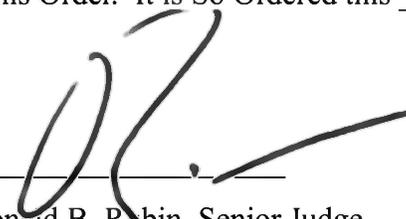
Conclusion

In view of the foregoing, the court has decided to give Wheeler a choice, elect the status of a third-party defendant (with conditions) under Md. Rule 2-214(c) or participate as an *amicus curiae*.

The conditions for third party defendant status, are: (1) Wheeler and the Cedar defendants agree not to remove this case to federal court unless the plaintiffs assert a direct claim against Wheeler; (2) Wheeler shall be subject to discovery in this case as if it were a party; (3) Wheeler and the director defendants may divide their deposition time as they see fit, but shall be treated for this purpose as a single party, subject to a motion by Wheeler for additional time if necessary for a particular deponent; (4) Wheeler will limit its briefing (*e.g.*, class certification, motions to compel or limit discovery, summary judgment, motions to exclude or limit expert testimony) to topics not fully addressed by the former Cedar directors, or on which Wheeler advances a different legal or factual position; (5) Wheeler will not propound document requests or interrogatories to the plaintiffs that duplicate those propounded by the former Cedar directors; and (6) the schedule previously set by the court will not be altered solely because of Wheeler's intervention. If Wheeler, or the former Cedar directors do not consent to the foregoing conditions, Wheeler may file briefs on legal questions as an *amicus curiae*.

For the reasons outlined above, Wheeler's motion for permissive intervention is granted, in part. The election, whether to proceed as a third-party defendant or as an *amicus curiae*, shall be filed with the Clerk within ten days of the entry of this Order. It is So Ordered this 27th day of January, 2026 of January, 2026.

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Ronald B. Rubin, Senior Judge  
**Ronald B. Rubin**

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