Consolidated Appeals No. 24-CV-1163 & No. 24-CV-1173

DISTRICT OF COLUMBIA COURT OF APPEALS

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DTLD, LLC, *et al.*,
Appellants,

v.

POWER STATION LIMITED PARTNERSHIP, *et al.*,
Appellees.

JPMORGAN CHASE BANK, N.A.,
Appellant,

v.

DTLD, LLC, *et al.*,
Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division No. 2023-CAB-006784 (Hon. Carl E. Ross, Judge)

BRIEF OF APPELLANT JPMORGAN CHASE BANK, N.A.

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RULE 28(a)(2) DESIGNATION

Pursuant to D.C. App. R. 28(a)(2), counsel for JPMorgan Chase Bank, N.A. submits the following listed Parties, Amici Curiae, and Counsel that appeared below or will appear in this appellate proceeding:

JPMorgan Chase Bank, N.A.	Proposed Intervenor below, Appellee (No. 24-CV-1163), and Appellant (No. 24-CV-1173)
Jessica Lynn Farmer, Esq. Zachary Lundgren, Esq. Christopher S. Cohen, Esq. Holland & Knight LLP	Counsel for JPMorgan Chase Bank, N.A.
Power Station Limited Partnership, Southern Building Associates, LLP, SJG Properties, LLC, and 15th and H Street Associates, LLP	Plaintiffs below and Appellees (Nos. 24-CV-1163 & 24-CV-1173)
Eric Scott Lammers, Esq. Rees Broome, PC	Counsel for Plaintiffs below and Appellees
DTLD, LLC, and Iraklion, LLC	Defendants below, Appellants (No. 24-CV-1163), and Appellees (No. 24-CV-1173)
James T. Bacon, Esq. Mahdavi, Bacon, Halfhill & Young PLLC	Counsel for Defendants below, Appellants, and Appellees

RULE 26.1 DISCLOSURE

JPMorgan Chase Bank, N.A. is a wholly-owned subsidiary of JPMorgan Chase & Co., which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser that is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

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RULE 28(a)(5) ASSERTION

This appeal is from the final order of the Superior Court of the District of Columbia, dated November 22, 2024. In the order, the Superior Court granted Plaintiffs' motion for summary judgment, finding that the restrictive covenant is enforceable and prohibits Defendants' proposed nightclub. The order further denied JPMorgan's motion to intervene as moot. Resolution of this appeal will dispose of all parties' claims related to the denial of JPMorgan's motion to intervene.

I. QUESTIONS PRESENTED

1. Did the Superior Court err in refusing to allow JPMorgan to intervene in the litigation?

II. STATEMENT OF THE CASE

In this case, Appellant JPMorgan Chase Bank, N.A. ("JPMorgan") moved to intervene in a lawsuit filed by Plaintiffs-Appellees Power Station Limited Partnership, Southern Building Associates, LLP, SJG Properties, LLC, and 15th and H Street Associates, LLP (collectively, the "Plaintiffs"),[1] against Defendants-

[1] These entities are co-appellees with JPMorgan in Appeal No. 24-CV-1163, which is an appeal from the Superior Court's order granting their motion for summary judgment. These entities are also appellees in Appeal No. 24-CV-1173, which is an appeal of the portion of that order denying JPMorgan's motion to intervene as moot. Appeal No. 24-CV-1163 and Appeal No. 24-CV-1173 have been consolidated into Appeal No. 24-CV-1163 by this Court's January 28, 2025 sua sponte order. Nonetheless, undersigned counsel has conferred with these entities' counsel and the entities do not oppose the appellate relief JPMorgan seeks herein.

Appellees DTLD, LLC, and Iraklion, LLC ("Defendants"). This action stems from the Defendants' efforts to operate a nightclub with nude dancing on an alley lot property located at 1412 I Street, NW, Washington, D.C. 20005. Plaintiffs have ownership interests in nearby property within Square 220, and Square 220 is further subject to a restrictive covenant. The restrictive covenant prohibits the operation of a "nightclub . . . which distributes or sells alcoholic beverages after midnight." Because the proposed nightclub would serve alcohol on the Property after midnight, Plaintiffs sued to enforce the restrictive covenant and forestall the nightclub.

JPMorgan, like Plaintiffs, owns property within Square 220, neighboring the proposed nightclub's location. Unlike Plaintiffs, however, JPMorgan's property is much closer to—and potentially impacted by—Defendants' proposed nightclub, as it directly abuts the proposed location. The proposed nightclub is located within the interior of the square, surrounded by public alleys, and does not face a street; JPMorgan owns abutting property that functions as a public alley due to a recorded public easement. JPMorgan has concerns about the safety risks associated with ingress and egress through the alley if a nightclub with nude dancing were to open in the alley, and is further concerned about potential liability it may face as a property owner within the alley.

Sharing Plaintiffs' concerns with the proposed nightclub, and seeking to protect its unique property interests and enforce the restrictive covenant, JPMorgan

moved to intervene in the lawsuit on September 23, 2024. JPMorgan filed the motion upon reviewing Defendants' motion for summary judgment and learning that its interests were not adequately represented by the existing parties in the lawsuit. Plaintiffs consented to JPMorgan's intervention, but Defendants opposed.

On November 22, 2024, the Superior Court granted Plaintiffs' motion for summary judgment, finding the restrictive covenant enforceable, and denied Defendants' cross-motion for summary judgment. In that same order, however, the Superior Court, without analysis, denied JPMorgan's motion to intervene as moot. Defendants filed a notice of appeal regarding the Superior Court's summary judgment ruling on December 18, 2024. *See* Appeal No. 24-CV-1163. JPMorgan filed a notice of appeal regarding the Superior Court's denial of the motion to intervene on December 19, 2024. *See* Appeal No. 24-CV-1173. This Court consolidated the two appeals sua sponte on January 28, 2025.

In the event that this Court remands this case to the Superior Court, JPMorgan respectfully requests that this Court find that JPMorgan is entitled to intervene and participate in the litigation. First, JPMorgan should have been permitted to intervene as of right under D.C. Super. Ct. Civ. Rule 24(a) because it has unique property interests in the subject Property, and timely sought intervention upon learning that its unique interests were not adequately represented by the parties. Second, JPMorgan should have been granted leave to intervene permissively under Rule

24(b) because the motion was timely and JPMorgan shares common claims and counterclaim defenses with the neighboring owners in Square 220. But the Superior Court failed to grant JPMorgan's motion on either basis and did not consider JPMorgan's arguments in support. By denying intervention, the Superior Court has effectively stripped JPMorgan of any meaningful opportunity to defend its property interests—both in this litigation and on appeal. Accordingly, the Court should allow JPMorgan to intervene in this action in the event of any remand.

Notwithstanding JPMorgan's position in this brief and any arguments made therein, JPMorgan maintains that the Superior Court correctly granted Plaintiffs' motion for summary judgment and correctly dismissed Defendants' counterclaim. JPMorgan reserves the right to join Plaintiffs' brief in further support of the court's summary judgment ruling. In the instant appeal, JPMorgan only challenges the limited portion of the Superior Court's order denying JPMorgan's motion to intervene as moot in the event of a remand.

III. STATEMENT OF FACTS

A. The Subject Property

The property at issue in this appeal is 1412 I Street NW, Washington, D.C. 20005, further described as Part of Lot 53 in Square 220 (the "Property").[2] Compl.

[2] The Property is also identified as Lot 806 in Square 220 for assessment and taxation purposes.

¶ 2. The property is located in an alleyway with no egress onto the main street. Nov. 22, 2024 Order at 2. The Property was formerly owned by Plaintiff Power Station Limited Partnership, and was sold in 2008. *Id.* at 1–2. When the Property was sold in 2008, a restrictive covenant ("Restrictive Covenant") was included in the deed, stating:

> In no event shall there be conducted at the Property any nightclub or discotheque nor any other establishment which which distributes or sells alcoholic beverages after midnight. For purposes hereof, a nightclub shall be defined in accordance with the then applicable provisions of the District of Columbia code, or if there shall be no such definition then provided, a nightclub shall be defined as space regularly used and kept open as a place that serves food and alcoholic beverages and which provides either (x) music and facilities for dancing, or (y) comedic entertainment. A discotheque shall similarly be defined under the then applicable provisions of the District of Columbia code, or if there shall be no such definition then provided, a discotheque shall be defined as space regularly used and kept open as a place that provides music and facilities for dancing.

Id. at 2; Mot. to Interv. Ex. 1 at 1. The Restrictive Covenant, by its terms, was "expressly made for the benefit of Grantor, and any successor-in-interest to the owners of real properties located in Square 220." Mot. to Interv. Ex. 1 at 1.

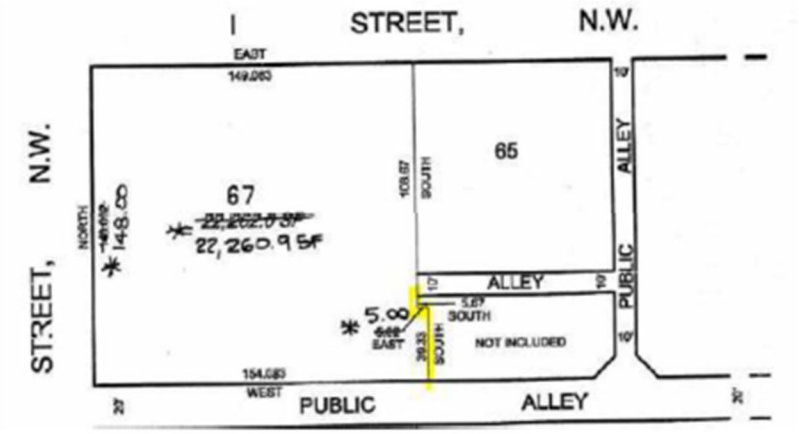
B. The Proposed Nightclub

On July 11, 2022, Defendant DTLD acquired ownership of the Property via special warranty deed, recorded at Instrument Number 2022074030. Compl. Ex. 4. Defendant Iraklion owns a Retailer's Class CN License, which permits nude dancing. Compl. ¶ 18. Defendants thereafter filed an application with the D.C.

Alcoholic Beverage and Cannabis Board (ABC Board) to transfer the license to the Property to open a nightclub allowing nude dancing on the Property. JPMorgan participated in the ABC Board proceedings and protested Defendants' application. The ABC Board ultimately approved the license transfer application. JPMorgan is appealing that decision in another appeal before the Court. *See* Appeal No. 24-AA-0748 (held in abeyance pending resolution of this appeal).

C. JPMorgan's Property Interest

JPMorgan owns land and existing improvements located at 875 15th Street, NW, Washington, D.C. 20005, further described as Lot 67 in Square 220 (the "JPMorgan Property"). Mot. to Interv. at 3. The JPMorgan Property lies on the boundary "in common with the property line" of the Property. *Id.* The area was formerly part of the alley system in Square 220, and this alley portion was closed and reverted as private property pursuant to D.C. Law 14-102, (titled, "Closing of a Portion of a Public Alley in Square 220," S.O. 01-2388 Act of 2001), as evidenced by the alley closing plat. Mot. to Interv. at 3–4; Mot to Interv. Ex 2. Today, the JPMorgan Property and the Property share the property line highlighted in the image below, which is excerpted from the subdivision plat for the JPMorgan Property:



Mot. to Interv. at 4; Mot. to Interv. Ex. 3.

While the alleyway is publicly accessible, the JPMorgan Property extends to the brick wall of the Property. Mot. to Interv. at 4. Thus, JPMorgan owns property within Square 220 that directly abuts the Property where the proposed nightclub will be located. *Id.* at 4.

D. The Underlying Lawsuit

On November 2, 2023, Plaintiffs filed the instant lawsuit seeking to enjoin Defendants from opening the nightclub on the Property. *See* Compl. Plaintiffs all have property interests in Square 220, and sued to enforce the Restrictive Covenant to prevent the nightclub from opening. *Id.* Defendants then filed an answer and counterclaim, seeking a declaratory judgment that the restrictive covenant is unenforceable because the conditions in downtown Washington, D.C. have changed since COVID-19. *See* Dec. 12, 2023 Amend. Answer & Countercl. On August 12,

2024, Plaintiffs filed a motion for summary judgment, and Defendants filed a cross-motion for summary judgment on August 14, 2024.

E. JPMorgan Moves to Intervene

On September 23, 2024, JPMorgan moved to intervene in the lawsuit. JPMorgan explained that it has a unique interest in this litigation because it is the only entity within Square 220 that owns property directly abutting the proposed nightclub location. Additionally, JPMorgan explained it had further interests in the litigation because Defendants made certain representations in their summary judgment papers about the ABC Board license transfer proceedings, and JPMorgan participated in those proceedings and disputed Defendants' representations. JPMorgan argued that intervention as of right under Rule 24(a) was warranted because it learned that its interests may not be adequately represented by the existing parties after reviewing the parties' summary judgment papers, and then timely moved to intervene thereafter. JPMorgan also argued in the alternative that permissive intervention under Rule 24(b) was warranted because it shares common claims and counterclaim defenses with Plaintiffs, along with similar property interests.

Defendants opposed JPMorgan's motion to intervene on October 3, 2024, and JPMorgan filed a reply in further support of the motion on October 10, 2024.

F. The Superior Court's Order

On November 22, 2024, the Superior Court entered an omnibus order addressing the cross-motions for summary judgment and JPMorgan's motion to intervene. The Superior Court granted Plaintiffs' motion for summary judgment, denied Defendants' motion for summary judgment, and dismissed Defendants' counterclaim with prejudice. The court concluded that the Restrictive Covenant is enforceable and its plain language "unambiguously prohibits the operation of the kind of establishment Defendants plan to operate on the property." Nov. 22, 2024 Order at 5. The court also rejected Defendants' claim that changed conditions have rendered the Restrictive Covenant unenforceable. The Restrictive Covenant's central purpose is to address safety related to the ingress and egress through the alley, but the court held that there is no evidence that the Property's location has changed, and the alley remains "a potential flash point for violence crime." *Id.* at 9. Accordingly, the Superior Court enforced the Restrictive Covenant and granted summary judgment for Plaintiffs.

In that same order, the Superior Court denied JPMorgan's motion to intervene as moot. *Id.* at 10. The court did not analyze the motion or assess JPMorgan's arguments supporting intervention in any way. The only time the court addressed the motion was in the one-sentence directive denying the motion as moot. JPMorgan appealed the order denying the motion to intervene on December 19, 2024.

IV. SUMMARY OF THE ARGUMENT

In the event of any remand, the Court should find that JPMorgan is entitled to intervene in the underlying litigation under Rule 24.

The Superior Court did not consider JPMorgan's arguments to intervene as of right under Rule 24(a). JPMorgan's motion to intervene was timely, as it moved to intervene within weeks after learning that its interests in Square 220 and the Restrictive Covenant may not be adequately represented. Additionally, JPMorgan has a unique and protectable interest in the subject litigation because it is the only entity in this litigation with property situated within Square 220 that directly abuts the Property where the nightclub will be located. Thus, the existing Plaintiffs have similar, but distinct, property interests because their property does not directly abut the Property like JPMorgan's Property. Additionally, JPMorgan was a participant in the ABC Board proceedings, which Defendants have invoked in the litigation to support their unfounded claim that the Board's conditional approval of the license transfer has preclusive effect.[3] Accordingly, JPMorgan fully demonstrated the required factors for intervention as of right under Rule 24(a), but the Superior Court did not analyze or address any of these factors.

[3] JPMorgan denies that the ABC proceeding has any preclusive effect and to date, Defendants have not presented any case law in support of such a strained position.

The Superior Court also failed to address JPMorgan's arguments to permissively intervene under Rule 24(b). JPMorgan's motion was timely, as it moved to intervene promptly after learning the basis for intervention, and still filed the motion at an early stage in the litigation. Additionally, JPMorgan shared common claims, counterclaim defenses, and property interests with the existing Plaintiffs because it sought to enforce the Restrictive Covenant and vindicate its rights as an adjacent property owner. Lastly, JPMorgan would not inject new issues into the litigation if intervention was granted, and its ability to protect its property interest would be significantly compromised going forward if intervention was not granted. Accordingly, JPMorgan satisfied the factors for Rule 24(b) permissive intervention as well, yet the Superior Court did not address or analyze these factors either.

In sum, JPMorgan demonstrated entitlement to intervention. Accordingly, in the event that this Court remands the case for further proceedings, JP Morgan requests that this Court also find that it is entitled to intervene in the litigation.

V. STANDARD OF REVIEW

A trial court's order denying a motion for leave to intervene as of right under Rule 24 is appealable to the D.C. Court of Appeals as a final order. *McPherson v. D.C. Hous. Auth.*, 833 A.3d 991, 994 (D.C. 2003). "To the extent that the trial court's ruling on a motion to intervene as a right is based on questions of law, it is reviewed de novo; to the extent that it is based on questions of fact, it is ordinarily reviewed

for abuse of discretion." *Kayan, LLC v. Yunus*, 278 A.3d 1179, 1180 (D.C. 2022) (quoting *McPherson*, 833 A.3d at 994).

Further, the determination of the timeliness of a motion to intervene is reviewed for an abuse of discretion. *Emmco Ins. Co. v. White Motor Corp.*, 429 A.2d 1385, 1387 (D.C. 1981). When a court reviews for abuse of discretion, it "examines the record and the trial court's determination for those indicia of rationality and fairness that will assure it that the trial court's action was proper." *McPherson*, 833 A.3d at 994 (quoting *Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979)).

VI. ARGUMENT

If this Court ultimately remands the case for further proceedings, JPMorgan requests that this Court also find that JPMorgan is entitled to intervene in the litigation. JPMorgan demonstrated that it is entitled to intervene in this action, but the Superior Court denied JPMorgan's motion as moot without addressing its supporting arguments.

First, JPMorgan should have been permitted to intervene as of right under Rule 24(a) because JPMorgan has unique property interests in Square 220 and the Restrictive Covenant underlying this litigation, and timely sought intervention upon learning that its interests were not adequately represented by the existing parties. Second, in the alternative, JPMorgan should have been granted leave to permissively

intervene under Rule 24(b) because JPMorgan shares common claims and counterclaim defenses with Plaintiffs and timely moved to intervene.

A. The Superior Court Should Have Granted JPMorgan's Motion to Intervene as of Right Under Rule 24(a).

In considering whether to permit intervention as of right under Rule 24(a), the trial court must consider four factors: "timeliness, interest, impairment of interest, and adequacy of representation." *HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d 229, 233 (D.C. 2010) (quoting *Jones v. Fondufe*, 908 A.2d 1161, 1162–63 (D.C. 2006)). Rule 24 "should be liberally interpreted," and "any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Id.* (first quoting *McPherson*, 833 A.2d at 994; and then quoting *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993)). As explained below, JPMorgan satisfied all four factors, but the Superior Court failed to analyze or address any of these factors in denying JPMorgan's motion as moot.

1. JPMorgan's Motion Was Timely

To intervene as of right, Rule 24(a) first requires a "timely motion." There is no bright-line rule or deadline for a motion to intervene; instead, "timeliness is to be determined from all the circumstances." *Anderson v. D.C. Hous. Auth.*, 923 A.2d 853, 866 (D.C. 2007) (citing *Emmco Ins. Co.*, 429 A.2d at 1387). This involves considering the following factors: "(1) the length of the intervenor's delay; (2) the

reason for the delay; (3) the stage to which the litigation had progressed when intervention was sought; (4) the prejudice that the original parties may suffer if the application is granted; and (5) the prejudice that the intervenor may suffer if its application is denied." *Id.* (citing *Emmco Ins. Co.*, 429 A.2d at 1387). The length of delay is measured *not* from the date of the litigation itself, but when the applicant knew or reasonably should have known that its interests would be affected by the litigation. *Id.*; *Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. 1988).

Here, JPMorgan sought intervention promptly after learning that its interests in Square 220 and the Restrictive Covenant may not be adequately represented by the original parties to the litigation. Plaintiffs filed the complaint on November 2, 2023, and Defendants filed their amended answer and counterclaim on December 11, 2023. Although these initial pleadings disclosed that Square 220 was the subject of the litigation, the pleadings did not contain enough information for JPMorgan to determine that its interests were not adequately represented. For instance, the pleadings disclosed the parties' base claims and defenses, but JPMorgan could not discern the arguments or evidence in support of the parties' positions until reviewing the summary judgment papers. As an abutting property owner, JPMorgan has a direct and unique interest distinct from the Plaintiffs, who may not share the same urgency or face comparable exposure to liability if a nightclub is ever permitted to operate on Defendants' Property. Defendants' motion for summary judgment was

also particularly eye-opening. In the motion, Defendants misstate the applicability of the ABC Board proceedings, to which JPMorgan was a party, and suggest that the ABC Board proceedings may have preclusive effect over this litigation. Defendants' unexpected litigation position alerted JPMorgan to the serious risk that its interests could be undermined in this case, particularly because the argument relies on an administrative proceeding in which JPMorgan actively participated and has firsthand knowledge.

Courts have found intervention following summary judgment motions to be timely where the applicants learned of the basis for intervention from the summary judgment filings. *See D.C. Bd. of Elections & Ethics v. Jones*, 481 A.2d 456, 460–61 (D.C. 1984) (permitting intervention after cross-motions for summary judgment were filed); *Grumman Flxible Corp. v. Dole*, 102 F.R.D. 36, 38 (D.D.C. 1983) ("[I]t would have been difficult, if not impossible, however, for RTA to determine whether its interests would be adequately represented in this action until the defendant filed its motion for summary judgment.").[4] Moreover, courts have consistently found applications filed within one month of the applicant learning of its unprotected interest to be timely. *Robinson v. First Nat'l Bank of Chi.*, 765 A.2d 543, 545 (D.C. 2001) (just under one month); *Appleton v. F.D.A.*, 310 F. Supp. 2d 194, 196–97

[4] "Super. Ct. Civ. R. 24 is identical in all relevant respects to Fed. R. Civ. 24, and accordingly, we look to federal court decisions as persuasive authority in interpreting it." *Vale Props., Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981).

(D.D.C. 2004) (two months); *Bible Way Church of Our Lord Jesus Christ World Wide, Inc. v. Showell*, 260 F.R.D. 1, 5 (D.D.C. 2009) (fifteen months after complaint). Here, JPMorgan sought to intervene within only two weeks of the parties' summary judgment filings. Thus this is not a situation where JPMorgan "slept on [its] rights before asserting [its] interest in the property." *Robinson*, 765 A.2d at 545.

Additionally, JPMorgan sought to intervene at an early stage, prior to mediation, and before the court issued a summary judgment decision. *Mokhiber*, 537 A.2d at 1104–05 (allowing intervention following *final* judgment); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (same). JPMorgan's involvement in the case also would not have prejudiced the parties because it would not inject new issues in the litigation, but simply sought to participate in future motions practice, mediation, and trial. *Anderson*, 923 A.2d at 866. Finally, without intervention, JPMorgan would be prejudiced by not having its interests adequately represented in the litigation—particularly if Defendants successfully argued that the ABC Board proceedings have preclusive effect.

For all of these reasons articulated in JPMorgan's motion to intervene, the motion was timely under Rule 24(a). Nonetheless, the Superior Court altogether failed to assess the timeliness of this factor in denying JPMorgan's motion.

2. JPMorgan Has an Interest in the Litigation

The second consideration in a Rule 24(a) motion is "whether the person seeking to intervene has an interest in the transaction which is the subject matter of the suit." *Anderson*, 923 A.2d at 865 (quoting *McPherson*, 833 A.2d at 994). District of Columbia courts "have adopted a 'broad reading' of the word 'interest' because it is 'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Fondufe*, 908 A.2d at 1163 (quoting *McPherson*, 833 A.2d at 994). To satisfy this requirement, the interest must be "a legally protectable one." *HSBC Bank*, 11 A.3d at 234 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)).

Here, JPMorgan undoubtedly demonstrated a protectable interest in Square 220 and the Restrictive Covenant because it owns property within Square 220 that directly abuts the proposed nightclub. Further, JPMorgan is an intended beneficiary of the Restrictive Covenant as it purchased the JPMorgan Property *after* the Restrictive Covenant was put into effect. Courts have consistently held that an ownership interest in property, even when subordinate to other options or ownership interests on the property, "clearly satisfies the first portion of the intervention rule." *Vale Props.*, 431 A.2d at 14. Moreover, it is well-established that a restrictive covenant running with the land may be enforced by one for whose benefit it was

made. *Jameson v. Brown*, 109 F.2d 830, 831 (D.C. Cir. 1939); *Herb v. Gerstein*, 41 F. Supp. 634, 635 (D.D.C. 1941).[5] Because JPMorgan is an "owner[] of real propert[y] located in Square 220," the Restrictive Covenant was "expressly made for [its] benefit," and JPMorgan can enforce its interest in the Restrictive Covenant. Accordingly, JPMorgan has a protectable interest under Rule 24(a) and demonstrated as much in its motion. Nonetheless, the Superior Court likewise failed to analyze this factor in denying JPMorgan's motion to intervention.

3. A Decision in Plaintiffs' Favor on Issues Involving the Restrictive Covenant Would Impair JPMorgan's Interest

The third factor asks whether the movant is "so situated that the disposition of the action may as a practical matter impede or impair the movant's ability to protect its interest." D.C. Super. Ct. Civ. R. 24(a)(2). "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interests is possible if intervention is denied. This burden is minimal." *HSBC Bank*, 11 A.3d at 235 (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)). In assessing impairment, courts take a "practical approach," under which there is an impairment if this action could "finally determine the disposition of the [intervenor's] claim" or if the intervenor would have

[5] "[D]ecisions of the United States Court of Appeals rendered prior to February 1, 1971 . . . like the decisions of this court, constitute the case law of the District of Columbia." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

"difficulty" in "framing a separate lawsuit to present for adjudication the question at issue in the first lawsuit." *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 800 (D.C. 1975).

Absent intervention, if final judgment was entered in Defendants' favor rendering the Restrictive Covenant unenforceable as to the proposed nightclub, this would nearly—if not completely—foreclose JPMorgan's ability to enforce the Restrictive Covenant going forward. *See id.* (recognizing "the stare decisis effect of a decision alone may be a sufficient practical disadvantage to warrant intervention," as "[i]t would be difficult for the intervenor to secure a decision on the issue in any subsequent litigation contrary to the one to be reached in this case"). Accordingly, if JPMorgan cannot intervene in this lawsuit, it may lose the ability to protect or assert its property interests in Square 220 or the Restrictive Covenant in the future. The third factor thus weighs in favor of intervention under Rule 24(a) as well and the Superior Court failed to address this factor.

4. JPMorgan's Interests Are Not Already Adequately Represented and There Will Be No Prejudice to the Current Parties

The final factor asks the trial court to consider "whether [the movant's] interest is adequately represented by existing parties." *Anderson*, 923 A.2d at 865 (quoting *McPherson*, 833 A.2d at 994). This factor "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *HSBC Bank*, 11 A.3d at 236

(quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). This remains "true even if there is a significant overlap between the would-be intervenor's interest and that of a party." *Id.*; *see also United States v. AT&T Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (holding that this factor favors the movant even when the parties have "similar but not identical" interests). This factor should be weighed against the movant only when "it is clear that the [existing] party will provide adequate representation for the absentee." *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (alteration in original) (quoting *AT&T Co.*, 642 F.2d at 1293).

Here, JPMorgan possesses "similar but not identical" interests to the other Plaintiff property owners and thus should have been permitted to intervene to fully represent its own interests in this litigation. As explained above, the JPMorgan Property directly abuts the proposed nightclub and the Defendants will undoubtedly seek to use JPMorgan's property vis-à-vis the alleyway for the nightclub—posing substantial risk to JPMorgan. *See AT&T Co.*, 642 F.2d at 1293.

The existing Plaintiffs do not own lots that are directly adjacent to the Property, as there are intervening public alleys that separate the Property from all other lots in Square 220.[6] Thus, as the owner of the alley directly adjoining the Property, JPMorgan may legitimately face premises liability risks that none of the

[6] For clarity, the public alleys are owned by the District and constitute public land—not alleyways subject to a public surface easement, like the portion of JPMorgan's property that shares a common boundary with the Property.

other Plaintiffs share, including liability for intervening criminal acts by third parties. *Bd. of Trs. of Univ. of D.C. v. DiSalvo*, 974 A.2d 868, 871 (D.C. 2009) (stating owner may be liable for intervening criminal acts by third parties "if the criminal act is so foreseeable that a duty arises to guard against it" (quoting *McKethean v. Wash. Metro. Area Transit Auth.*, 588 A.2d 708, 717 (D.C. 1971))). If Defendants succeed in opening the proposed nightclub, the abutting alleyway, located within the square and largely obscured from public view, will likely experience a substantial increase in both foot and vehicular traffic. This intensified activity heightens the risk of congestion, disorderly conduct, and spontaneous interactions, potentially leading to accidents, property damage, or criminal activity on JPMorgan's property. Accordingly, JPMorgan will be exposed to greater premises liability concerns. As none of the existing Plaintiffs own property directly abutting the proposed nightclub, JPMorgan's legitimate premises liability interests are not currently represented in this litigation and JPMorgan should have had the opportunity to intervene and protect its unique interests.

Accordingly, the fourth factor weighs in favor of JPMorgan as well. As with above, the Superior Court failed to address this factor in denying JPMorgan's motion to intervene. Nonetheless, JPMorgan has satisfied this factor, as well as the remaining three factors supporting intervention as of right under Rule 24(a). Therefore, the Superior Court should have granted JPMorgan's motion to intervene.

B. The Superior Court Should Have Granted JPMorgan Leave to Permissively Intervene Under Rule 24(b).

The Superior Court should have granted JPMorgan leave to permissively intervene and failed to address any factors supporting JPMorgan's motion. Should the Court find that JPMorgan is entitled to intervene as of right under Rule 24(a), it need not address whether permissive intervention is warranted under Rule 24(b). In the alternative, however, JPMorgan maintains that permissive intervention under Rule 24(b) is proper because its motion was timely, and JPMorgan has "a claim or defense that shares with the main action a common question of law or fact." D.C. Super. Ct. Civ. R. 24(b)(1)(B).

When there is a request for permissive intervention, courts typically consider both timeliness and undue delay or prejudice together as part of a five-factor test examining: (1) the length of delay in filing the application; (2) the reason for the delay; (3) the stage to which the litigation had progressed when intervention was sought; (4) prejudice to the original parties if intervention is permitted; and (5) prejudice to the intervenor if intervention is denied. *Emmco Ins. Co.*, 429 A.2d at 1387. These factors "allow the court to evaluate the justice and efficiency of permitting intervention in a particular lawsuit." *Mokhiber*, 537 A.2d at 1104. The concern is not whether having a proper adjudication might "delay" a party's preferred schedule, but whether an intervenor truly "slept on her rights before asserting her interest" in the litigation. *Robinson*, 765 A.2d at 545.

JPMorgan should have been permitted to intervene under Rule 24(b) because it raised not just one common question, but several shared concerns, and its timely intervention would not "unduly delay or prejudice the adjudication." D.C. Super. Ct. Civ. R. 24(b)(3). Like Plaintiffs, JPMorgan is an intended beneficiary of the Restrictive Covenant because it owns property within Square 220. Further, JPMorgan also seeks to protect this property interest and enforce the Restrictive Covenant to forestall the nightclub from opening on the Property just like Plaintiffs. Additionally, for the same reasons stated above with respect to Rule 24(a) intervention, JPMorgan's motion was timely and came at an early stage in the litigation, and there is no plausible suggestion that JPMorgan "slept on [its] rights." *Robinson*, 765 A.2d at 545. Thus, the first three factors clearly weigh in favor of permissive intervention. Nonetheless, the Superior Court failed to address any of these factors.

The fourth factor likewise weighs in JPMorgan's favor. Courts typically find prejudice where intervention would inject new issues into the the suit that would precipitate further discovery. *See Emmco Ins. Co.*, 429 A.2d at 1387 ("[W]ithout submitting any reasons for its tardiness in coming forward, appellant wanted the court and the original parties to the action to halt the progress of the litigation and belatedly incorporate its claim into the case."). But where an applicant simply seeks to participate in future proceedings without "reopen[ing] the settled issues,"

intervention does not prejudice the adjudication. *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977). Although JPMorgan's adjacency to the Property presents considerations unique to its position, its intervention would not inject any new issues into the case. The central question remains the same: whether the configuration of the Property, together with the character of the surrounding neighborhood, continues to warrant enforcement of the Restrictive Covenant. JPMorgan—much like Plaintiffs—simply sought to protect its interest in Square 220 and the Restrictive Covenant by participating in the ongoing and future briefing, mediation, and trial, if necessary. Despite clearly satisfying this fourth factor, the Superior Court did not address this factor.

Finally, the fifth factor under Rule 24(b) also weighs in JPMorgan's favor. For the same reasons stated above with respect to Rule 24(a), if this Court denies JPMorgan's intervention, JPMorgan's ability to protect its interest in Square 220 and enforce the Restrictive Covenant going forward will be significantly compromised, if not foreclosed entirely.

Therefore, all five factors for permissive intervention under Rule 24(b) weigh in JPMorgan's favor. Thus, if this Court remands this case to the Superior Court for further proceedings, this Court should also find that JPMorgan was entitled to permissively intervene under Rule 24(b).

VII. CONCLUSION

For these reasons, JPMorgan respectfully requests that in the event this case is remanded to the Superior Court for further proceedings, this Court also find that JPMorgan is entitled to intervene in the litigation.

Date: May 6, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on May 6, 2025, a copy of the foregoing was filed and served upon counsel for all parties via the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and length requirements of Rule 32(a)(5), (6) because it is prepared in 14-point Times New Roman font and does not exceed 50 pages in length, excluding those portions exempted from the page length set forth in Rule 32(a)(6).

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